



June 27, 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: Supplemental authority in *Commonwealth of Pennsylvania v. President United States of America*, Nos. 17-3752, 18-1253, 19-1129, 19-1189 (3d Cir.) — *American Legion v. American Humanist Association*, No. 17-1717, 588 U.S. ____ (June 20, 2019), attached as an Exhibit.

Dear Ms. Dodszuweit:

In *American Legion*, the Supreme Court upheld a large Latin cross war memorial on public land, holding that its removal would be seen as “hostility toward religion that has no place in our Establishment Clause traditions.” Exhibit 9.

The States have argued that the Final Rule violates the Establishment Clause. *See* Little Sisters’ Opening Br. 56-57; Little Sisters’ Reply Br. 19-20; States’ Br. 48-49 n.20 (discussing claims raised in motion for injunction); States’ Memo Supp. Summ. J. at 27-30, No. 2:17-cv-04540 (E. D. Pa. May 15, 2019), Dkt. 170-01 (arguing for summary judgment on Establishment Clause claims). *American Legion* resolves this argument against the States.

If a large Latin cross on public land does not violate the Establishment Clause, a religious exemption for nuns cannot either. That is particularly true where the Supreme Court has already pointed the government to “the most straightforward way” of providing these products, namely by



1200 New Hampshire Ave. NW, Suite 700
Washington, DC 20036

June 27, 2019

Page 2 of 4

the government paying directly. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014). That is precisely what the agencies have tried to do. 84 Fed. Reg. 7714, 7734 (Mar. 4, 2019).

Further, *American Legion* rejects the use of the *Lemon* test on which the States rely. See Dkt. 170-01 at 27-28. A majority of the Court upheld the cross without regard to *Lemon*, Exhibit 38, and six justices agreed that *Lemon* is no longer a viable Establishment Clause test. Exhibit 31-32 (plurality op.), 64 (Gorsuch, J., concurring).

American Legion stresses that the Religion Clauses “aim to foster a society in which people of all beliefs can live together harmoniously.” Exhibit 9; *see* Little Sisters’ Opening Br. 56-57 (noting the long tradition of religious accommodations). The same is true of the Final Rule. This Court should uphold the Rule and let all parties live together harmoniously.

Sincerely,

Word count: 297

/s/ Mark L. Rienzi

Mark L. Rienzi

Eric C. Rassbach

Lori H. Windham

Diana M. Verm

Chris Pagliarella

The Becket Fund for Religious Liberty

1200 New Hampshire Ave. NW

Suite 700

Washington, DC 20036

Telephone: (202) 955-0095

Facsimile: (202) 955-0090



1200 New Hampshire Ave. NW, Suite 700
Washington, DC 20036

June 27, 2019
Page 3 of 4

mrienzi@becketlaw.org

*Counsel for Defendant-Intervenor
Little Sisters of the Poor
Saints Peter and Paul Home*



1200 New Hampshire Ave. NW, Suite 700
Washington, DC 20036

June 27, 2019

Page 4 of 4

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 27, 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