



July 19, 2023

VIA CM/ECF

Deborah S. Hunt, Clerk
U.S. Court of Appeals for the Sixth Circuit
540 Potter Stewart U.S. Courthouse
100 E. Fifth Street
Cincinnati, OH 45202

**Re: *American College of Pediatricians v. Becerra*
Case No. 23-5053**

Dear Ms. Hunt:

I write to advise the Court of supplemental authority under Federal Rule of Appellate Procedure 28(j). As we have argued, the court below erred in concluding Plaintiffs did not plausibly allege a credible threat of enforcement. Opening Br. 26–29, 31–36; Reply Br. 3–14. Specifically, the district court erred by (1) ignoring that a “substantial risk” of harm is enough, (2) requiring “some combination” of the so-called *McKay* factors, and (3) stating that a plaintiff “must allege” that the “*same* conduct” has triggered enforcement. Opening Br. 31–35 (quoting Op., R.61, PageID 1216–17).

This Court’s recent decision in *Block v. Canepa*, No. 22-3852, 2023 WL 4540523 (6th Cir. July 14, 2023), confirms that the district court erred on all three points.

First, this Court in *Block* correctly defined the required showing: a plaintiff must allege that “the threatened injury is certainly impending, *or there is a substantial risk* that the harm will occur.” *Block*, 2023 WL 4540523, at *5 (cleaned up) (emphasis added).

Second, this Court did *not* require “some combination” of the so-called *McKay* factors. It only cited *McKay* for the point that Article III “limits federal courts’ jurisdiction” to cases and controversies. *Id.* at *4.

And third, this Court expressly *rejected* the argument that a plaintiff is “obligated to show” that the same conduct has triggered enforcement. *Id.* at *6. The district court in *Block* thought that it mattered that the only evidence of enforcement involved conduct different from the plaintiff’s “desired conduct.” *Id.* But that “analysis was flawed,” this Court concluded. *Id.* The state had “prosecute[d] violations”—even if only for other conduct. *Id.* And that, combined with a refusal to disavow, was enough. *Id.*

Likewise here, Plaintiffs plausibly alleged that the Government is enforcing its gender-identity mandate. Opening Br. 36; Reply Br. 12. They did not need to allege the Government has enforced the mandate against the “same conduct” in which Plaintiffs plan to engage. Op., R.61, PageID 1217. The district court erred by concluding otherwise.

Thank you for bringing this letter to the Court’s attention.

Sincerely,

s/ Christopher P. Schandavel

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CERTIFICATE OF SERVICE

I certify that on July 19, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Christopher P. Schandavel
Christopher P. Schandavel
Attorney for Appellants