

February 4, 2021

VIA CM/ECF

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Susan Herman
President

Anthony Romero
Executive Director

**RE: Response to Notice of Supplemental Authority, Executive Order
No. 13,988**

Dear Mr. Cayce,

Plaintiffs' supplemental authority confirms that Plaintiffs seek to enjoin hypothetical regulations the Biden administration may adopt in the future pursuant to Executive Order No. 13,988 (the "EO"). Such an injunction lies beyond the power of an Article III court. Intervenor's Br. 28-32.

The EO is not itself subject to challenge under the APA, *see Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992), and issuance of the EO does not constitute "final agency action" by HHS. *See* 5 U.S.C. § 704; *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1813 (2016). The EO simply directs federal agencies to consider whether to "promulgate new agency actions" and to "develop, in consultation with the Attorney General, as appropriate, a plan to carry out actions that the agency has identified." EO §§ 2(b), (d).

In short, the EO is the beginning—not the end—of the regulatory process. Although the EO makes a general statement that transgender people "should be able to access healthcare," EO § 1, it does not issue any specific direction to HHS regarding how to apply that principle in the context of treatments for gender dysphoria. Nor does the EO issue any specific direction regarding what exceptions should or should not be provided to religious organizations. "Any prediction how the Executive Branch might eventually implement this general statement of policy is 'no more than conjecture' at this time." *Trump v. New York*, 141 S. Ct. 530, 535 (2020) (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 108 (1983)).

If the EO ultimately culminates in final agency action requiring the Plaintiffs to act contrary to their religious beliefs, Plaintiffs may challenge that final agency action—including through a pre-enforcement challenge if necessary. *See* Intervenor’s Br. 27. Plaintiffs will also be able to invoke issue preclusion to the extent it is applicable. *Id.* at 36 n.4. “Until such time as the agency decides whether and how to exercise its regulatory authority, however, the courts have no cause to intervene.” *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 164 (2010).

Respectfully submitted,

/s/ Joshua A. Block

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Counsel for Intervenor-Appellees

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