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

Lindsey Kaley
Joshua Block
Brigitte Amiri
James D. Esseks
Louise Melling
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500

Andre Segura
Brian Klosterboer
AMERICAN CIVIL LIBERTIES UNION OF TEXAS
5225 Katy Freeway, Suite 350
Houston, TX 77007
(713) 942-8146

Counsel for Intervenor Defendants-Appellants continued inside cover

Daniel Mach
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, N.W.
Washington, D.C. 20005
(202) 675-2330

Scout Richters
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NEBRASKA
134 S. 13th St., #1010
Lincoln, NE 68508
(402) 416-2694

CERTIFICATE OF INTERESTED PERSONS

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

(1) This case is *Franciscan Alliance, Inc., et al., v. Xavier Becerra, Secretary, et al.*, No. 21-11174 (5th Cir.).

(2) The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

Intervenor Defendants-Appellants:

American Civil Liberties Union of Texas
River City Gender Alliance

Counsel for Intervenor Defendants-Appellants:

Lindsey Kaley, American Civil Liberties Union Foundation
Joshua Block, American Civil Liberties Union Foundation
Brigitte Amiri, American Civil Liberties Union Foundation
James Esseks, American Civil Liberties Union Foundation
Louise Melling, American Civil Liberties Union Foundation
Daniel Mach, American Civil Liberties Union Foundation
Andre Segura, American Civil Liberties Union of Texas
Brian Klosterboer, American Civil Liberties Union of Texas
Scout Richters, American Civil Liberties Union of Nebraska

Defendants-Appellants:

Xavier Becerra, Secretary, U.S. Department of Health and Human Services
U.S. Department of Health and Human Services

Counsel for Defendants-Appellants:

McKaye Lea Neumeister, U.S. Department of Justice
Marleigh D. Dover, U.S. Department of Justice
Bradley Philip Humphreys, U.S. Department of Justice
Charles Wylie Scarborough, U.S. Department of Justice
Jack Starcher, U.S. Department of Justice

Plaintiffs-Appellees:

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

Counsel for Plaintiffs-Appellees:

Luke W. Goodrich, Becket Fund for Religious Liberty
Mark Rienzi, Becket Fund for Religious Liberty
Daniel Chen, Becket Fund for Religious Liberty
Joseph C. Davis, Becket Fund for Religious Liberty

/s/ Lindsey Kaley
Lindsey Kaley
Counsel for Intervenor Defendants-Appellants

STATEMENT REGARDING ORAL ARGUMENT

Intervenor Defendants-Appellants believe that oral argument will significantly aid the decisional process in this case. This appeal presents important issues about the appropriate scope of relief for plaintiffs against a federal antidiscrimination statute directed to health care entities receiving federal funds. The case also involves a lengthy litigation history, including prior appeals to this Court.

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JURISDICTIONAL STATEMENT

The district court had subject-matter jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1361. The district court's judgment of August 9, 2021, amended on August 16, 2021, and modified on October 1, 2021, disposed of all parties' claims not severed.

This Court has jurisdiction under 28 U.S.C. § 1291. Intervenor Defendants-Appellants appeal from the order and final judgment entered on August 16, 2021, and modified on October 1, 2021. Defendants-Appellants timely filed a Notice of Appeal on November 21, 2021, followed by Intervenor Defendants-Appellants, who timely filed a Notice of Appeal on November 30, 2021.

STATEMENT OF THE ISSUES

Plaintiffs brought this lawsuit to challenge provisions of a final rule (the "2016 Rule") interpreting Section 1557 of the Affordable Care Act ("ACA") and issued by the U.S. Department of Health and Human Services ("HHS") as violating, *inter alia*, the Religious Freedom Restoration Act ("RFRA"). After Defendants declined to defend the 2016 Rule, the district court held that the Rule violated RFRA because Defendants failed to produce evidence that the 2016 Rule was narrowly tailored to withstand strict scrutiny. The district court issued a declaratory judgment that the 2016 Rule violated RFRA but did not issue an injunction.

On appeal, Plaintiffs argued for the first time that they were entitled to a permanent injunction against the 2016 Rule and any future agency action enforcing Section 1557 against Plaintiffs in a manner that would require them to perform or provide insurance coverage for gender-transition procedures or abortions contrary to their beliefs. This Court remanded the case to the district court for further consideration. The district court entered a sweeping permanent injunction prohibiting Defendants from interpreting or enforcing the 2016 Rule, Section 1557,

and any implementing regulations against Plaintiffs to require them to perform or provide insurance coverage for gender-transition procedures or abortions. The issues presented for review are:

1. Whether Federal Rule of Civil Procedure 54(c) authorized the district court to issue a permanent injunction against future enforcement of Section 1557 even though Plaintiffs never challenged the underlying statute, the parties did not have an opportunity to litigate the validity of the underlying statute, the district court's summary judgment order did not analyze the validity of the underlying statute, and the time for Defendants to appeal the district court's summary judgment order had already expired.
2. Whether Article III allows a district court to issue a prophylactic injunction against hypothetical future agency enforcement actions and regulations.

INTRODUCTION

Plaintiffs filed this lawsuit over five years ago challenging a 2016 Rule from HHS implementing Section 1557 of the ACA. Plaintiffs argued that the 2016 Rule violated their rights under RFRA by requiring Plaintiffs to provide and pay for abortions and for medical procedures related to gender transition. 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. Defendants did not defend the 2016 Rule against Plaintiffs' RFRA claim on the merits, and the district court held that Intervenors could not attempt to satisfy RFRA on the government's behalf. Without any adversarial presentation, the court granted summary judgment to the Plaintiffs because, even assuming that the 2016 Rule advanced a compelling governmental interest, Defendants had failed to show that the Rule was the least restrictive means of advancing that interest. The district court issued a declaratory judgment that the 2016 Rule violated RFRA but did not issue an injunction.

Plaintiffs appealed to this Court and argued, for the first time, that

they are entitled to a permanent injunction against the 2016 Rule *and also* an injunction against any future hypothetical agency action interpreting Section 1557 in a manner that would require Plaintiffs to perform or pay for abortions or gender-transition procedures. This Court remanded the matter to the district court to address, *inter alia*, whether Plaintiffs had ever advanced claims against the underlying statute.

On remand, the district court evaded that threshold question and held that Federal Rule of Civil Procedure 54(c) authorized the court to grant a permanent injunction against Section 1557 itself even though that relief had not been requested in the pleadings or Plaintiffs' motion for summary judgment.

As discussed below, Intervenors do not challenge the injunction insofar as it applies to the 2016 Rule that was actually litigated before the district court, but an injunction against hypothetical future applications of Section 1557—whether against the statute itself or future rulemaking—exceeds the district court's authority, and must be vacated.

STATEMENT OF THE CASE

I. PLAINTIFFS' CHALLENGE TO THE 2016 RULE.

Section 1557 of the ACA (codified at 42 U.S.C. § 18116) prohibits a health care entity receiving federal funds from discriminating on the grounds protected by Title IX of the Education Amendments of 1972—the law prohibiting sex discrimination in education. 42 U.S.C. § 18116(a) (citing 20 U.S.C. § 1681 et seq.). On May 18, 2016, HHS published the 2016 Rule implementing Section 1557's prohibition on sex discrimination. *See* Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,375 (May 18, 2016) ("2016 Rule"). The 2016 Rule stated in relevant part that Section 1557's prohibition against sex discrimination includes "discrimination on the basis of pregnancy, false pregnancy, termination of pregnancy, or recovery therefrom, childbirth or related medical conditions, sex stereotyping, and gender identity." *Id.* at 31,467 (formerly codified at 45 C.F.R. § 92.4).

On August 23, 2016, Plaintiffs brought this lawsuit against the Secretary of HHS and HHS ("Defendants"), claiming that the 2016 Rule's definition of sex discrimination was contrary to law to the extent it includes discrimination on the basis of gender identity and termination

of pregnancy. ROA.43–45. Initially, two groups of plaintiffs challenged the 2016 Rule: one group of private health care organizations and one group of states. ROA.45–48. Only the group of private plaintiffs pursued the post-judgment injunction that is the subject of this appeal. Br. of Appellants at 25, *Franciscan Alliance v. Becerra*, 843 Fed. Appx. 662 (5th Cir. 2021) (No. 20-10093) (per curiam).[1] The American Civil Liberties Union of Texas and River City Gender Alliance ("Intervenors")—nonprofit organizations whose members include transgender people and people seeking reproductive healthcare—moved to intervene in the lawsuit on September 16, 2016. ROA.144–151.

A. Plaintiffs' Claims Against the 2016 Rule.

Plaintiffs' operative complaint opens by explaining: "This lawsuit challenges a new Regulation ('Regulation' or 'Rule') issued by the Department of Health and Human Services ('HHS') that seeks to override the medical judgment of healthcare professionals across the country." RE.147. The Amended Complaint describes the 2016 Rule as the basis for the requirement that healthcare providers perform or refer for

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

transition-related care, ROA.321–24, that covered employers must offer insurance coverage for transition-related care, ROA.326–27, and that covered entities may need to provide abortions or health insurance coverage for abortions, ROA.336, 342–43, 347–48, among other alleged harms from the Rule.

Plaintiffs' legal claims were directed exclusively at the 2016 regulation—not at the underlying statute. Plaintiffs' RFRA claim alleged that "Plaintiffs' sincerely held religious beliefs prohibit them from deliberately offering services and performing (or referring for) operations or other procedures required by *the Regulation*," and that the "*Regulation* violates the Plaintiffs [sic] rights secured to them by the Religious Freedom Restoration Act." RE.150–51, 153 (emphasis added). Indeed, Plaintiffs claimed that all of the alleged harms that form the basis of Plaintiffs' RFRA claims were caused by "the Regulation." RE.151–53. Plaintiffs brought numerous other claims against "the Regulation," including claims arising under the Administrative Procedures Act ("APA"), all of which *also* challenged only the 2016 Rule. ROA.350–78,

381–93.[2]

The relief that Plaintiffs requested as to their RFRA claims was for the Court to "[d]eclare that the challenged Regulation is invalid under the Religious Freedom Restoration Act"; "[i]ssue a permanent injunction enjoining Defendants from enforcing the challenged Regulations against Plaintiffs"; award Plaintiffs actual and nominal damages, as well as costs and fees; and "[a]ward such other and further relief as it deems equitable and just." RE.154–55.

B. Plaintiffs Seek Relief Against the 2016 Rule.

On October 21, 2016, Plaintiffs moved for partial summary judgment or, in the alternative, a preliminary injunction against the 2016 Rule. ROA.440–41. Plaintiffs argued that the 2016 Rule would "coerc[e] Plaintiffs to provide harmful medical procedures or objectionable insurance coverage in direct violation of their faith." ROA.504. As to why the 2016 Rule violated RFRA, Plaintiffs argued that the 2016 Rule's prohibition on discrimination on the basis of "termination of pregnancy" and "gender identity" pressured Plaintiffs to provide and

[2] On March 14, 2017, Plaintiffs dismissed without prejudice counts III–X and XIII–XX, after which only APA and RFRA claims remained. ROA.1886.

pay for abortions and surgery to treat gender dysphoria, in violation of Plaintiffs' religious beliefs and thus RFRA. ROA.478–85.

The Obama Administration opposed the motion for preliminary injunction. With respect to Plaintiffs' RFRA claim, Defendants argued on a variety of jurisprudential grounds that Plaintiffs had not shown a likelihood that the 2016 Rule would be enforced against them, but Defendants did not present any merits arguments for why applying the 2016 Rule against Plaintiffs would not violate RFRA. ROA.1589–603, 1599 n.21. Defendants did not argue that the 2016 Rule served a compelling governmental interest, or that the Rule was the least restrictive means to fulfill that interest. ROA.1583–84. Intervenors presented merits arguments against Plaintiffs' RFRA claim, but the district court declined to rule on Intervenors' motion to intervene in time to allow Intervenors to participate in opposing Plaintiffs' motion. RE.140 n.34.

On December 31, 2016, the district court issued a nationwide preliminary injunction prohibiting enforcement of the challenged provisions of the 2016 Rule, but did not rule on the requests for partial summary judgment. RE.144–45. With respect to the RFRA claim, the

district court assumed for purposes of its decision that there is a compelling governmental interest in "expand[ing] access to transition and abortion procedures." RE.140–41. The district court then concluded that HHS had less restrictive alternatives for advancing that interest because the government could pay for such procedures itself. RE.140–41. The district court stated that although Intervenors (participating as *amici*) had proffered other compelling governmental interests, the court would not consider those arguments because (according to the court) RFRA does not allow third-parties to satisfy the strict-scrutiny test on the government's behalf. RE.140 n.34.

The district court reaffirmed the narrow scope of its holding when it later denied Intervenors' motion for a stay of the preliminary injunction. The district court explained that its preliminary injunction "did not purport to alter any statutory protections for women or transgender individuals outside of the challenged portion of the Rule." ROA.1845. According to the court, all "non-discriminatory obligations that protected patients and bound healthcare providers on July 17, 2016 remain in full effect and are unencumbered by the Court's preliminary injunction order." ROA.1846.

On February 4, 2019, following an almost two-year stay for the Trump Administration to undertake new rulemaking, Plaintiffs renewed their motion for summary judgment. RE.156–58. Plaintiffs once again told the Court that "[t]his lawsuit challenges a 2016 Rule issued by the Department of Health and Human Services ('HHS')." RE.157. Plaintiffs then told the Court that they "specifically request the following relief against the Defendants, their officers, agents, employees, and attorneys":

1. A declaratory judgment that the Rule is invalid under the Administrative Procedure Act;

2. A declaratory judgment that the Rule violates the Religious Freedom Restoration Act;

3. A permanent injunction prohibiting Defendants from enforcing the Rule; and

4. An order vacating and remanding the unlawful portions of the Rule.

RE.157. Plaintiffs' brief in support of the motion was similarly focused exclusively on the 2016 Rule. *See* ROA.3294–357. Plaintiffs' "Statement of Facts" repeatedly stated that it is the 2016 Rule that was "at issue in this case," ROA.3307–14, and described the "Effect of the Rule" on Plaintiffs, ROA.3316–18. Plaintiffs argued that the 2016 Rule violated RFRA because "Plaintiffs sincerely believe that providing the medical

procedures or insurance coverage demanded by the HHS regulations lies on the forbidden side of the line" of their sincere religious beliefs, ROA.3341 (cleaned up), "[t]he Rule substantially burdens Plaintiffs' religious exercise," ROA.3341, and "[t]he Rule cannot satisfy strict scrutiny," ROA.3342. As relief, Plaintiffs asked the court to "vacate the unlawful portions of the Rule, and convert the Court's preliminary injunction"—which only enjoined enforcement of the two challenged provisions of the 2016 Rule—"into a final injunction." ROA. 3355.

Despite all this, Plaintiffs submitted a *proposed order* with sweeping language that bore little resemblance to the relief "specifically request[ed]" in Plaintiffs' motion, or in their supporting memorandum of law. Instead of simply enjoining HHS from "enforcing the Rule," the proposed order also included an injunction against HHS from ever "[c]onstruing Section 1557 to require Private Plaintiffs to provide medical services or insurance coverage related to 'gender identity' or 'termination of pregnancy' in violation of their religious beliefs." RE.163. No other document filed in this case alleged or argued that Plaintiffs were challenging anything but the 2016 Rule or that Plaintiffs were entitled to an injunction extending beyond the 2016 Rule that they had

challenged.

Defendants took the position that the 2016 Rule violated the APA, but contended that the court did not need to reach Plaintiffs' RFRA claim. ROA.4378. Defendants once again did not offer any argument to defend the 2016 Rule under RFRA.

Intervenors renewed their motion to intervene, which the court ultimately granted only at the time it ruled on the summary judgment motion. RE.75, 87. In the proposed brief they tendered in opposition to summary judgment, Intervenors argued that it would be premature for the court to rule on the Plaintiffs' APA and RFRA claims without reviewing the administrative record, which Defendants had not yet compiled or filed with the court. ROA.4425–27. Intervenors continued to identify several compelling governmental interests to support the 2016 Rule and argued that they should be given the opportunity to demonstrate that the 2016 Rule is narrowly tailored by pointing to evidence in the administrative record once it is filed. ROA.4426–27 & n.7.

C. The District Court Holds That the 2016 Rule Violates RFRA.

On October 15, 2019, the district court granted Plaintiffs' motion for summary judgment in part, holding that the 2016 Rule violates the

APA and RFRA. RE.91, 99. In addressing Plaintiffs' RFRA claim, the court adopted the reasoning from its prior decision granting a preliminary injunction. RE.95. The court noted that Defendants "twice failed to demonstrate that applying the [2016] Rule to Private Plaintiffs . . . would achieve a compelling governmental interest through the least restrictive means," and again declined to consider Intervenors' arguments that the 2016 Rule satisfied RFRA. RE.94. The court nonetheless considered whether the preamble to the Rule's "broadly stated purpose, implemented through universal application of the Rule, could arguably satisfy a categorical application of strict scrutiny," but concluded that it could not "satisfy RFRA's 'more focused' inquiry." RE.94. Accordingly, the district court held "that the [2016] Rule, which expressly prohibits religious exemptions, substantially burdens Private Plaintiffs' religious exercise in violation of RFRA." RE.95.

The court then granted three of the four forms of relief Plaintiffs requested. *See* RE.72. The court's final judgment declared that the court:

> **HOLDS** that Nondiscrimination in Health Programs & Activities ("the Rule"), 81 Fed. Reg. 31376 (May 18, 2016), codified at 45 C.F.R. § 92, violates the APA and RFRA and enters this Final Judgment on those claims. Accordingly, the Court **VACATES** and **REMANDS** the Rule for further consideration.

RE.72. The court thus issued the two declaratory judgments that Plaintiffs requested, and vacated the challenged portions of the 2016 Rule as Plaintiffs requested. RE.73–74 (modifying the final judgment to vacate "only the portions of the Rule that Plaintiffs challenged"). It did not grant the requested "permanent injunction prohibiting Defendants from enforcing the Rule." RE.157.

The court explained that "neither Plaintiffs nor similarly situated non-parties need injunctive relief from the vacated Rule," as Defendants had been complying with the preliminary injunction, and there was no indication that it would attempt to apply the Rule in defiance of the court's order. RE.98–99. The court also noted that "should Defendants attempt to apply the vacated Rule—in violation of the APA, RFRA, and this Court's Order—Plaintiffs may return to the Court for redress." RE.99.

II. PLAINTIFFS' REQUEST ON APPEAL FOR AN INJUNCTION AGAINST FUTURE APPLICATIONS OF SECTION 1557.

Neither Defendants nor Intervenors appealed the district court's final judgment against the 2016 Rule. Plaintiffs, however, appealed the denial of a permanent injunction on January 24, 2020.

In their opening brief on appeal, filed on September 21, 2020, Plaintiffs argued for the first time that they are entitled to an injunction against the 2016 Rule and also a "permanent injunction enjoining HHS from construing Section 1557 to require Appellants to perform or provide insurance coverage for gender-transition or abortion procedures contrary to their beliefs." Br. of Appellants at 25, *Franciscan Alliance*, 843 Fed. Appx. 662. Following briefing by the parties, this Court remanded the case to the district court for further proceedings without reaching the merits of the appeal. *Franciscan Alliance*, 843 Fed. Appx. at 663. The Court identified divergence among the parties as to what relief the district court granted, and whether Plaintiffs ever asked the district court for relief against the underlying statute. *Id*. On remand, this Court identified two issues to be addressed by the district court: "[w]hether the providers are pressing the same claim before us as they did in the district court," and "the jurisdictional consequences of the evolving state of the law." *Id*.

III. THE DISTRICT COURT GRANTS A PERMANENT INJUNCTION ON REMAND.

Following this Court's remand to the district court, on May 10, 2021, HHS issued a notice that it will interpret Section 1557 and Title IX

to prohibit discrimination on the basis of sexual orientation and gender identity, consistent with *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). Dep't of Health and Hum. Servs., *Notification of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments of 1972* (May 10, 2021), https://www.hhs.gov/sites/default/files/ocr-bostock-notification.pdf. The *Notification of Interpretation* did not indicate how HHS intended to apply Section 1557 to religiously affiliated entities or to cases in which there is a religious objection. HHS made clear that in enforcing Section 1557, it "will comply with the Religious Freedom Restoration Act" and "with all applicable court orders that have been issued in litigation involving the Section 1557 regulations," including the district court's orders in this case. *Id.* at 3–4.

On April 23, 2021, the district court ordered supplemental briefing by the parties "on the specific issues highlighted in the Fifth Circuit's remand order." ROA.4902. Following briefing by the parties, on August 9, 2021, the district court entered a sweeping permanent injunction against enforcement of both the 2016 Rule and Section 1557 of the ACA against Plaintiffs in a manner that would require them to perform or

provide insurance coverage for gender-transition procedures or abortions (followed by an Amended Memorandum to correct grammatical and typographical errors on August 16). ROA.5025–47; RE.47–69. As to the first issue this Court identified, the district court did not adopt Plaintiffs' argument that they had previously sought relief against Section 1557 through the proposed order appended to their renewed motion for summary judgment. RE.67–68. As to the second issue, the district court held that the case was not moot, and ripe for consideration, based on "the current Section 1557 regulatory scheme," in particular HHS's *Notification of Interpretation*. RE.62–63, 65.

The district court then addressed Plaintiffs' arguments that, under RFRA, they are entitled to a permanent injunction against both the 2016 Rule and Section 1557 itself. The court held that Plaintiffs had shown success on the merits, finding that "the current Section 1557 regulatory scheme" burdens Plaintiffs' religious exercise "by placing substantial pressure on Christian Plaintiffs, in the form of fines and civil liability, to perform and provide insurance coverage for gender-transition procedures and abortions." RE.64. The court devoted a single line to the remainder of the RFRA analysis, noting only that "[t]he government asserts no

'harm [in] granting specific exemptions' to Christian Plaintiffs." RE.64 (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726–27 (2014)). After also referring to the reasoning from its opinion granting summary judgment to Plaintiffs against the 2016 Rule, the court concluded that "the current Section 1557 regulatory scheme substantially burdens Christian Plaintiffs' religious exercise in clear violation of RFRA." RE.64–65.

Finally, the court held the violation of Plaintiffs' rights under RFRA constitutes irreparable harm, which is not limited to the 2016 Rule. RE.65–67. Rejecting Defendants' and Intervenors' arguments that Plaintiffs had only challenged the 2016 Rule, and not Section 1557 itself, the court held that Federal Rule of Civil Procedure 54(c) entitled it to grant relief beyond what was sought in Plaintiffs' pleadings. RE.67. The court reasoned that future applications of Section 1557 would pose the same substantial burden on Plaintiffs' exercise of religion:

> Plaintiffs 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." Am. Compl. ¶ 314, ECF No. 21. That was the alleged RFRA violation then. That was the alleged RFRA violation before the Court in 2019. And that is the same RFRA violation the

Court found today.

RE.67–68. Accordingly, the court held that a permanent injunction was warranted, granting Plaintiffs' request and permanently enjoining Defendants:

> . . . from interpreting or enforcing Section 1557 of the Affordable Care Act, 42 U.S.C. § 18116(a), or any implementing regulations thereto against Plaintiffs, their current and future members, and those acting in concert or participation with them . . . in a manner that would require them to perform or provide insurance coverage for gender-transition procedures or abortions . . . .

RE.68.[3]

SUMMARY OF THE ARGUMENT

Intervenors do not challenge the injunction insofar as it applies the 2016 Rule that was actually litigated before the district court. But an injunction against hypothetical future applications of Section 1557, whether against the statute itself or future agency rulemaking implementing the statute, exceeds the district court's authority and must

[3] On September 13, 2021, Defendants moved to modify the Amended Memorandum and Order, to clarify that they would not violate the injunction by taking action under Section 1557 against entities that they are not aware are covered by the scope of the Order, given that Plaintiffs' members are not known to Defendants. ROA.5077. The motion was unopposed, and on October 1, 2021, the district court entered the requested modification. RE.70–71.

be vacated.

The district court lacked authority under the Federal Rules of Civil Procedure to enter a permanent injunction against Section 1557 when Plaintiffs had failed to plead and prove claims against the statute itself, and there was no basis to enter such relief following entry of final judgment in the case. Under Federal Rule of Civil Procedure 65, a permanent injunction cannot extend beyond the precise legal violation that has been established. In this case, the district court granted summary judgment because it concluded that Defendants had failed to show that the 2016 Rule was narrowly tailored. That precise legal violation does not entitle Plaintiffs to an injunction against hypothetical future agency action that seeks to enforce Section 1557 in a less restrictive way.

The district court also lacked authority under Federal Rule of Civil Procedure 54(c) to grant relief against future applications of Section 1557 when the validity of the underlying statute had never been challenged or subjected to adversarial briefing. "Rule 54(c) does not permit unrequested relief when it operates to the prejudice of the opposing party, such as when relief is finally sought at a late stage of the proceedings." *Portillo*

v. Cunningham, 872 F.3d 728, 735 (5th Cir. 2017) (cleaned up). Defendants declined to defend the 2016 Rule from Plaintiffs' RFRA claim and conceded that the 2016 Rule was not sufficiently narrowly tailored to survive strict scrutiny. But for future applications, Defendants may proffer new governmental interests not considered by the district court, and Defendants might apply the statute in a more tailored way. If Plaintiffs had broadly challenged the underlying statute and argued that no agency action applying Section 1557 on this subject could *ever* be narrowly tailored, Defendants may have made a different decision about whether to offer a defense. Intervenors also declined to appeal the district court's summary judgment ruling based on the understanding that the ruling applied only to the 2016 Rule. Broadening the injunction post-judgment severely prejudices Defendants and Intervenors who were never provided an opportunity to fully litigate a broader challenge.

Moreover, even if the Federal Rules of Civil Procedure authorized the district court to issue an injunction against a statute that had never been challenged, Article III would bar the district court from issuing an injunction against future hypothetical agency action interpreting Section 1557. Courts lack the power under Article III to issue advisory opinions

regarding the legality of regulations that have not yet been enacted, and Defendants' waiver of sovereign immunity is limited to final agency action.

STANDARD OF REVIEW

"'The decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court, reviewable on appeal for abuse of discretion.'" *Hill v. Washburne*, 953 F.3d 296, 303 (5th Cir. 2020) (quoting *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)). "A district court abuses its discretion if it (1) relies on clearly erroneous factual findings when deciding to grant or deny the permanent injunction, (2) relies on erroneous conclusions of law when deciding to grant or deny the permanent injunction, or (3) misapplies the factual or legal conclusions when fashioning its injunctive relief." *Aransas Project v. Shaw*, 775 F.3d 641, 663 (5th Cir. 2014) (cleaned up).

"Although the ultimate decision whether to grant or deny a preliminary injunction is reviewed only for abuse of discretion, a decision grounded in erroneous legal principles is reviewed *de novo*." *Women's*

Med. Ctr. of Nw. Houston v. Bell, 248 F.3d 411, 419 (5th Cir. 2001); *see also Moore v. Brown*, 868 F.3d 398, 403 (5th Cir. 2017).

ARGUMENT

I. THE DISTRICT COURT LACKED AUTHORITY TO GRANT PLAINTIFFS PERMANENT INJUNCTIVE RELIEF AGAINST SECTION 1557.

The district court erred by granting Plaintiffs' request for a prophylactic injunction against Section 1557 and other future interpretations of the statute. In Plaintiffs' pleadings, requests for injunctive relief, and briefing in support of summary judgment, they have challenged only the 2016 Rule, not the underlying statute itself. Because Federal Rule of Civil Procedure 65 limits the Court's authority to issue injunctions beyond the precise legal violation that has been established, the district court had no authority to issue an injunction beyond the 2016 Rule that was actually challenged by Plaintiffs. Moreover, although Federal Rule of Civil Procedure 54(c) authorizes a court to grant unrequested relief, this Court has "carefully qualifie[d] Rule 54(c)'s latitude by referring to the other case pleadings *or facts proven at trial*." *Peterson v. Bell Helicopter Textron, Inc.*, 806 F.3d 335, 340 (5th Cir. 2015) (emphasis added). Because Plaintiffs' post-judgment contentions that

Section 1557 itself violates RFRA were never "tested adversarially, tried by consent, or at least developed with meaningful notice to the defendant," the district court had no authority to issue an injunction against Section 1557 itself. *Id.*

A. Plaintiffs Challenged Only the 2016 Rule—Not Section 1557 Itself.

From the initiation of this lawsuit to their request for summary judgment, Plaintiffs challenged only the 2016 Rule's interpretation of Section 1557, not the underlying statute. Indeed, nothing makes that more evident than that Plaintiffs' APA claim was predicated on the theory that the 2016 Rule was contrary to the statutory text of Section 1557. ROA.352–53.

The pleadings are plain throughout that the 2016 Rule was at issue. Plaintiffs' Amended Complaint is explicit that the lawsuit challenges the 2016 Rule alone. RE.147. The requirements Plaintiffs object to, and the harm they allege they will suffer, all stem from the 2016 Rule. ROA.321–24, 326–27, 336, 342–43, 347–48. Plaintiffs' claims are clear that it is the 2016 Rule that violates RFRA—not Section 1557 itself—as Plaintiffs' RFRA claim was based on their religious objections to "offering services and performing (or referring for) operations or other procedures *required*

by the Regulation." RE.150 (emphasis added). Finally, the relief that Plaintiffs requested as to their RFRA claims specifically was also against the 2016 Rule, not the underlying statute. RE.154–55.

In seeking a preliminary injunction and summary judgment, Plaintiffs continued to challenge only the 2016 Rule. Plaintiffs argued that it was the 2016 Rule—not Section 1557 itself—that would "coerc[e] Plaintiffs to provide harmful medical procedures or objectionable insurance coverage in direct violation of their faith." ROA.504. Plaintiffs' motion states that "Plaintiffs are entitled to a preliminary injunction *against the Rule*." ROA.441 (emphasis added). As a result, the district court justified its preliminary injunction on the language and requirements of the 2016 Rule, and enjoined provisions of the 2016 Rule. RE.137–45.

The district court subsequently reaffirmed that its holding ran against the 2016 Rule, not Section 1557, when it denied Intervenors' motion for a stay of the preliminary injunction. The district court explained that its preliminary injunction "did not purport to alter any statutory protections for women or transgender individuals outside of the challenged portion of the Rule." ROA.1845. According to the court, all

"non-discriminatory obligations that protected patients and bound healthcare providers on July 17, 2016 remain in full effect and are unencumbered by the Court's preliminary injunction order." ROA.1846. In other words, not only did the court's analysis extend only to violations found in the 2016 Rule, but the court fully understood the protections offered by Section 1557 to be distinct from the Rule and to remain "unencumbered" by the court's order.

Plaintiffs' approach was no different when they moved for summary judgment in 2019. In their motion, Plaintiffs stated that they sought the following relief: "1. A declaratory judgment that the Rule is invalid under the Administrative Procedure Act; 2. A declaratory judgment that the Rule violates the Religious Freedom Restoration Act; 3. A permanent injunction prohibiting Defendants from enforcing the Rule; and 4. An order vacating and remanding the unlawful portions of the Rule." RE.157. Additionally, in their briefing in support of the motion, Plaintiffs' "Statement of Facts" repeatedly states that it is the 2016 Rule that is "at issue in this case," ROA.3307–14, and describes the "Effect of the Rule" on Plaintiffs, ROA.3316–18. Plaintiffs go on to argue that the 2016 Rule violates RFRA, because "[t]he Rule substantially burdens Plaintiffs'

religious exercise," ROA.3341, and "[t]he Rule cannot satisfy strict scrutiny," ROA.3342. As relief, Plaintiffs asked the Court to "vacate the unlawful portions of the Rule, and convert the Court's preliminary injunction"—which only enjoined enforcement of the two challenged provisions of the 2016 Rule—"into a final injunction." ROA.3355.

The lawsuit in *Brackeen v. Haaland*, 994 F.3d 249 (5th Cir. 2021), is instructive as to how plaintiffs structure a case when they seek to challenge both agency regulations and the underlying statute—there, the Indian Child Welfare Act ("ICWA"). *Id.* at 267, *petition for cert. granted* (U.S. Feb. 28, 2022) (No. 21-380). In their complaint, plaintiffs explicitly challenged both "the validity of a final rule entitled *Indian Child Welfare Act Proceedings*" as well as "certain provisions of ICWA that the Final Rule purports to interpret and implement"; they laid out what aspects of their claims run against the rule and the statute; and they sought relief against both ICWA and the regulations. Second Am. Compl. at 4, 57–84, *Brackeen v. Zinke*, 338 F. Supp. 3d 514 (N.D. Tex. 2018), *rev'd sub nom. Brackeen v. Bernhardt*, 937 F.3d 406 (5th Cir. 2019), *aff'd in part, rev'd in part per curiam on reh'g en banc sub nom. Brackeen v. Haaland*, 994 F.3d 249 (5th Cir. 2021), *cert. granted* (U.S. Feb. 28, 2022) (No. 21-380),

ECF No. 35. When the matter was before the district court on plaintiffs' motions for summary judgment, the court laid out which claims ran against either the rule or the underlying statute (or both), and analyzed the claims accordingly. *Brackeen v. Zinke*, 338 F. Supp. 3d at 520, 530. Likewise, on appeal, this Court listed out the claims separately, conducted a separate analysis as to whether plaintiffs had standing to challenge the statute or the rule, and adjudicated the claims against the statute and rule separately. *Brackeen v. Haaland*, 994 F.3d at 270, 290, 352–3.

Plaintiffs' claims in this case also stand in stark contrast to the claims in *Religious Sisters of Mercy v. Azar*, 513 F. Supp. 3d 1113 (D.N.D. Jan. 19, 2021), *appeal filed*, No. 21-1890 (8th Cir. Apr. 21, 2021). Plaintiffs have contended that the court in *Religious Sisters of Mercy* granted "exactly the relief Plaintiffs are seeking" now. ROA.4922. But the plaintiffs in that case amended their complaint to explicitly seek that relief, and explicitly sought an injunction against the statute in their summary judgment motion. Am. Compl. ¶ 3, *Religious Sisters of Mercy*, 513 F. Supp. 3d 1113, ECF No. 95 ("Plaintiffs . . . seek a ruling that HHS's interpretation of Section 1557 is unlawful, as well as an injunction

prohibiting HHS from interpreting and enforcing Section 1557 in a way that would force them to perform or pay for gender-transition procedures and abortions in violation of their religious beliefs and medical judgment."). By contrast, the Plaintiffs in this case did not seek an injunction against the underlying statute until long after summary judgment had been granted.

To support their claim that they are entitled to an injunction against future applications of Section 1557, Plaintiffs point to the proposed order they submitted to the district court in connection with their motion for summary judgment. ROA.4923 (citing RE.160). However, the inclusion of a single line in a proposed order did not convert Plaintiffs' suit against a regulation into a suit against its underlying statute. "[I]t is elementary that a 'request for a court order must be made by motion,' and that an informal request for a court order ordinarily will not suffice to preserve a party's rights." *Motus, LLC v. CarData Consultants, Inc.*, 23 F.4th 115, 127–28 (1st Cir. 2022) (quoting Fed. R. Civ. P. 7(b); citing 5 Charles Alan Wright, Arthur R. Miller & A. Benjamin Spencer, *Federal Practice & Procedure: Civil* § 1191 (4th ed. 2021)). Federal Rule of Civil Procedure 7 states that the "motion must

not only state the relief sought, but also state with particularity the grounds for the motion," and "[w]hile parties may file proposed orders, such proposals must accompany a motion to the court" and have no separate effect from the motion. *Alonzo v. Wal-Mart Stores, Inc.*, No. EP-19-CV-00378-FM, 2020 WL 7046650, at *1 (W.D. Tex. Mar. 17, 2020). "Nowhere in Rule 7's list of permitted pleadings and motions is there authority for an order by the parties to the court unaccompanied by a motion." *Id.* Plaintiffs failed to seek an injunction against Section 1557 in their motion, or to list the grounds for such an injunction; the Defendants, Intervenors, and court "should not be required to assume or guess what motion or other relief a party is seeking. A party should properly identify his pleadings, motions, and the relief sought." *Starns v. Avent*, 96 B.R. 620, 635 (M.D. La. 1989), *aff'd sub nom. Hendrick v. Avent*, 891 F.2d 583 (5th Cir. 1990). Absent such notice in the motion itself, Plaintiffs cannot now claim that they sought relief against Section 1557 in their motion for summary judgment.

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

Although Plaintiffs' original RFRA challenge had been limited to

the 2016 Rule, the district court held on remand that Plaintiffs are also entitled to an injunction against Section 1557 itself because future applications of the statute would pose the same substantial burden on their exercise of religion. According to the court:

> Plaintiffs 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." Am. Compl. ¶ 314, ECF No. 21. That was the alleged RFRA violation then. That was the alleged RFRA violation before the Court in 2019. And that is the same RFRA violation the Court found today.

RE.67–68. But identifying a substantial burden is only the beginning of the RFRA test. Under RFRA, "Government *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). Plaintiffs may experience the same burden from the 2016 Rule and future applications of Section 1557, but the government's ability to satisfy RFRA's strict scrutiny test may well be different. Contrary to the district court's conclusion, Defendants did not concede Plaintiffs' success on the merits of their RFRA claim, RE.64; there was simply no basis for briefing the topic when it was not properly

before the court.[4]

The district court's earlier holdings on the 2016 Rule likewise do not support a RFRA holding against Section 1557. In declaring that the 2016 Rule violated RFRA as applied to Plaintiffs, the district court did not hold that RFRA categorically forecloses the government from requiring covered entities to provide or pay for transition-related care on a nondiscriminatory basis, or prohibiting discrimination based on termination of pregnancy. And the district court did not hold that HHS lacks a compelling governmental interest in such policies. Instead, the district court noted that Defendants had failed to assert a compelling governmental interest served by the challenged provisions of the 2016

[4] The district court faulted Defendants for failing to brief the RFRA question on remand, but the court's briefing order precluded Defendants from doing so. In the parties' joint status report on supplemental briefing, which the district court adopted as to the subject matter, ROA.4902, Plaintiffs submitted that the parties should address 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* as to the 2016 Rule, not to litigate a brand-new claim RFRA claim against Section 1557 that Plaintiffs had not been previously raised in the original litigation.

Rule, and held that HHS failed to demonstrate that the particular provisions challenged in this case were the least restrictive means of advancing that interest. RE.93–95.

In holding that the 2016 Rule violated RFRA, 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.

In future enforcement actions, HHS may well encounter situations in which granting a specific exemption would result in specific harm. For example, HHS might wish to take administrative 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. *See* United States Conference of Catholic Bishops, *Ethical and Religious Directives for Catholic Health Care Services* 18 (6th ed. 2018), https://www.usccb.org/about/doctrine/ethical-and-religious-

directives/upload/ethical-religious-directives-catholic-health-service-sixth-edition-2016-06.pdf. HHS might also wish to take administrative action if Plaintiffs or other covered entities withdraw hormone therapy from a transgender patient who is admitted to the hospital on an emergency basis following a car accident. *See* Nat'l Catholic Bioethics Center, *Summary: Transgender Issues in Catholic Health Care*, at 2 (Feb. 15, 2017), https://www.ncbcenter.org/resources-and-statements-cms/summary-transgender-issues-in-catholic-health-care (stating that a Catholic hospital cannot maintain hormone therapy for a transgender patient "who had sex reassignment surgery elsewhere was admitted to [the] emergency room following a car accident").

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 strict scrutiny. A decision with respect to the 2016 Rule cannot support a permanent injunction barring HHS in perpetuity from taking more tailored agency action in particular circumstances based on a different administrative record.

C. The District Court's Injunction Against Section 1557 Violated Federal Rule of Civil Procedure 65 Because the Injunction Extends Beyond the Specific Violation That Was Pled and Proven.

Under Federal Rule of Civil Procedure 65, federal courts do not have authority to issue broad prophylactic injunctions that extend beyond a plaintiff's alleged injuries. *See* Fed. R. Civ. P. 65(d). "When crafting an injunction, district courts are guided by the Supreme Court's instruction that 'the scope of injunctive relief is dictated by the extent of the violation established.'" *ODonnell v. Harris Cty.*, 892 F.3d 147, 163 (5th Cir. 2018) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)), *overruled on other grounds by Daves v. Dallas Cty.*, 22 F.4th 522 (5th Cir. 2022). A district court "abuses its discretion if it issues an injunction that is not narrowly tailored to remedy the specific action which gives rise to the order as determined by the substantive law at issue." *Id.* at 155 (cleaned up). "Thus, an injunction must be vacated if it fails to meet these standards and is overbroad." *Id.* at 163 (cleaned up).

The district court abused its discretion by granting an injunction that extends beyond the 2016 Rule to the underlying statute or future

agency action.[5] The injunction is thus "necessarily overbroad because it exceeds the extent of the violation established." *John Doe #1 v. Veneman*, 380 F.3d 807, 819 (5th Cir. 2004); *see also ODonnell*, 892 F.3d at 155, 163. Courts cannot "craft injunctions that address all hypotheticals." *Daniels Health Sci., L.L.C. v. Vascular Health Sci., L.L.C.*, 710 F.3d 579, 586 (5th Cir. 2013) (vacating overbroad injunction where violation was not established). In determining the extent of the violation established, this Court looks to the activity plaintiffs challenged in their operative complaint, and what relief plaintiffs actually sought and were granted at summary judgment—not whether a violation *could* be established. *See E.T. v. Paxton*, 19 F.4th 760, 769 (5th Cir. 2021) ("[A]n injunction cannot encompass more conduct than was requested or exceed the legal basis of the lawsuit." (internal quotation marks omitted)); *OCA-Greater Houston v. Texas*, 867 F.3d 604, 615–16 (5th Cir. 2017); *Veneman*, 380 F.3d at 819 (rejecting injunctive relief where complaint did not challenge applicable agency decision); *Brown v. Petrolite Corp.*, 965 F.2d 38, 50–51 (5th Cir. 1992) (vacating injunction "beyond the relief that the appellees

[5] On appeal, Intervenors do not challenge the district court's entry of a permanent injunction to the extent it runs against the 2016 Rule.

requested"); *Meyer v. Brown & Root Constr. Co.*, 661 F.2d 369, 374 (5th Cir. 1981) (same).

As discussed above, Plaintiffs' operative complaint is explicit that the lawsuit challenges the 2016 Rule alone, as reflected in the requirements Plaintiffs objected to, the harm they alleged they would suffer, the articulation of their RFRA claim, and the relief they requested. *See generally* ROA.310–96. Prior to entering final judgment, the district court's summary judgment analysis of Plaintiffs' RFRA claims was limited to the 2016 Rule, not Section 1557. RE.95. And in granting summary judgment on Plaintiffs' RFRA claim, the district court found that Plaintiffs had standing to challenge the 2016 Rule, relied on the Defendants' failure to defend the 2016 Rule, and held that the Rule's express prohibition on religious exemptions violated RFRA. RE.91 n.5, 94–95. The district court's findings were limited to the flaws it identified in the 2016 Rule challenged by Plaintiffs. Based on the claims that were properly before the court, the entry of a permanent injunction prohibiting Defendants from enforcing Section 1557 against Plaintiffs exceeded the scope of the violation established.

This Court has considered and vacated a similarly flawed

injunction. In *OCA*, this Court vacated a district court's injunction as "not appropriately confined" to the parties' presentation and plaintiff's harm. 867 F.3d at 615–16. "From beginning to end" of its suit, the plaintiff had challenged a specific provision of Texas's Election Code, Section 61.033, as violating the Voting Rights Act, including in its live complaint and motion for summary judgment. *Id.* at 615. Yet the district court "went beyond the engaged challenge" and held that a different provision of Texas's Election Code, Section 61.032, also violated the Voting Rights Act, and later extended the permanent injunction to include Section 61.032. *Id.* On appeal, this Court vacated the injunction to the extent it enjoined enforcement of Section 61.032, explaining that the injunction was not narrowly tailored as it "exceed[ed] the scope of the parties' presentation, which was limited to Tex. Elec. Code § 61.033. And more to the point, it exceeds the scope of the [plaintiff's] harm." *Id.* at 616 (footnote omitted).

Here as well, the district court's injunction against Section 1557 is not appropriately confined to challenges raised by Plaintiffs' operative complaint, which made no mention of claims against the 2016 Rule's underlying statute, or of Plaintiffs' motion for summary judgment, which

did not seek relief against Section 1557. In *OCA*, the district court had at least determined on summary judgment that Section 61.032 violated the VRA—here, the district court did not even consider any claims against Section 1557 itself on summary judgment prior to final judgment—though ultimately this Court held that the injunction could still not stand on that basis. As in *OCA*, this Court need not separately consider whether Section 1557 violates RFRA, or the extent to which enforcement of Section 1557 may replicate harms by the 2016 Rule, as those questions go beyond the challenge engaged in by the parties before the district court.

D. Federal Rule of Civil Procedure 54(c) Does Not Authorize Post-Judgment Relief Against Section 1557 Because the Court's Findings Were Limited to the 2016 Rule and Granting Post-Judgment Relief Would Prejudice Defendants.

The district court claimed authority to issue new relief to Plaintiffs against Section 1557 based on an erroneous application of Federal Rule of Civil Procedure 54(c), which provides that for final judgments the court "should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings."

The district court reasoned that even if the court were to "read

Plaintiffs' live pleading as challenging just the 2016 Rule and not Section 1557 itself," the scope of injunctive relief would not be limited to the 2016 Rule, because Rule 54(c) "provides no such limit." RE.67. To the contrary, this Court has "carefully qualifie[d] Rule 54(c)'s latitude by referring to the other case pleadings *or facts proven at trial*." *Peterson*, 806 F.3d at 340 (emphasis added). Moreover, a court may not grant unrequested relief pursuant to Rule 54(c) when a plaintiff's "'failure to seek a form of permissible relief in his pleadings may operate to the prejudice of the opposing party.'" *Id.* (quoting *Engel v. Teleprompter Corp.*, 732 F.2d 1238, 1242 (5th Cir. 1984)). "The discretion afforded by Rule 54(c) . . . assumes that a plaintiff's entitlement to relief not specifically pled has been tested adversarially, tried by consent, or at least developed with meaningful notice to the defendant." *Id.* at 340.

In this case, for all the same reasons that the district court's injunction against Section 1557 violates Federal Rule of Civil Procedure 65, the injunction is also not supported by the "facts proven at trial" for purposes of Rule 54(c). *Id.* at 340. An injunction that extends beyond the particular violation proven at trial (or summary judgment) is not relief "to which [a] party is entitled." Fed. R. Civ. P. 54(c).

Granting post-judgment relief against future applications of Section 1557 would also severely prejudice Defendants and Intervenors. The district court reasoned that granting injunctive relief against Section 1557 itself would not prejudice Defendants and Intervenors because Plaintiffs "repeatedly" challenged "the same RFRA violation the Court found today," and "the relief has been sufficiently adversarially tested for nearly five years so as to provide meaningful notice to the government and to be a legally permitted remedy." RE.68. But as explained *supra* Part I.B., even if the 2016 Rule and future applications of Section 1557 impose the same burden on Plaintiffs, the governmental interest and narrow tailoring of future administrative actions may be substantially different. And the court has been clear that its prior holdings extend only to RFRA violations by the 2016 Rule, not Section 1557 itself, which could remain unaltered as separate from the 2016 Rule. For example, in one of the district court's prior orders, it emphasized that the preliminary injunction that Plaintiffs sought to make permanent "did not purport to alter any statutory protections for women or transgender individuals outside of the challenged portion of the Rule." ROA.1845. Defendants did not have notice that by declining to defend the 2016 Rule (which

Defendants had already begun the process of repealing through new rulemaking) Defendants were also forfeiting the ability to take any future administrative action that imposed the same substantial burden no matter how narrowly tailored that future administrative action may be.

Moreover, the district court's statement that the RFRA claim in this case has been "adversarially tested for nearly five years" cannot be reconciled with the actual procedural history in this case. Defendants never defended the validity of the 2016 Rule on the merits—first raising only jurisdictional arguments, and then arguing that the court need not reach the RFRA claim. ROA.1589–603, 1599 n.21; ROA.4378. Although Intervenors attempted to defend the 2016 Rule by providing evidence to satisfy strict scrutiny, the district court held that Intervenors could not defend the 2016 Rule on the government's behalf and granted summary judgment without even waiting for the administrative record to be filed. ROA.4425–27; RE.94–95. It would severely prejudice Defendants and Intervenors if Plaintiffs were able to leverage Defendants' decision not to defend a particular regulation into a permanent injunction barring all future enforcement of Section 1557 in perpetuity regardless of what

specific facts or circumstances may arise in the future. *See Peterson*, 806 F.3d at 341 (holding defendant was unfairly prejudiced by award of "broad-sweeping injunctive relief" post-judgment because company believed case "was an action for money damages" and "would have called additional witnesses or elicited additional testimony and would have prepared a defense to the claims for [injunctive] relief" had it known that such relief would be requested (internal quotation marks omitted)).

Additionally, neither Defendants nor Intervenors appealed the district court's entry of final judgment in favor of Plaintiffs, on the understanding that the judgment only ran against the 2016 Rule. Again, had the parties been on notice that the judgment would also justify relief against the underlying statute, they may have appealed. Given that the time to appeal the final judgment has expired, Plaintiffs' delay has severely prejudiced Defendants and Intervenors.

Based on Plaintiffs' pleadings, Plaintiffs' motion for summary judgment, and the district court's prior rulings, Defendants and Intervenors had no notice of any claim that Section 1557 itself violates RFRA.

The district court's holding, as in *Peterson*, "is a paradigm of how

Rule 54(c) should not have been employed," as Defendants and Intervenors are "severely prejudiced" by Plaintiffs' post-judgment request for injunctive relief. *Id.* at 340–41. Defendants and Intervenors were only on notice that they were opposing summary judgment against Plaintiffs' claim that the 2016 Rule violated RFRA, not that Section 1557 violated RFRA as well.

II. THE DISTRICT COURT LACKED ARTICLE III JURISDICTION TO ENJOIN HYPOTHETICAL FUTURE AGENCY ACTION.

Plaintiffs sought, and the district court granted, a permanent injunction prohibiting HHS "from interpreting or enforcing Section 1557 of the Affordable Care Act, 42 U.S.C. § 18116(a), or any implementing regulations thereto against Plaintiffs." RE.68. But these are all hypothetical *future* agency actions, which have not yet taken place, and Article III courts lack jurisdiction to issue such a prophylactic injunction. This Court can nonetheless avoid reaching these constitutional concerns by reversing the district court's injunction on the statutory grounds described above.

While HHS has taken final agency action with respect to whether Section 1557 prohibits discrimination against transgender people, HHS's

Notification of Interpretation takes no position on how that prohibition will apply to religious organizations and people with religious objections. And HHS has not taken any final agency action whatsoever as to whether Section 1557 prohibits discrimination based on termination of pregnancy. If and when final agency action occurs, Plaintiffs may challenge it. Until that time, however, the district court did not have authority to issue an injunction based on speculation about hypothetical actions HHS may or may not decide to take in the future. Because, "[a]t present, this case is riddled with contingencies and speculation that impede judicial review . . . [a]ny prediction how the Executive Branch might eventually implement this general statement of policy is 'no more than conjecture' at this time"—even where the executive branch "has made clear [its] desire to" act. *Trump v. New York*, 141 S. Ct. 530, 535 (2020) (per curiam) (quoting *Los Angeles v. Lyons*, 461 U.S. 95 (1983)).

The Supreme Court and this Court have both rejected similar attempts to enjoin hypothetical future agency action based on past violations. In *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010), the Supreme Court vacated a district court's injunction that purported to bar an agency from taking hypothetical future regulatory action. *Id.* at

165–66. There, the plaintiffs had sued under the APA to challenge a particular agency order to deregulate genetically modified alfalfa, and the district court held that the order was procedurally defective in violation of NEPA because the agency had not prepared an adequate environmental assessment. *Id.* at 158–59. As a remedy, the district court issued an injunction that not only prohibited the agency from enforcing the particular order challenged in the case, but also enjoined the agency from taking any other agency action to deregulate genetically modified alfalfa until an adequate environmental assessment was conducted. *Id.* The Supreme Court held that the district court abused its discretion in enjoining hypothetical future agency action that had not yet commenced. The Court explained that "a permanent injunction is not now needed to guard against any present or imminent risk of likely irreparable harm" because, if the agency takes new agency action "that arguably runs afoul of NEPA, [plaintiffs] may file a new suit challenging such action and seeking appropriate preliminary relief" at that time. *Id.* at 162. "Until such time as the agency decides whether and how to exercise its regulatory authority, however, the courts have no cause to intervene." *Id.* at 164; *see also EPA v. Brown*, 431 U.S. 99, 104 (1977) ("For [the Court]

to review regulations not yet promulgated, the final form of which has only been hinted at, would be wholly novel.").

This Court's decisions have reaffirmed the same principles. In *Veneman*, the plaintiffs brought an action under the APA to prevent an agency from releasing personal information about farmers who had applied to the agency for permission to use "livestock protection collars" with pesticides. 380 F.3d at 810–11. After the district court ruled in favor of the plaintiffs, the court issued an injunction that also prohibited the agency more broadly from releasing personal information contained in other agency records regarding "the location where restricted-use pesticides have been, or will be, applied." *Id.* at 819. The court held that the injunction was overbroad because the underlying "complaint [did] not challenge an agency decision to release the locations where restricted-use pesticides have been, or will be, applied." *Id.* "Without an agency decision to release personal information in 'records regarding the location where restricted use pesticides have been, or will be, applied,' an injunction enjoining such a release constitutes an impermissible advisory opinion." *Id.*

More recently, in *Google, Inc. v. Hood*, 822 F.3d 212 (5th Cir. 2016),

this Court vacated an injunction against an administrative subpoena issued by Mississippi's Attorney General against Google as part of an investigation into whether Google was liable under state law based on unlawful activity on its online platforms. *Id.* at 216. The injunction prohibited enforcement of the subpoena, as well as bringing any civil or criminal action against Google for making third party content available. *Id.* This court vacated the injunction in part because the "injunction covers a fuzzily defined range of enforcement actions that do not appear imminent." *Id.* at 227. Even with the subpoena, the Court could not predict what conduct the Attorney General "might one day try to prosecute," explaining that "adjudicating whether federal law would allow an enforcement action here would require us to determine the legality of state action in hypothetical situations." *Id.* (internal quotation marks omitted). The Court held that, even though the loss of First Amendment freedoms is unquestionably an irreparable injury, "invocation of the First Amendment cannot substitute for the presence of an imminent, non-speculative irreparable injury," and at this early stage, the Court cannot determinate whether any suit "would necessarily violate the Constitution." *Id.* at 227–28.

The Sixth Circuit's decision in *Associated General Contractors of America v. City of Columbus*, 172 F.3d 411 (6th Cir. 1999) is also instructive. In that case, the plaintiffs successfully challenged a set-aside ordinance for minority-owned businesses as unconstitutional under *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). After enjoining the unconstitutional ordinance, the district court purported to retain jurisdiction to ensure that any new city ordinance for minority-owned businesses complies with the requirements of *Croson*. *See Associated Gen. Contractors*, 172 F.3d at 414–15. The plaintiffs contended that continuing jurisdiction was necessary because their "real grievance is not simply with the particular set-aside ordinance; their real contention is that the City cannot, consistent with the requirements of *Croson*, adopt *any* set-aside program." *Id.* at 415.

The Sixth Circuit nevertheless held that Article III courts lack the power to assert jurisdiction over potential future laws: "We are not blind to the efficiency of this approach to determining jurisdiction. It is, however, wrong." *Id.* "[T]he role of the court is to intervene, if at all, only after a legislative enactment has been passed." *Id.* at 415–16 (collecting cases). Until then, federal courts lack the power to issue an "advisory

opinion regarding the constitutionality of [a new] ordinance prior to its becoming law." *Id.* at 421.

Like the plaintiffs in *Associated General Contractors*, Plaintiffs' "real grievance" is that HHS could not adopt *any* rule implementing Section 1557 to require the performance or provision of insurance coverage for gender-transition procedures or abortions without violating RFRA. But Article III courts lack jurisdiction to issue such a prophylactic injunction against future hypothetical regulations. "This language can be read only as a request by [Plaintiffs] for an advisory opinion as to the constitutionality of future legislative action. . . . Such an opinion is beyond the power of a federal court to provide." *Id.*

The injunction granted to plaintiffs in *Sisters of Mercy*, on which Plaintiffs have relied, is also insufficient evidence that the Court may issue an injunction against hypothetical future rulemaking here. *See* ROA.4920–22. The *Sisters of Mercy* case is a district court opinion that has not been upheld on appeal. Indeed, in *Religious Sisters of Mercy*, defendants completely failed to defend the rule on the merits. 513 F. Supp. 3d at 1148. This is not persuasive authority that a court may issue relief in violation of "the oldest and most consistent thread in the federal

law of justiciability . . . that the federal courts will not give advisory opinions." *Flast v. Cohen*, 392 U.S. 83, 96 (1968) (internal quotation marks omitted).

Finally, even if the district court's injunction were not advisory, Defendants' sovereign immunity would bar the district court from enjoining hypothetical future enforcement before HHS takes final agency action. The Administrative Procedure Act's waiver of sovereign immunity is limited to "final agency action." 5 U.S.C. §§ 702, 704. "Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." *FDIC v. Meyer*, 510 U.S. 471, 475 (1994). "Section 702 [of the APA] contains two separate requirements for establishing a waiver of sovereign immunity." *Alabama-Coushatta Tribe of Tex. v. United States*, 757 F.3d 484, 489 (5th Cir. 2014). First, a plaintiff must identify an "agency action"—such as an agency rule, order, or sanction—affecting the plaintiff. *Id.* The agency action must be final. *Id.* Second, "the plaintiff must show that he has 'suffered legal wrong because of the challenged agency action, or is adversely affected or aggrieved by that action within the meaning of a relevant statute.'" *Id.* (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990)). Defendants have not reimposed the 2016

Rule's requirements that Plaintiffs challenged, whether through new rulemaking or the underlying statute. Lacking final agency action, the district court did not have authority to issue an injunction based on speculation about hypothetical actions HHS may or may not decide to take in the future.

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,

/s/ *Lindsey Kaley*
(NY Bar No. 5324983)
Joshua Block
Brigitte Amiri
James D. Esseks
Louise Melling
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500

Daniel Mach
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, N.W.
Washington, D.C. 20005
(202) 675-2330

Andre Segura
Brian Klosterboer
AMERICAN CIVIL LIBERTIES UNION OF TEXAS
5225 Katy Freeway, Suite 350
Houston, TX 77007
(713) 942-8146

Scout Richters
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NEBRASKA
134 S. 13th St., #1010
Lincoln, NE 68508
(402) 416-2694

Counsel for Intervenor Defendants-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on March 28, 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/ *Lindsey Kaley*
Lindsey Kaley
Counsel for Intervenor Defendants-Appellants

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 10,350 words, according to the count of Microsoft Word, and excluding the parts exempted by Fed. R. App. P. 32(f).

/s/ *Lindsey Kaley*
Lindsey Kaley
Counsel for Intervenor Defendants-Appellants