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June 10, 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: Supplemental authority in *California v. Azar*, Nos. 19-15072, 19-15118, 19-15150 — *DeOtte v. Azar*, No. 4:18-cv-00825 (N.D. Tex. June 5, 2019), Dkt. 76, attached as an Exhibit.

Dear Ms. Dwyer:

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. That adds to the over-60 live injunctions against the mandate.

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 concession *DeOtte* discusses matches the States' concession here. *See* Resp. Br. 46-47 ("part of the same ERISA plan"). Relying on that concession, *DeOtte* held that the mandate imposes a substantial burden and violates RFRA. Exhibit at 16 (explaining departure from prior Fifth Circuit ruling because the government "omitted [from that] briefing" what it "explained to the Supreme Court," making the facts "much different"). *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.

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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.

Like *DeOtte*, the agencies recognized that the "representations . . . made in the Supreme Court" in *Zubik* doom any RFRA defense. Exhibit at 13-14; *see* 83 Fed. Reg. 57,536, 57,544 (Nov. 15, 2018); *cf.* 136 S. Ct. at 1560 (noting that government had "substantial[ly]" changed positions). Nor can discovery revive that RFRA defense here because, in the district court, *all* parties expressly agreed that discovery was unnecessary and proceeded with summary judgment instead. Dkt. 251 ("Plaintiffs do not anticipate taking discovery"); Dkt. 275 (setting summary judgment schedule without discovery period). That was precisely the posture in *DeOtte*. Exhibit at 1.

Congress made preliminary injunctions immediately appealable, 29 U.S.C. 1292(a)(1); this Circuit's rules treat those appeals with urgency, Circuit Rule 3.3; and *DeOtte* provides both an additional reason for this Court to decide this appeal and an example for doing so correctly.

Sincerely,

Word count: 348

/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 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

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