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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.<sup>1</sup> Intervenor reasons that the agencies' issuance of rules creating broad exemptions from the mandate is justified by the subsequent decision of those

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<sup>1</sup> 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.<sup>2</sup>

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

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<sup>2</sup> 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 PAINE, 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.