



U.S. Department of Justice
Civil Division
950 Pennsylvania Ave., N.W., Room 7261
Washington, D.C. 20530-0001

Tel: (202) 353-9018

VIA CM/ECF

April 9, 2021

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

Dear Mr. Cayce:

We write in response to appellants' April 7, 2021 letter pursuant to Federal Appellate Rule 28(j).

Plaintiffs brought this lawsuit challenging specific provisions of the 2016 Rule and obtained a favorable final judgment on their RFRA claims. ROA.4812 (vacating "the portions of the [2016] Rule that Plaintiffs challenged," "[s]pecifically," the portions of the rule defining "'On the basis of sex' to include gender identity and termination of pregnancy"). Moreover, the Department of Health and Human Services (HHS) rescinded the challenged provisions of the 2016 Rule. 85 Fed. Reg. 37,160, 37,244 (June 19, 2020). Thus, this appeal is moot.

Plaintiffs cannot use this appeal to challenge hypothetical future agency action that is not imminent and the contours of which are unknown. Even if they could, the question would not be whether HHS generally construes Section 1557 to prohibit discrimination based on gender identity. Rather, the question would be how HHS might apply Section 1557 to religious entities who object under RFRA

and other religious exemptions in the context of gender-transition procedures, and specifically to plaintiffs, who have obtained a favorable judgment on RFRA claims against the 2016 Rule.

The guidance memorandum from the Civil Rights Division of the Department of Justice does not create a justiciable controversy or demonstrate that plaintiffs face imminent irreparable harm sufficient to justify a permanent injunction. The memorandum states that “the Division has determined that the best reading of Title IX’s prohibition of discrimination ‘on the basis of sex’ is that it includes discrimination on the basis of gender identity and sexual orientation,” consistent with *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). Pls.’ Ex. A at 2. However, *Bostock* indicated that how “doctrines protecting religious liberty interact with [these statutes] are questions for future cases,” 140 S. Ct. at 1754, and HHS has yet to decide issues related to religious exemptions. Plaintiffs’ reliance on this guidance memorandum before HHS has taken any action only highlights the speculative and premature nature of their request for injunctive relief.

Respectfully submitted,

s/ Ashley A. Cheung
Ashley A. Cheung
Attorney, Appellate Staff
Civil Division, Room 7261
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 353-9018

cc: all counsel (via CM/ECF)

CERTIFICATE OF COMPLIANCE

This letter complies with the word count limitation of Fed. R. App. 28(j), as its body contains 332 words as automatically totaled by Microsoft Word.

s/ Ashley A. Cheung
ASHLEY A. CHEUNG