**U.S. Department of Justice**
Civil Division, Appellate Staff
950 Pennsylvania Ave. NW, Rm. 7241
Washington, DC 20530

Tel: (202) 514-3427

April 1, 2020

Lyle W. Cayce
Clerk, United States Court of Appeals
for the Fifth Circuit
600 S. Maestri Place, Suite 115
New Orleans, LA 70130

Re: *Dierlam v. Trump*, No. 18-20440 (5th Cir.)

Dear Mr. Cayce:

On March 9, 2020, the Court requested letter briefs advising whether the parties request a stay of this appeal pending the Supreme Court's resolution of two cases: *Texas v. United States*, 945 F.3d 355 (5th Cir. 2019), *cert. granted*, *California v. Texas*, No. 19-840 (S. Ct.), and *Little Sisters of the Poor Saints Peter and Paul Home v. Commonwealth of Pennsylvania and State of New Jersey*, No. 19-431 (consolidated with *Trump v. Pennsylvania*, No. 19-454). In response to that order, appellees request that this case be stayed for *Little Sisters of the Poor* and *Trump v. Pennsylvania*, but not for *Texas v. United States*.

1. In *Little Sisters of the Poor* and *Trump v. Pennsylvania*, the Supreme Court is reviewing the Third Circuit's decision that the expanded religious exemption from the contraceptive-coverage mandate is not required by the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb, because the prior regulatory accommodation satisfies RFRA. The Third Circuit based that holding on the analysis of RFRA's "substantial burden" requirement the Court had previously adopted in *Real Alternatives, Inc. v. Sec'y Dep't of Health & Human Servs.*, 876 F.3d 338, 371 (3d Cir. 2017). *See Pennsylvania v. President*, 930 F.3d 543, 573 (3d Cir. 2019).

Specifically, the Third Circuit held that RFRA does not require the expanded religious exemption because an employer's submission of a self-certification form to its insurer to invoke the accommodation "does not make the employer[] 'complicit' in the provision of contraceptive coverage." *Pennsylvania*, 930 F.3d at 573 (quoting *Real Alternatives*). The Third Circuit rejected the agencies' argument that this reasoning conflicts with *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), by second-guessing religious employers' sincerely-held beliefs that accessing the accommodation violates their religion.

In this case, the district court, relying on the Third Circuit's reasoning in *Real Alternatives*, dismissed Dierlam's RFRA claim for a refund of the 2015 and 2016 shared-responsibility payments he made pursuant to the ACA's individual mandate on the ground that he failed to show a substantial burden on the free exercise of religion. *See* ROA 625-26. Appellees believe that the district court's ruling conflicts with the reasoning in *Hobby Lobby*, *see* Gov't Br. 47-50, and the Supreme Court's resolution of *Little Sisters* and *Trump v. Pennsylvania*, which raise similar questions, albeit in the context of the contraceptive-coverage mandate rather than the individual mandate, could very well provide guidance on that issue.

*Little Sisters* and *Trump v. Pennsylvania* are currently scheduled for oral argument in the Supreme Court on April 29, 2020, and to be decided this term. For all the above reasons, therefore, appellees respectfully request the Court to stay proceedings in this appeal pending the Supreme Court's resolution of those cases.

2. By letter of January 8, 2020, appellees notified the Court that it need not hold this case for *Texas*. Appellees continue to adhere to that view. In *Texas*, this Court held that the elimination of the individual mandate's penalty in the Tax Cut and Jobs Act (TCJA) negated the Supreme Court's saving construction of the mandate as a tax (*see National Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012)), and rendered the mandate unconstitutional. *Texas* then remanded the case for the district court to perform a more granular severability analysis.

While the Court previously placed this case in abeyance pending the outcome of the appeal in *Texas*, we believe it is unnecessary to hold this appeal for the Supreme Court's resolution of that case. As Appellees' January 8 letter explained, Dierlam failed to preserve the non-severability arguments at issue in *Texas*, *see* Gov't Br. 52-53, and the *Texas* panel's invalidation of the individual mandate only underscores that Dierlam is not entitled to prospective relief from the individual mandate, which was already the case given the TCJA's elimination of the mandate's penalty. *See* Gov't Br. 26-27.

Sincerely,

Sharon Swingle
(202) 514-2689
s/Lowell V. Sturgill Jr.
Lowell V. Sturgill Jr.
(202) 514-3427
*Attorneys, Civil Division*
*Appellate Staff, Room 7241*
*U.S. Department of Justice*
*950 Pennsylvania Avenue, N.W.*
*Washington, D.C. 20530*

## Certificate of Service

I hereby certify that on April 1, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. A copy of this letter will be served on the plaintiff by e-mail.

s/Lowell V. Sturgill Jr.
Lowell V. Sturgill Jr.