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October 22, 2018

VIA ECF

Patricia S. Dodszuweit
Office of the Clerk
U.S. Court of Appeals for the Third Circuit
21400 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

Re: *Fulton, et al. v. City of Philadelphia, et al.*, No. 18-2574 (3d Cir.)
(Response to Appellant's Submission Under Fed. R. App. Proc. 28(j) (348 words))

Dear Ms. Dodszuweit:

ACLU v. Azar, No 16-cv-03539-LB (N.D. Cal. Oct. 11, 2018), does not, as Appellants suggest, reject Intervenor's Establishment Clause arguments. *Azar* turned on the plaintiff's lack of standing to raise certain arguments and the lack of support in the record for others.

In *Azar*, the plaintiff argued that giving a federal grant to a religious organization to operate shelters for unaccompanied minors when the organization restricts minors' access to abortion based on its religious beliefs violates the Establishment Clause.

But the court found that the facts did not support the claim that the government delegated to a religious organization the ability to determine which health services minors could access since there was no evidence in the record that any minor who requested an abortion was denied. Here, the record demonstrates that if the City allowed contracted agencies to exclude prospective foster families based on religious criteria, that would be an impermissible delegation of a government function to a religious organization to be carried out in a non-secular manner.

The *Azar* plaintiff argued that the fact that some minors had to be transferred to another shelter to get an abortion harmed them by delaying access to abortion and forcing them to leave the support of their original shelter, which impermissibly accommodates religion to the detriment of third parties. However, the court refrained from addressing this claim because the plaintiff—an organization suing based on taxpayer standing—lacked standing to raise it. The court acknowledged, however, that an affected minor might be able to bring such a claim. Here, there is no standing issue. Appellants seek an injunction, and before this Court could order such relief, it would have to consider the impact on families that would face discrimination or be deterred

from coming forward, as well as the impact on children who would risk losing out on foster families.

Azar does not support the proposition that the Establishment Clause allows the government to contract with religious organizations that use religious criteria to exclude prospective foster families as long as there are other agencies that would not exclude those families.

Respectfully,

Fred T. Magaziner

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and Philadelphia Family Pride*

cc: All counsel of record (via ECF)

CERTIFICATE OF SERVICE

I hereby certify that on this date, the foregoing was filed electronically and served on all counsel of record via the ECF system of the United States Court of Appeals for the Third Circuit

Dated: October 22, 2018

/s/ Fred T. Magaziner