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July 24, 2019

VIA CM/ECF

Molly C. Dwyer, Clerk of Court
U.S. Court of Appeals for the Ninth Circuit
The James R. Browning Courthouse
95 7th Street
San Francisco, CA 94103

Re: Response to 28(j) Letter of July 16, 2019 in *California v. Azar*, Nos. 19-15072, 19-15118, 19-15150 — regarding *Pennsylvania v. President*, Nos. 17-3752, 18-1253, 19-1129, 19-1189, --- F.3d ---, 2019 WL 3057657 (3d Cir. July 12, 2019).

Dear Ms. Dwyer:

The Third Circuit's decision in *Pennsylvania* relies on two premises conflicting with this Circuit's precedent.

First, *Pennsylvania* diverges on whether a procedural defect in an interim final rule infects the final rule. Relying on circuit precedent, the Third Circuit held the final rule invalid even though it was promulgated after notice and comment because "deficits in the promulgation of the IFRs compromised the procedural integrity of the Final Rules." 2019 WL 3057657, at *13. But Ninth Circuit precedent allows prospective application of final rules even where procedural defects invalidate an identical interim final rule previously in force. Br. 49 (discussing *Paulsen v. Daniels*, 413 F.3d 999 (9th Cir. 2005)).

Second, *Pennsylvania* held "substantial burden" in the RFRA context to turn on a judge's assessment of the substantiality of the act required of the religious objector, contrary to this Circuit's and the Supreme Court's view that "substantial" refers to the burden placed by the government. The Third Circuit reasoned that "the submission of the self-

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certification form does not make the [employers] 'complicit' in the provision of contraceptive coverage," and therefore, "any possible burden from the notification procedure is not substantial." 2019 WL 3057657, at *15-16 (quoting *Geneva Coll. v. Sec'y U.S. Dep't Health & Human Servs.*, 778 F.3d 422, 442 (3d Cir. 2015), *vacated*, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016)).

By contrast, this Court correctly holds that religious beliefs on matters like complicity need not be "acceptable, logical, consistent, or comprehensible to others" to merit RFRA protection. *United States v. Zimmerman*, 514 F.3d 851, 853 (9th Cir. 2007) (per curiam). Instead, this Court asks whether the *government* has put "substantial pressure on an adherent to modify his behavior." *Warsoldier v. Woodford*, 418 F.3d 989, 995 (9th Cir. 2005) (quoting *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981)). "Substantial" refers to the degree of the government's pressure, not the significance of the believer's belief.

Further, this Court's approach better comports with Supreme Court precedent. *See Burwell v. Hobby Lobby*, 573 U.S. 682, 720 (2014) ("substantial economic consequences" for following religious beliefs alone established substantial burden).

Sincerely,

Word count: 346

/s/ Mark L. Rienzi

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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 Ninth Circuit by using the appellate CM/ECF system on July 24, 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

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