No. 20-10093

In the United States Court of Appeals for the Fifth Circuit

FRANCISCAN ALLIANCE, INC., ET AL.,
Plaintiffs-Appellants,

v.

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

v.

AMERICAN CIVIL LIBERTIES UNION OF TEXAS, ET AL.,
Intervenors-Appellees.

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

PLAINTIFFS-APPELLANTS' UNOPPOSED MOTION FOR LEAVE TO FILE RESPONSE TO LETTER BRIEF

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In accordance with Federal Rule of Appellate Procedure 28(j) and Fifth Circuit Rule 28.4, Plaintiffs-Appellants respectfully seek leave to file a 350-word response to the 350-word supplemental letter brief filed by Intervenors-Appellees on February 5, 2021.

1. In this appeal, Appellants seek a plaintiff-specific injunction barring Defendants-Appellees from taking the action that the district court correctly held violated the Religious Freedom Restoration Act—that is, applying Section 1557 of the Affordable Care Act to force Appellants to violate their beliefs by performing and providing insurance coverage for gender transitions and abortions.

2. In support, Appellants have noted that when a court finds a defendant has violated the plaintiff's rights, courts often enter relief forbidding the defendant from doing so again. As the Supreme Court has explained: when a plaintiff "faces the threat of future injury due to illegal conduct ongoing at the time of suit," "[i]t can scarcely be doubted that" relief that both "abates that conduct and prevents its recurrence" is a legitimate "form of redress." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 185-86 (2000).

3. Nonetheless, Intervenors have insisted throughout this appeal on arguing against a *different* form of relief that Appellants *don't* seek—namely, an injunction stopping Defendants from promulgating new regulations in the future.

4. To that end, on February 5, 2021, Intervenors filed a supplemental letter brief bringing to this Court's attention the Sixth Circuit's decision in *Associated General Contractors of America v. City of Columbus*, 172 F.3d 411 (6th Cir. 1999).

5. Because *Associated General Contractors* was decided 21 years ago, Intervenors sought leave to present it to this Court through a 350-word supplemental brief, rather than through a notice of supplemental authority pursuant to Federal Rule of Appellate Procedure 28(j).

6. Appellants took no position on Intervenors' motion for leave, and the motion was granted.

7. Appellants now seek leave to respond to Intervenors' supplemental brief in the proposed letter brief attached as **Exhibit A**. The proposed brief complies with the 350-word limit applicable to responses to notices of supplemental authority under Rule 28(j).

8. Counsel for Appellants has conferred with counsel for Defendants and Counsel for Intervenors regarding their position on this motion. Counsel for Defendants and counsel for Intervenors have advised that they consent to the relief sought in this motion.

CONCLUSION

For these reasons, Plaintiffs-Appellants' motion for leave to submit a 350-word response to Intervenors-Appellees' supplemental letter brief filed February 5, 2021, should be granted.

Respectfully submitted,

/s/ Joseph C. Davis

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CERTIFICATE OF COMPLIANCE

This motion complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 412 words; and (2) the typeface and type style requirements of Rule 27(d)(1)(E) because it has been prepared in a proportionally spaced typeface (14-point Century Schoolbook) using Microsoft Word.

/s/ Joseph C. Davis
Joseph C. Davis
Attorney for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I certify that on February 8, 2021, I filed the foregoing motion by causing a digital version to be filed electronically via the Court's CM/ECF system. The participants in this case are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

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

/s/ Joseph C. Davis
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February 8, 2021

VIA CM/ECF

Lyle W. Cayce, Clerk of Court
United States Court of Appeals for the Fifth Circuit
F. Edward Hebert Building
600 S. Maestri Place
New Orleans, LA 70130

Re: *Franciscan Alliance, Inc. v. Cochran* (No. 20-10093)
Response to Intervenors' Supplemental Letter Brief:

Associated Gen. Contractors of Am. v. City of Columbus, 172 F.3d 411 (6th Cir. 1999)

Dear Mr. Cayce:

Dusting off a 20-year-old, out-of-circuit opinion as "supplemental" authority smacks of desperation—particularly since it doesn't actually help Intervenors.

In *Associated General Contractors of America v. City of Columbus*, 172 F.3d 411 (6th Cir. 1999), the district court entered an injunction requiring a city to "petition" it for pre-approval before adopting a certain type of ordinance. Unsurprisingly, the Sixth Circuit held that relief violated Article III, because it is "seldom" "appropriate" for courts to exercise a "power of prior approval or veto over the legislative process." *Id.* at 415-19 (cleaned up).

Here, Appellants don't seek an injunction requiring HHS to submit new proposed regulations to the district court for pre-approval. Indeed, Appellants don't seek to enjoin HHS from enacting new regulations at all. What Appellants seek is an order prohibiting HHS—whatever the operative rule—from *applying Section 1557* to require *them* to perform or insure gender transitions or abortions. Reply 1-4. That relief is commonplace—as demonstrated by the fact that another court (in *Religious Sisters of Mercy v. Azar*) just granted it, as well as by at least 20 decisions entering analogous injunctions against the contraceptive mandate, Br.52-54 & n.8.

Associated General Contractors is therefore inapposite. The court there *distinguished* cases "not involv[ing] the jurisdiction of the court to" "review and pre-approve the actions of a legislative body"—*i.e.*, this case. 172 F.3d at 418-19. And the court *approved* the district court's injunctive relief barring the city from "reenact[ing]" the challenged ordinance "or enact[ing] one that was not sufficiently altered so as to present a substantially different controversy." *Id.* at 420-21 (cleaned up).

Here, by contrast, "nothing in *Franciscan Alliance* prevented HHS from re-promulgating the very provisions that the court vacated," *Whitman-Walker Clinic, Inc. v. HHS*, ___ F. Supp. 3d ____, 2020 WL 5232076, at *25 (D.D.C. Sept. 2, 2020), much less from otherwise forcing Appellants to violate their beliefs in the very same way. Worse, HHS's *current* implementation of Section 1557 threatens just that. Br.38-46, Reply 8-12. That's why an injunction is both appropriate and required here.

Word Count: 340

Sincerely,

/s/ *Joseph C. Davis*

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