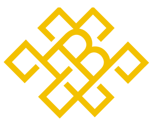

BECKET
Religious Liberty for All

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June 10, 2019

VIA CM/ECF

Patricia S. Dodszuweit, Clerk of Court
United States Court of Appeals for the Third Circuit
21400 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106-1790

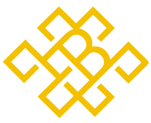
> Re: Rule 28(j) Notice of Supplemental Authority in *Pennsylvania v. President*, Nos. 17-3752, 18-1253, 19-1129, 19-1189 (3d Cir.)
> *DeOtte v. Azar*, No. 4:18-cv-00825 (N.D. Tex. June 5, 2019), Dkt. No. 76, attached as an Exhibit

Dear Ms. Dodszuweit:

DeOtte is a permanent injunction protecting a class of "[e]very current and future employer in the United States" with religious objections to the "accommodation" the States wish to reinstate here. Exhibit at 8, 31.

DeOtte relies on concessions made in *Zubik* that, for self-insured employers, the "accommodation" coverage achieved by signing the form was actually "part of the same 'plan.'" Exhibit at 14 (quoting Resp. Br. 38, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016)). The States' response brief mirrors this language. Resp. Br. 36-37 (describing alleged harm to Pennsylvania if employees "lose contraceptive coverage through their employer's plans" (quoting Mendelsohn Declaration, JA 299)).

Relying on that concession, *DeOtte* held that the mandate imposes a substantial burden and violates RFRA. It explained that a prior Fifth Circuit case vacated by *Zubik* did not control because the government "omitted [from that] briefing" what it "explained to the Supreme Court," making the facts "much different." Exhibit at 16; *accord Zubik*, 136 S. Ct.



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at 1560 (noting government had "substantial[ly]" changed position). The same analysis applies here. *See* Sisters Br. 52-53 (noting *Geneva College*'s reliance on separate-coverage representations).

DeOtte explained that where a plaintiff "views execution of the forms as complicity" in wrongdoing, refraining from signing "*is* the religious exercise" and "exorbitant fines" for non-compliance substantially burden that exercise. Exhibit at 17-19. Finally, "the only two other options—provide the objected-to contraceptives or pay exorbitant fines,"—are options *Hobby Lobby* already rejected. Exhibit at 19.

In light of *DeOtte* (and the 60+ other live injunctions it joins) it cannot be that the agencies were obligated to continue losing cases over a mandate they cannot effectively enforce, rather than obeying the law and changing the rule. RFRA "surely allows" such changes, *Burwell v. Hobby Lobby*, 573 U.S. 682, 730 (2014), and this Circuit has found that "the Government has discretion to grant certain religious accommodations subject to constitutional limitations." *Real Alternatives v. HHS*, 867 F.3d 338, 352 (3d Cir. 2017).

DeOtte provides important additional confirmation that the agencies were right and were required (or, at a minimum, permitted) by RFRA to change the rule.

Sincerely,

Word count: 350

/s/ Mark L. Rienzi

Mark L. Rienzi
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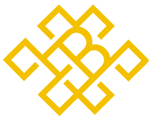
Diana M. Verm
Chris Pagliarella
The Becket Fund for Religious Liberty



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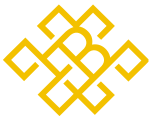

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system on June 10, 2019.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Mark L. Rienzi

Mark L. Rienzi
Counsel for Defendant-Intervenor Little Sisters of the Poor Saints Peter and Paul Home