

No.17-10135

In the United States Court of Appeals for the Fifth Circuit

FRANCISCAN ALLIANCE, INC., ET AL.,

Plaintiffs-Appellees,

NORRIS COCHRAN, ACTING SECRETARY OF THE UNITED STATES
DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,

Defendants.

On Appeal from the U.S District Court for the
Northern District of Texas, Wichita Falls Division
No. 7:16-cv-00108-O

JOINT MOTION TO DISMISS APPEAL AS MOOT

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Pursuant to Federal Rule of Appellate Procedure 42(b), the parties jointly move to dismiss this pending appeal as moot, and in support, show as follows:

1. This appeal was filed by the ACLU of Texas and River City Gender Alliance as an appeal of the district court's order dated January 24, 2017, which denied their motion for intervention as of right. *See Franciscan All., Inc. v. Burwell*, No. 7:16-cv-00108-O, 2017 WL 2964088 (N.D. Tex. Jan. 24, 2017); Notice of Appeal, *Franciscan All., Inc. v. Cochran*, (5th Cir. Feb. 8, 2017). The ACLU of Texas and River City Gender Alliance also filed a protective notice of appeal of the district court's order dated December 31, 2016, granting a preliminary injunction against the federal government's enforcement of the challenged rule. *See Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660 (N.D. Tex. 2016); Notice of Appeal, *Cochran, supra* (5th Cir. Feb. 2, 2017).
2. Plaintiffs-Appellees moved to dismiss the appeal for lack of jurisdiction since (1) the district court had not ruled on putative intervenors' motion for permissive intervention, and (2) since putative intervenors' status as parties to the case was not yet resolved, putative intervenors had no standing to appeal the preliminary injunction order.
3. In its June 30, 2017 order, this Court (1) granted Plaintiffs-Appellees' motion to dismiss the appeal from district court's January 24, 2017 order denying intervention as of right, and (2) denied Plaintiffs-Appellees' motion to dismiss the protective notice of appeal from the district court's December 31, 2016

order granting the preliminary injunction. *Cochran, supra* (5th Cir. June 30, 2017). This Court confirmed that it lacked jurisdiction to adjudicate the merits of the protective notice of appeal because putative intervenors were not yet parties to the case. *Id.* Since the district court had not finally resolved that matter, the Court held the case in abeyance until the district court ruled on the motion to intervene. *See id.*

4. On October 15, 2019, the district court entered an order granting putative intervenors' motion to intervene as of right and entering final judgment on the plaintiffs' Administrative Procedure Act and Religious Freedom Restoration Act claims, which vacated the challenged rule. *Franciscan All., Inc. v. Azar*, No. 7:16-cv-00108-O, 2019 WL 5157100 (N.D. Tex. Oct. 15, 2019) (mem. op.).
5. The district court's ruling granting putative intervenors' motion to intervene as of right moots the appeal from the district court's January 24, 2017 order denying the motion to intervene. *See id.* at *6. And the district court's entry of final judgment vacating the challenged rule supersedes the preliminary injunction, which moots the appeal from the district court's December 31, 2016 order granting the preliminary injunction. *See id.* at *11.
6. The parties agree that the above-captioned appeal is moot and should be dismissed.

7. No fees are currently due to the Court, and the parties will each bear their own costs associated with this appeal.

CONCLUSION

The Court should dismiss the appeal as moot.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that on December 3, 2019, this motion was (1) served via the Court's CM/ECF Document Filing System, <https://ecf.ca5.uscourts.gov>, upon all registered CM/ECF users; and (2) transmitted to Mr. Lyle W. Cayce, Clerk of the United States Court of Appeals for the Fifth Circuit, via the Court's CM/ECF Document Filing System, <https://ecf.ca5.uscourts.gov>. I further certify that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Heather Gebelin Hacker
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CERTIFICATE OF COMPLIANCE

This motion complies with the word limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts exempted by Fed. R. App. P. 32(f), it contains 494 words. This motion complies with the requirements of Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface (Equity) using Microsoft Word.

/s/ Heather Gebelin Hacker
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Dated: December 3, 2019