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

REPLY BRIEF OF INTERVENOR DEFENDANTS-APPELLANTS AMERICAN CIVIL LIBERTIES UNION OF TEXAS & RIVER CITY GENDER ALLIANCE

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INTRODUCTION

Throughout this litigation—in their complaint, their motions for summary judgment, and their supporting memoranda—Plaintiffs sought declaratory relief and an injunction prohibiting Defendants from enforcing the 2016 Rule against them. See *Nondiscrimination in Health Programs and Activities*, 81 Fed. Reg. 31,375 (May 18, 2016) (codified at 45 C.F.R. § 92) ("2016 Rule"). The parties had no opportunity to defend against a challenge to Section 1557 itself, and the district court did not purport to adjudicate any claims against Section 1557. To the contrary, the district court assured Intervenors that its ruling did *not* affect any statutory non-discriminatory obligations that protected patients under Section 1557 before the 2016 Rule was adopted.

Plaintiffs now say that although their motions for summary judgment requested an injunction against only the 2016 Rule, Plaintiffs requested broader relief in the proposed orders they submitted in connection with their motions for summary judgment. But proposed orders have no independent legal effect and are not proper mechanisms for requesting new relief. If Plaintiffs intended to seek broader relief, they were obligated under Federal Rule of Civil Procedure 7(b) to request it in

their actual motion and supporting briefs, not merely slip it into a proposed order.

After the district court's judgment became final and the time for the government and Intervenors to appeal expired, the Supreme Court in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), held that discrimination against an employee for being transgender is discrimination because of sex under Title VII. At that point, if Plaintiffs believed they needed additional protection in light of the Supreme Court's clarification of the law, they could have filed a new complaint challenging Section 1557, and—if Plaintiffs could demonstrate standing—that complaint could have been adjudicated on the merits. But instead of doing so, Plaintiffs sought to skip over the normal litigation process and retroactively expand the district court's decision to cover a claim against Section 1557 that was never alleged, never defended, and never ruled upon.

If Plaintiffs wish to obtain a broader injunction, they must file a new case. Plaintiffs could have brought claims against both the 2016 Rule and the underlying statute, but they did not do so. The only issue the district court considered was the validity of the 2016 Rule, and neither

Federal Rule of Civil Procedure 54(c) nor Rule 65 empowers the district court to extend injunctions beyond the specific legal violations proven and ruled upon at summary judgment.

Moreover, even if the district court had authority to grant relief beyond the 2016 Rule, it would still lack the power under Article III to preemptively enjoin the government from enforcing regulations that have not yet been promulgated. The district court's ruling may be relevant in future cases under principles of issue preclusion, but federal courts do not have power to issue advisory opinions by enjoining statutes or regulations before they have been enacted.

ARGUMENT

I. Plaintiffs Challenged Only The 2016 Rule—Not Section 1557 Itself.

As explained in Intervenors' opening brief, Plaintiffs' pleadings, motions, and supporting memoranda all expressly requested relief against only the 2016 Rule, not the underlying statute. Intervenors' Br. 23–29.

Plaintiffs do not dispute these facts. Instead, Plaintiffs point to the proposed orders they submitted to the district court in connection with their motions for summary judgment, which would have broadly enjoined

the government from "[c]onstruing Section 1557 to require [Plaintiffs] to provide medical services or insurance coverage … in violation of their religious beliefs." Pls.' Br. 37. But Plaintiffs never requested such relief in their actual motions or in their supporting memoranda, which "specifically request[ed]" "[a] permanent injunction prohibiting Defendants from enforcing the Rule." RE.157.

A proposed order is not a proper vehicle for requesting new relief or expanding the scope of a party's legal claims. Federal Rule of Civil Procedure 7(b) requires a party to "state the relief sought" in the motion itself, not in a proposed order. If there is any divergence between the relief requested in the motion and the relief requested in a proposed order, the motion is controlling. *See, e.g.*, *Smithfield Packaged Meats Sales Corp. v. Dietz & Watson, Inc.*, No. 1:20-CV-00005-RGE-CFB, 2020 WL 5579177, at *1 n.1 (S.D. Iowa July 24, 2020) (noting opposing party's argument that the "proposed order improperly expands the injunctive relief requested in [the] motion" and concluding that because the "motion does not request this relief, the Court does not consider it"); *Compass Bank v. Lovell*, No. 16-CV-00538-PHX-DJH, 2016 WL 8738244, at *3 n.4 (D. Ariz. Apr. 8, 2016) (noting that party's "proposed order seeks relief

far broader than that which it seeks in its motion" and stating that the court "as it must, is limiting its consideration to the relief which [the party] actually seeks in its motion"); *TVB Holdings (USA), Inc. v. eNom, Inc.*, No. SACV 13-624-JLS, 2014 WL 3717889, at *5 (C.D. Cal. July 23, 2014) (refusing to provide injunctive relief contained in a proposed order when the relief was not sought in the party's motion or briefing); *Trombley v. Bank of Am. Corp.*, No. 08-CV-456-JD, 2011 WL 3273930, at *7 (D.R.I. July 29, 2011) (refusing to grant relief requested in proposed order that was not included in the party's motion and instructing that if parties want additional relief "they must seek relief by filing a motion along with a supporting memorandum").

Plaintiffs' attempt to draw support from *FEC v. Cruz*, 142 S. Ct. 1638 (2022), is equally meritless. Pls.' Br. 35–36. Plaintiffs misleadingly cite *Cruz* for the proposition that the Supreme Court has "rejected the argument that '[a] challenge to [a] regulation … is separate from a challenge to the statute that authorized it.'" Pls.' Br. 5 (quoting *Cruz*, 142 S. Ct. at 1648). But, unlike Plaintiffs in this case, the plaintiff in *Cruz* explicitly and unambiguously challenged the constitutionality of the relevant statute. The issue in *Cruz* was whether the plaintiff had

standing to bring that challenge or instead—as the government argued—had standing to challenge only the implementing regulation. The Supreme Court rejected the government's argument and held that a plaintiff injured by a regulation "may raise constitutional claims against … the statutory provision that, through the agency's regulation, is being enforced." *Id.* at 1650.

For purposes of this case, *Cruz* merely confirms that Plaintiffs could have brought a challenge to Section 1557 along with their challenge to the 2016 Rule had they chosen to do so (assuming other elements of standing were met). Plaintiffs *could* have, but they *did* not. Plaintiffs were the masters of their own complaint, and nothing in *Cruz* allows plaintiffs or the court to retroactively transform a challenge to a regulation into a statutory challenge after summary judgment has already been granted and a final judgment has been entered. If Plaintiffs wish to broaden their challenge in light of changes in the legal landscape, they may file a new complaint.

II. The District Court's Holding That The 2016 Rule Violated RFRA Does Not Also Establish That Future Applications Of Section 1557 Will Also Violate RFRA.

In arguing that they are entitled to an injunction that extends beyond the 2016 Rule, Plaintiffs attempt to rewrite the Religious Freedom Restoration Act ("RFRA") into a statute focused solely on the presence or absence of a substantial burden on the exercise of religion. According to Plaintiffs, "[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)." Pls.' Br. 36 (emphasis omitted). Plaintiffs go on to argue that, "[s]trictly speaking, then, Plaintiffs' RFRA claim 'challenged' neither the 2016 Rule nor Section 1557 but the burden HHS imposed on their religious exercise." *Id.*

But, as explained in Intervenors' opening brief, the existence of a substantial burden is only the first half of the analysis. Intervenors' Br. 30. RFRA does not provide categorical protection for particular burdens on religious exercise in the abstract. To the contrary, RFRA affirmatively states that "[g]overnment *may* substantially burden a person's exercise of religion" when the burden "(1) is in furtherance of a compelling

governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb–1(b) (emphasis added). Thus, a particular substantial burden may violate RFRA if imposed for a less-than-compelling reason or through an overbroad statute, but still survive RFRA scrutiny if imposed for a different reason or through a more tailored approach.

In this case, when the district court initially granted summary judgment, it did not hold that RFRA categorically forecloses the government from requiring covered entities to provide or pay for transition-related care on a nondiscriminatory basis, or from prohibiting discrimination based on termination of pregnancy. And the district court did not hold that HHS lacks a compelling governmental interest in such policies. Instead, the district court's holding was based on a lack of narrow tailoring. The district court emphasized that the 2016 Rule applied categorically and "expressly prohibit[ed] religious exemptions." RE.95. The court stated that "universal application of the Rule, could arguably satisfy a categorical application of strict scrutiny," but "it cannot satisfy RFRA's 'more focused' inquiry," which requires the

government to show there would be "harm [in] granting *specific* exemptions" to particular plaintiffs. RE.94–95.

As explained in Intervenors' opening brief, the district court's holding that the 2016 Rule is not narrowly tailored does not automatically establish that applying Section 1557 in a way that burdens Plaintiffs' religious beliefs will also automatically fail RFRA. Intervenors' Br. 31–33. HHS could adopt a more narrowly tailored rule that allows for religious exemptions and limits enforcement to cases in which granting specific exemptions would result in specific harm. For example, HHS might wish to take action against Plaintiffs or other covered entities if they refuse to provide an abortion in an emergency situation when necessary to save the life of a patient or if they withdraw medically necessary hormone therapy from a transgender patient who is admitted to the hospital on an emergency basis following a car accident. Intervenors' Br. 32–33.

In response, Plaintiffs do not assert that they would, in fact, provide abortions or hormone therapy in those emergency circumstances. Instead, Plaintiffs state that the government could address new instances of discrimination by asking the district court to "dissol[ve] or

modif[y]" the injunction under Rule 60(b)(5). Pls.' Br. 42 (citing *Cooper v. Tex. Alcoholic Beverage Comm'n*, 820 F.3d 730, 741 (5th Cir. 2016)). But that gets things backwards. Rule 65 requires that an injunction be narrowly tailored at the outset to remedy only the specific violation that was actually proven in court. Courts may not issue facially overbroad injunctions, enforced under penalty of contempt, and place the burden on parties to "pre-clear" all future governmental action with the court.[1]

III. Rule 54(c) Does Not Authorize The District Court To Retroactively Broaden Its Summary Judgment Decision.

As explained in Intervenors' opening brief, Rule 54(c) does not permit the district court to retroactively broaden the scope of its summary judgment ruling to effectively adjudicate new RFRA claims against the underlying statute. Intervenors' Br. 38–43. The time for requesting broader relief was before summary judgement was entered, not after summary judgment was entered and the time to appeal already expired. Defendants did not have notice that by declining to defend the 2016 Rule (which Defendants had already begun the process of repealing

[1] The problem with the injunction is not that it is insufficiently specific. Pls.' Br. 43. The problem is that it extends beyond the 2016 Rule to other types of enforcement that were never challenged in this case.

through new rulemaking) Defendants were also forfeiting the ability to take any future administrative action on the topic.

Plaintiffs assert that Defendants and Intervenors were put "on notice" that Plaintiffs sought an injunction once Plaintiffs filed their notice of appeal, and that Defendants and Intervenors could have filed a cross-appeal in response. Pls.' Br. 41. But the notice of appeal did not provide any indication that Plaintiffs were seeking a broader injunction than the injunction requested in their motion for summary judgment and supporting brief: "A permanent injunction prohibiting Defendants from enforcing the Rule." RE.157. That is the injunction Plaintiffs requested, that is the injunction the district court declined to issue, and that is the injunction that would have been a proper subject of Plaintiffs' notice of appeal.

Plaintiffs also assert that Defendants and Intervenors had opportunity to defend the underlying statute on the limited remand from this Court, Pls.' Br. 40–41, but Plaintiffs made the opposite argument to the district court. Plaintiffs told the district court that "[t]he Fifth Circuit's 'mandate rule requires a district court on remand to effect our mandate and to do nothing else.'" ROA. 4918 (quoting *Veasey v. Abbott*,

870 F.3d 387, 390 n.2 (5th Cir. 2017) (cleaned up)). Plaintiffs argued that "by declining to appeal, HHS and ACLU have forfeited any dispute over the merits of Plaintiffs' claims" and "the only questions before the Court are those identified by the Fifth Circuit for remand: whether, in light of Plaintiffs' meritorious RFRA claim, Plaintiffs are entitled to 'injunctive relief against the 2016 rule and the underlying statute,' or, alternatively, whether a request for such relief is moot or waived." ROA.4918*; see also Jacked Up, L.L.C. v. Sara Lee Corp.*, 807 F. App'x 344, 349–50 (5th Cir. 2020) (district court on remand "can consider whatever [the Fifth Circuit] directs—no more, no less" (internal quotation marks omitted; collecting cases)).

Consistent with that understanding, the district court issued a briefing order for "supplemental briefing on the specific issues highlighted in the Fifth Circuit's remand order." ROA.4902. Those specific issues were whether Plaintiffs should be granted "injunctive relief against the 2016 rule and the underlying statute … or, alternatively, whether the case is moot or Private Plaintiffs never asked the district court for relief against the underlying statute." ROA.4898 (internal quotation marks omitted). The parties were thus requested to

brief whether an injunction should be issued as a remedy for the *RFRA violation that the court had already found*, not to litigate a brand new RFRA claim that had not previously been raised in the original litigation.

IV. The District Court Lacked Article III Jurisdiction To Enjoin Hypothetical Future Agency Actions.

Plaintiffs do not offer any support for the notion that courts may preemptively enjoin agencies from enforcing hypothetical rules that have not yet been promulgated. As a matter of issue preclusion, the district court's decision may have implications for the government's ability to enforce future rules, but courts do not have Article III jurisdiction to enjoin new rules until they have actually been enacted.

The only precedent identified by Plaintiffs for such injunctions are (a) injunctions entered in cases challenging the Obama administration's requirement for employers to cover contraception in employee's heath plans, which the Trump administration settled, and (b) injunctions against section 1557 currently on appeal in the Eighth Circuit. Pls.' Br. 19–20. But none of the cited decisions addressed Article III's prohibition on preemptive advisory opinions, and "[w]hen a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision

does not stand for the proposition that no defect existed." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 144 (2011).

Plaintiffs focus primarily on an alleged threat of future enforcement actions, but the prospect of any enforcement action is purely theoretical. The fact that HHS has pledged to enforce Section 1557 against secular entities does not establish a credible threat of similar action against religious ones. Despite Plaintiffs' attempts to imply otherwise, Plaintiffs cannot point to any instance in which HHS has ever taken an enforcement action against a religious organization with respect to exclusions of transition-related care.

At a minimum, the actual threat of enforcement must be fully and fairly assessed through the normal litigation process in a new case. Plaintiffs cite to comments in a declaration by CMDA member Dr. Hoffman, but that declaration illustrates the speculative nature of Plaintiffs' claims. Section 1557 applies to covered entities, not their employees. Dr. Hoffman states that he would refuse to provide gender affirming endocrine care to children, but he also states that he works at a hospital that has always accommodated his beliefs, and

"accommodation is quite easy." ROA.2370. Under these facts, there is not even a theoretical risk of enforcement faced by Dr. Hoffman.

Finally, Plaintiffs note that they must certify to HHS that they are in compliance with Section 1557. Pls.' Br. 30. Plaintiffs may well have standing to challenge current certification requirements through a separate lawsuit, but if they prevail in such a case, the appropriate remedy would be an injunction tailored to the current certification requirements, not an open-ended injunction against all future hypothetical regulations and enforcements actions of whatever kind. Article III allows courts to issue injunctions against *current* threats of enforcement, not to anticipate and preemptively enjoin hypothetical future threats that may never materialize.

CONCLUSION

This Court should vacate the district court's entry of a permanent injunction prohibiting HHS from interpreting or enforcing Section 1557, or any implementing regulations beyond the 2016 Rule, against Plaintiffs in a manner that would require them to perform or provide insurance coverage for gender-transition procedures or abortions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system, and that service will be accomplished by the appellate CM/ECF system.

/s/ *Joshua Block*
Joshua Block
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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I hereby certify this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6) because it has been prepared in 14-point Century Schoolbook, a proportionally spaced font, and that it complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 2,880 words, according to the count of Microsoft Word, and excluding the parts exempted by Fed. R. App. P. 32(f).

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