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June 26, 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: Rule 28(j) Notice of Supplemental Authority in  
*Pennsylvania v. President*, Nos. 17-3752, 18-1253, 19-1129,  
19-1189 (3d Cir.)—*California v. Azar*, No. 19-15974 (9th Cir.  
June 20, 2019) (per curiam), attached as an Exhibit.

Dear Ms. Dodszuweit:

In *California*, the Ninth Circuit granted a stay pending appeal of three district court injunctions against HHS's new Title X regulations.

Like the States in this case, the states in *California* argued that an HHS regulation violates the Administrative Procedure Act as arbitrary and capricious for lack of explanation. Exhibit 22; States Br. 84. *California* held that HHS did not violate the APA under the "narrow" arbitrary and capricious standard, overturning the district court decisions because they "generally ignored HHS's explanations, reasoning, and predictions whenever they disagreed with the policy conclusions that flowed therefrom." Exhibit 22. In particular, *California* found that the district courts ignored HHS's "primary reasoning" for the Final Rule, that it was "required by HHS's reasonable reading of" the statute. Exhibit 23. Likewise here, the States suggest that the agencies' primary reasoning for the Final Rule, that the prior regulations violate RFRA, is insufficient even though the agencies



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are subject to dozens of injunctions. Exhibit 22; Little Sisters' Br. 49.

*California* also rejected the argument, made by the States below, *see* Dkt. 91-2 at 22, that the regulations violate section 1554 of the Affordable Care Act (42 U.S.C. § 18114), holding that the government's "decision to fund childbirth but not abortion" under Title X creates a "governmental obstacle" to abortion. Exhibit 21.

The section 1554 argument is even weaker here. If the government does not create an unreasonable barrier or impede timely access to medical care by declining to fund services *itself*, then *a fortiori* it does not violate that statute when it declines to force *others* to fund those services, as the States have argued.

Finally, *California* held that the federal government would suffer irreparable harm if it is "forced" to implement a status quo that "it has concluded violates the law," outweighing even undisputed "financial costs" to the plaintiffs. Exhibit 24, 25. Here, the agencies have concluded that the prior version of the mandate "violates . . . RFRA." 82 Fed. Reg. 47,792, 47,800 (Oct. 13, 2017). The district court's attempt to impose the same status quo on the agencies should be swiftly reversed.

Sincerely,

Word count: 349

/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 Third Circuit by using the appellate CM/ECF system on June 26, 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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