



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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