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June 17, 2019

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

By CM/ECF

Re: *Commonwealth of Pennsylvania & State of New Jersey v. President United States of America et al., Nos. 17-3752, 18-1253, 19-1129, 19-1189 (Argued May 21, 2019) (McKee, Shwartz, Fuentes)*

Dear Ms. Dodszuweit:

The Appellee States respectfully write to bring a matter to the Court's attention and to respond to the June 10, 2019, letter filed by Intervenor.

First, the States respectfully inform the Court that the Supreme Court today denied *certiorari* in *California v. Azar*, 911 F.3d 558 (9th Cir. 2018), *cert. denied*, *Little Sisters of the Poor v. California*, 18-1192 (order list attached).

Second, the States respectfully respond to Intervenor's recent 28(j) letter. That letter argues that *DeOtte v. Azar*, 4:18-cv-00825 (N.D. Tex. 2019), shows "that the agencies were right" in issuing the rules at issue in this case. In *DeOtte*—like the other injunctions on which Intervenor relies—the agencies did not contest plaintiffs' claims.¹ Intervenor reasons that the agencies' issuance of rules creating broad exemptions from the mandate is justified by the subsequent decision of those

¹ The agencies nominally contested class certification, but appear to have conducted no discovery on the question.

same agencies not to contest lawsuits seeking exemptions from the mandate. Even the agencies have not made this circular argument.

In fact, *DeOtte* demonstrates why courts exercise caution in relying on judicial decisions made without adversarial briefing. A cursory review of the decision raises several serious questions. For instance, there is a significant question concerning whether the claims are time-barred; the classes certified seem to include plaintiffs whose claims are prohibited by *res judicata*, including the individual plaintiffs in *Real Alternatives*; and the decision rests on a factually inaccurate argument—also advanced by Intervenor here—regarding prior assertions made by the government in earlier litigation.²

Eight of the nine circuits to address the issue before *Zubik*—in cases the government *did* defend—held that the accommodation did not violate RFRA. Those decisions were correct, as this Court recognized in *Real Alternatives*. And based on the sound reasoning of those decisions, the rules cannot be justified.

Respectfully submitted,

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cc (by CM/ECF): Counsel of Record

² Intervenor suggests (at 1-2) that this argument was acknowledged by the Supreme Court in *Zubik*, and (at 1) that the States have made similar “concessions” to those they allege the government made. Neither claim finds any support in the material Intervenor cites.

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing document, and any attachments thereto, to be electronically filed with the Clerk of the Court for the U.S. Court of Appeals for the Third Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: June 17, 2019

/s/ Michael J. Fischer

MICHAEL J. FISCHER

(ORDER LIST: 587 U.S.)

MONDAY, JUNE 17, 2019

CERTIORARI -- SUMMARY DISPOSITIONS

17-1445 UNITED STATES V. HERROLD, MICHAEL

The motion of respondent for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Quarles v. United States*, 587 U. S. ____ (2019).

18-547 KLEIN, MELISSA, E., ET VIR V. OR BUREAU OF LABOR & INDUSTRIES

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the Court of Appeals of Oregon for further consideration in light of *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 584 U. S. ____ (2018).

18-7036 RICHARDSON, FRANK V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Sixth Circuit for the court to consider the First Step Act of 2018, Pub. L. No. 115-391 (2018).

ORDERS IN PENDING CASES

18M168 EKWUNIFE, SYLVESTER V. PHILADELPHIA, PA, ET AL.

The motion for leave to file a petition for a writ of

certiorari with the supplemental appendix under seal is granted.

18M169 STREETER, ERIC D. V. WALDEN UNIVERSITY, LLC, ET AL.

The motion to direct the Clerk to file a petition for a writ of certiorari out of time under Rule 14.5 is denied.

18M170 BUTLER, QUINCY D. V. DAVIS, DIR., TX DCJ

18M171 BAGWELL, JAMES J. V. BANK OF AMERICA, N.A.

18M172 CHARLES, VICTOR A. V. DAVIS, DIR., TX DCJ

The motions to direct the Clerk to file petitions for writs of certiorari out of time are denied.

141, ORIG. TEXAS V. NEW MEXICO, ET AL.

The motion of Nathan Boyd Estate, et al. for leave to intervene is referred to the Special Master.

17-1672 UNITED STATES V. HAYMOND, ANDRE R.

The motion of respondent for appointment of counsel is granted, and William D. Lunn, Esq., of Tulsa, Oklahoma, is appointed to serve as counsel for respondent in this case.

18-1291 THURMAN, LINDA, ET AL. V. JUDICIAL CORRECTION, ET AL.

The motion of Fane Lozman for leave to file a brief as *amicus curiae* is granted.

18-1293 EVERGREEN FREEDOM FOUNDATION V. WASHINGTON

The motion of National Right to Work Legal Defense Foundation, Inc. for leave to file a brief as *amicus curiae* is granted.

18-8006 IN RE CURTIS EVANS

The motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* is denied.

CERTIORARI DENIED

17-1189	TORREZ, JORGE A. V. UNITED STATES
17-1455	JORDAN, DWIGHT E. V. DARIEN, GA, ET AL.
17-1686	RPX CORPORATION V. CHANBOND LLC
17-7224	SECORD, ROBERT E. V. UNITED STATES
17-7496	FERGUSON, SHANNON L. V. UNITED STATES
17-8153	MOORE, MICHAEL E. V. UNITED STATES
17-9127	HERROLD, MICHAEL V. UNITED STATES
18-750	JTEKT CORP. V. GKN AUTOMOTIVE LTD.
18-781	BALTIMORE COUNTY, MD V. EEOC
18-940	HANCOCK, JAMAL M. V. DAVIS, DIR., TX DCJ
18-1052	RENTERIA, ZENAIDO V. UNITED STATES
18-1053	ASHLAND SPECIALTY CO., INC. V. STEAGER, WV STATE TAX COMM'R
18-1157	VEGA, EDWIN A. V. OHIO
18-1177	PETERS, BRADFORD G. V. CIR
18-1192	LITTLE SISTERS OF THE POOR V. CALIFORNIA, ET AL.
18-1197	BROOKHART, ACTING WARDEN V. LEE, ANTHONY D.
18-1303	COLBERT, SONJA V. MITCHELL, CLEVELAND
18-1315	HMONG 1, ET AL. V. LAO PEOPLE'S DEMOCRATIC, ET AL.
18-1316	NETTLES, BEVERLEY R. V. BULLINGTON, CYNTHIA C., ET AL.
18-1319	THOMAS, ELIJAH V. WILKIE, SEC. OF VETERANS AFFAIRS
18-1333	JONES, RONALD, ET AL. V. KEITZ, MICHAEL, ET AL.
18-1339	FORNESA, MARK A., ET AL. V. FIFTH THIRD MORTGAGE CO.
18-1356	ADETU, DAYO, ET AL. V. SIDWELL FRIENDS SCHOOL
18-1359	GRESHAM, WILLIAM S. V. TENNESSEE
18-1381	SUPPLY PRO SORBENTS, LLC V. RINGCENTRAL, INC.
18-1390	TALLEY, ROCHELL V. OCWEN LOAN SERVICING, ET AL.
18-1392	BARONE, JOHN M. V. WELLS FARGO BANK, N.A.

18-1423	COOPER, PAUL E. V. UNITED STATES
18-1425	CHAGANTI, NAREN V. CIR
18-1433	BALKANY, MILTON V. UNITED STATES
18-1436	JONES, ULRIC V. UNITED STATES
18-8016	GOFF, JAMES V. OHIO
18-8050	THOMPSON, ALVAUN V. UNITED STATES
18-8125	WALKER, DARRELL W. V. UNITED STATES
18-8386	APELT, MICHAEL V. RYAN, DIR., AZ DOC
18-8393	OVALLES, IRMA V. UNITED STATES
18-8415	LOTTER, JOHN L. V. NEBRASKA
18-8417	JACKSON, ROBERT V. UNITED STATES
18-8426	LYNCH, CHARLES C. V. UNITED STATES
18-8731	NOGUERA, CARLOS V. SMITH, WARDEN, ET AL.
18-8768	ROBINSON, DARRYL A. V. MAWER, UNKNOWN, ET AL.
18-8787	DOUCE AL-DEY, OLIVER V. NEW YORK, NY
18-8800	WINN, STEPHEN R. V. METZGER, WARDEN, ET AL.
18-8802	VERNON, ELI V. DAVIS, DIR., TX DCJ
18-8806	DUTTON, MARGUERITE V. McCREA, NIKKISHA P.
18-8812	BARR, JAMES V. SHAPIRO, ATT'Y GEN. OF PA, ET AL.
18-8815	REICH, SCOTT R. V. SLAGLE, ADM'R, MOUNTAIN VIEW
18-8820	DECK, CARMAN L. V. JENNINGS, WARDEN
18-8835	DAVIS, SABRINA D. V. KIA MOTORS AMERICA, INC.
18-8848	ROBINSON, ANTYANE V. PENNSYLVANIA
18-8849	ROBINSON, KEITH A. V. WHITE, H., ET AL.
18-8850	SHAW, OSCAR L. V. DAVIS, DIR., TX DCJ, ET AL.
18-8851	SMITH, LESTER J. V. GEORGIA
18-8853	BROWN, CAMERON V. CALIFORNIA
18-8858	WARREN, ASPEN V. TEXAS

18-8859 BORDEN, LaSHUNDA R. V. CHEAHA MENTAL HEALTH CENTER
18-8863 TURNBULL, NEVILLE V. JOHNSON, WARDEN
18-8867 BROWN, JAMES A. V. DAVIS, DIR., TX DCJ
18-8875 BROWN, GEORGE E. V. BONDI, ATT'Y GEN. OF FL, ET AL.
18-8876 LOGAN, NICKIE R. V. DISTRICT ATT'Y OF ALLEGHENY CTY.
18-8878 JARA, ABDULLAHI H. V. STANDARD PARKING, ET AL.
18-8883 JESSUP, JAMES E. V. CLARKE, DIR., VA DOC
18-8884 BROWN, JIMMY W. V. CALIFORNIA
18-8906 WILSON, DE'ANGELO V. RUSSELL, MARILYN, ET AL.
18-8908 DEMOUCHET, PRESTON G. V. VANNOY, WARDEN
18-8942 AKARD, JEFFREY V. CARTER, COMM'R, IN DOC
18-8958 DAVALLOO, SHEILA V. LAMANNA, ACTING SUPT., BEDFORD
18-8990 REEDER, RASZELL V. WHELDON, E., ET AL.
18-8991 ROJAS-VEGA, DANY A. V. IMMIGRATION & CUSTOMS, ET AL.
18-8992 LORRAINE, CHARLES V. OHIO
18-8994 WOLF, ABIE V. OSHEROW, RANDOLPH, ET AL.
18-9038 PETERS, SCOTT V. ILLINOIS
18-9074 FRANCOIS, AARON V. VANNOY, WARDEN
18-9101 MONTANEZ, PIERRE V. WALOWSKI, URSULA
18-9123 McCLENTON, JOVAN V. CALIFORNIA
18-9154 SMITH, JEFFREY W. V. CLARKE, DIR., VA DOC
18-9163 HORRELL, PHILLIP L. V. DOWNEY, SHERIFF
18-9192 BALICE, MICHAEL V. UNITED STATES
18-9212 McCRUDDEN, VINCENT V. UNITED STATES, ET AL.
18-9213 PAIN, JAMES V. UNITED STATES
18-9219 THOMAS, YAQOB TAFAN V. MEKO, WARDEN
18-9224 ILLARRAMENDI, FRANCISCO V. SEC
18-9231 LEACHMAN, MATTHEW V. TEXAS

18-9233	PERALES, MICHAEL V. UNITED STATES
18-9236	GONZALEZ, AMY, ET AL. V. UNITED STATES
18-9240	CORDOBA, CARLOS V. UNITED STATES
18-9241	SEALED APPELLANT V. SEALED APPELLEE
18-9242	HAYDEN, JOEL V. MAINE
18-9243	ALIGWEKWE, CHIMA E. V. UNITED STATES
18-9245	DE-LA-ROSA, MARTIN P. V. UNITED STATES
18-9248	PHILLIPS, PRESTON V. UNITED STATES
18-9255	RAM, SANTOSH V. UNITED STATES
18-9256	SYED, ZEESHAN K. V. UNITED STATES
18-9258	SHAW, BERNARD R. V. UNITED STATES
18-9259	EJIOFOR, AKUNNA B. V. UNITED STATES
18-9264	MARSHALL, ROBERT V. UNITED STATES
18-9275	TROIANO, JAMES V. UNITED STATES
18-9284	ROGERS, ANGELA V. COMPASS AIRLINES, INC., ET AL.
18-9291	GREEN, ADRIAN V. UNITED STATES
18-9292	FREDRICKSON, TIMOTHY B. V. UNITED STATES
18-9293	COOPER, EUGENE V. FLORIDA
18-9300	WATERS, DEVON V. UNITED STATES
18-9301	LOMAX, SKIP E. V. UNITED STATES
18-9303	LINCKS, LARRY R. V. UNITED STATES
18-9304	DE LEON, ABEL V. UNITED STATES
18-9305	CHAPMAN-SEXTON, JOSHUA V. UNITED STATES
18-9306	SAYER, SHAWN V. UNITED STATES
18-9312	WRIGHT, TRAVIS J. V. UNITED STATES
18-9313	WATSON, WARREN D. V. KILLOUGH, MATTHEW, ET AL.
18-9315	PEEBLES, CASEY V. UNITED STATES

The petitions for writs of certiorari are denied.

18-543 SCI AT FAYETTE, ET AL. V. REEVES, JERRY

The motion of respondent for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is denied.

18-918 COPELAND, JOHN, ET AL. V. VANCE, CYRUS R., ET AL.

The motion of The Legal Aid Society for leave to file a brief as *amicus curiae* is granted. The motion of Criminal Law Professors, et al. for leave to file a brief as *amici curiae* is granted. The motion of Constitutional Law Scholars for leave to file a brief as *amici curiae* is granted. The petition for a writ of certiorari is denied.

18-1279 LEWIS, K. WENDELL, ET AL. V. PENSION BENEFIT GUARANTY CORP.

The petition for a writ of certiorari is denied. Justice Kavanaugh took no part in the consideration or decision of this petition.

18-8434 HALVORSEN, LEIF V. HART, WARDEN

The motion of petitioner to defer consideration of petition for a writ of certiorari is denied. The petition for a writ of certiorari is denied. Justice Kagan took no part in the consideration or decision of this motion and this petition.

18-8664 LOWE, RODNEY T. V. FLORIDA

The petition for a writ of certiorari is denied. Justice Sotomayor, dissenting from the denial of certiorari: I dissent for the reasons set out in *Reynolds v. Florida*, 586 U. S. ____ (2018) (Sotomayor, J., dissenting).

18-8789 EASTERWOOD, ROY V. OKLAHOMA

The motion of petitioner for leave to proceed *in forma pauperis* is denied, and the petition for a writ of certiorari is

dismissed. See Rule 39.8.

HABEAS CORPUS DENIED

18-9388 IN RE RAMSEY RANDALL

18-9403 IN RE CHRISTOPHER JOHNSON

18-9437 IN RE STEVEN WESTE

The petitions for writs of habeas corpus are denied.

18-9378 IN RE TAE HON CHON

The motion of petitioner for leave to proceed *in forma pauperis* is denied, and the petition for a writ of habeas corpus is dismissed. See Rule 39.8.

MANDAMUS DENIED

18-8790 IN RE STEVEN M. BACKSTROM

The petition for a writ of mandamus is denied.

18-8805 IN RE ANDRE R. SCOTT

18-8919 IN RE TATYANA E. DREVALEVA

The petitions for writs of mandamus and/or prohibition are denied.

PROHIBITION DENIED

18-9276 IN RE JESUS AVILA

The petition for a writ of prohibition is denied.

REHEARINGS DENIED

18-1147 BRUNSON, DERON V. HOGAN, L. D., ET AL.

18-1216 LUSSY, R. C. V. FL ELECTIONS COMM'N, ET AL.

18-7966 SMITH, DESMOND V. TERRIS, WARDEN

18-8022 COREAS, LEONICIO A. V. CLARKE, DIR., VA DOC

18-8175 GUNCHICK, WESSLEY J. V. BANK OF AMERICA

18-8244 CORNELL, JUSTIN K. V. VIRGINIA

18-8507 JENNETTE, RANDALL V. CIR

The petitions for rehearing are denied.