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Religious Liberty for All

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May 2, 2023

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The Honorable Markwayne Mullin
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Re: Impending Lawsuit for Emergency Relief and Monetary Damages for Your Violation of Saint Francis Health System's First Amendment Rights

Dear Secretary Becerra, Administrator Brooks, and Mr. Perlin,

In twenty-five days, you will cripple the operations of the premiere hospitals in the State of Oklahoma, simply because they keep a candle in hospital chapels. If you refuse to accredit Saint Francis Hospital South, it will result in such unreasonable financial losses to the Saint Francis Health System that it would abruptly and immediately jeopardize its services to the elderly, disabled, and low-income patients who rely on Medicare, Medicaid, and the Children's Health Insurance Program (CHIP).

You have threatened to deny accreditation because Saint Francis keeps a candle—an eternal flame—in its hospital sanctuary. For 15 years, that flame has burned without problem or concern in Saint Francis Hospital South in Tulsa; and for 63 years, the eternal flame has burned at Saint Francis Hospital Yale Campus, the largest hospital in the state of Oklahoma, without problem or concern. From the moment Saint Francis opened its doors in 1960, this flame has been maintained without interruption. In requiring Saint Francis to extinguish its flame, you are trying to extinguish not just a candle, but the First Amendment rights of Saint Francis Health System, as well as vital healthcare for the elderly, poor, and disabled in Oklahoma.

My firm, the Becket Fund for Religious Liberty, along with Yetter Coleman LLP, a trial boutique based in Houston, Texas,[1] represents Saint Francis Health System, a Catholic, not-for-profit health system in Oklahoma. We are writing to ask you to cease and desist before we file an emergency lawsuit naming you as defendants and seeking emergency relief and substantial damages.

If we go to court, you will lose. I write in the hope that you will see reason (or at least the law) and we can skip to the easy part.

For decades, Saint Francis has run a highly regarded health system in Oklahoma in accordance with, and indeed driven by, its Catholic faith. For decades, also inspired by its religious mission, Saint Francis has provided many millions of dollars per year in free healthcare to its community. For decades, it has provided high-quality care to patients receiving Medicare and Medicaid. And for decades, Saint Francis

[1] Becket is the nation's leading law firm specializing in religious freedom cases. We have won multiple cases in Oklahoma and the Tenth Circuit under the laws at issue here, and we are undefeated in the U.S. Supreme Court.

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has maintained chapels on its hospital campuses exclusively for religious worship—always, as dictated by its faith, under the continuously burning light of a sanctuary candle, enclosed in a lamp and suspended before the Tabernacle.

Now, you put not just Saint Francis Health System in peril but the entire State of Oklahoma and any person in need of Saint Francis Health System's preeminent care, all because Saint Francis maintains a single, enclosed, and reverently kept eternal flame in its chapels. Two months ago, and for the first time since Saint Francis's founding in 1960, a surveyor from one of the federal government's official hospital accreditors took issue with the sanctuary candle and issued a fire-safety citation demanding that it be snuffed out. Saint Francis cannot do this as a matter of faith. And so, in twenty-five days, the federal government intends to disaccredit (and thereby effectively shutter) this premier health system, which includes the number one hospital in Oklahoma and the 12th largest hospital in the nation. All because Saint Francis refuses to abandon its religious beliefs and extinguish the sanctuary lamp.

This is a blatant violation of Saint Francis's rights. The citation is inconsistent with the applicable fire-safety rules, with which Saint Francis complies. The false choice put to Saint Francis violates the Religious Freedom Restoration Act and the First Amendment. And a separate statutory exemption for unreasonable hardship applies. Saint Francis's rights are so clearly established that continued violations will result in not just a court order, but personal liability for the individuals involved in the decision.

The Centers for Medicare and Medicaid Services (CMS) has rejected Saint Francis's request for a reasonable accommodation. The accrediting organization's reasons have shifted, recently suggesting that the eternal flame is not the problem so much as the fleeting flame of the lighter used to keep it going. And, when such inconsistency was pointed out to CMS, it merely said it agreed with its accrediting organization's citation, and added that the organization was free to impose additional requirements on Saint Francis regarding the flame. Whatever CMS's next move may be, one thing is clear: the game is not worth the candle.

Background

Saint Francis is a Catholic, not-for-profit health system based in Tulsa, Oklahoma. Its Catholic identity is central to its mission: to extend the presence and healing ministry of Christ in all that they do. In addition to providing compassionate and top-notch care to its patients, including several hundred million dollars in free medical services over the past decade alone, Saint Francis lives out its religious mission by maintaining chapels in its hospitals. These

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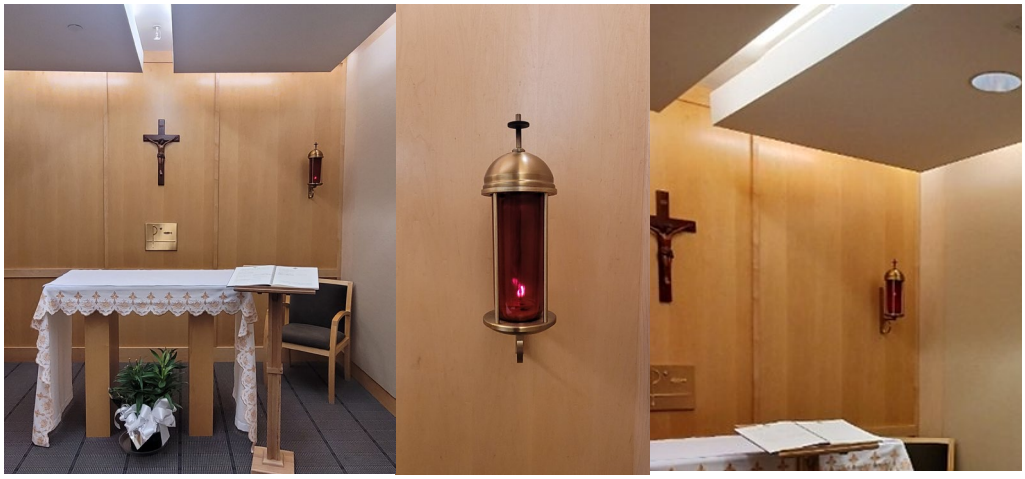
chapels—each blessed and consecrated by the local bishop, and each far removed from any patient care rooms—are reserved for and dedicated to the worship of God through celebration of the Sacred Liturgies.

Since Saint Francis opened its doors in 1960, the health system has had a sanctuary candle with a living flame in its chapels as a sign of the living presence of Jesus. The Code of Canon Law requires that wherever the Blessed Sacrament is kept, a special lamp must shine continuously.[2] The living flame is so important to worship that the Fifth Chapter of the General Instruction of the Roman Missal expressly mandates that "a special lamp, fueled by oil or wax, should shine prominently to indicate the presence of Christ and honor it."[3] Saint Francis believes that the laws governing the liturgy and chapel suitability have been divinely instituted by Jesus Christ Himself and that derogating from these laws is an affront to God.

Saint Francis's living flame is fueled by a candle that is encased in a thick glass globe, which is itself encased in a second glass globe, covered by a bronze top that fits over the second globe. The globe rests in a bronze holder, which is affixed to the wall of the chapel. Pictured below is the living flame in the Saint Francis South Hospital's chapel:



[2] Code of Canon Law, Can. 940.

[3] General Instruction on the Roman Missal, §§ 316-17. The United States Conference of Catholic Bishops (USCCB) has further articulated that "candles for use in the Mass and other liturgical rites must be made of wax and provide a living flame," and that "to safeguard the authenticity and the full symbolism of light, electric lights as a substitute for candles are not permitted, [which] also applies to the so-called electric vigil lights." USCCB Committee on the Liturgy, *Built of Living Stones: Guidelines of the National Conference of Catholic Bishops*, § 93.

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There has not been a day in Saint Francis history where the living flame has been extinguished. And Saint Francis's religious identity and mission are intimately united with the living flame of the sanctuary candle.

But both CMS and its accrediting organization have recently cast a shadow over Saint Francis's chapels and the health system's broader mission. On February 21, 2023, a surveyor with The Joint Commission—one of CMS's official accrediting organizations for hospitals that wish to participate in the Medicare or Medicaid programs—paid a visit to Saint Francis South Hospital (HCO 399060). Curiously, during the inspection, the surveyor expressly asked to go to the chapel to see if there was a living flame. Of course, he found it: the same sanctuary flame that Saint Francis has kept alight since the chapel was blessed by the local Ordinary.

Despite many sprinkler heads surrounding the candle, good exhaust, the flame's double glass encasing, the bronze top enclosing the flame, despite its mounting to a wall over six feet high, and despite the surveyor's knowledge of the fire marshal's long-standing approval of the eternal flame, the sanctuary lamp did not meet with the surveyor's favor. The surveyor observed to Saint Francis personnel that other Catholic hospitals had complied and extinguished the living flame at their chapels, substituting it with an electric light.

The surveyor cited the living flame in Saint Francis Hospital South as a violation of the CMS's Life Safety Code Requirements. On a likelihood-of-harm scale ranging from "low," to "moderate," to "high," to "immediate threat to health and safety," the surveyor ranked the chapel's *enclosed* living flame as a "moderate" threat. (What, one wonders, is the "low" risk category reserved for?)

The chapel's living flame—never a problem in decades' worth of prior accreditation surveys—is the only reason the Joint Commission would deny accreditation of the hospital. The government's idea of the "corrective action" requires that Saint Francis *extinguish* the sanctuary lamp. If Saint Francis fails to take that "corrective action," it will lose its Medicare and Medicaid eligibility and its ability to serve elderly, disabled, and low-income patients in Tulsa.

Since the inspection and citation, Saint Francis has repeatedly explained to CMS and its accrediting agency why the eternal flame is safe and why Saint Francis' faith requires the living and eternal flame in order for Saint Francis to suitably honor and proclaim the living presence of Christ. Saint Francis has asked for a waiver four separate times.[4] But CMS and its accrediting agency

[4] Saint Francis sent its first waiver request to CMS and the Joint Commission on March 9, 2023. On March 15, Saint Francis had a conference call with representatives of The Joint

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have refused to budge. The surveyor stated: "During the building tour of the Chapel, there was a lit candle with an open flame burning unattended 24/7." But when Saint Francis explained that the sanctuary candle is not an open flame but is enclosed, one representative asked how *that* flame was lit.

Saint Francis's answer? A lighter. Now it appears that *this* lighter's (fleeting) flame, not the sanctuary lamp's (eternal) flame, is the open flame that violates the National Fire Protection Association Codes and Standards adopted by CMS. Call it Maslow's open flame.[5]

The point remains that forbidding the living flame (whether by demanding it be extinguished or precluding it from being relit) strikes at the heart of the most important work of Saint Francis, the basis of all its services and care for the community: its worship of God in the Sacred Liturgies.

Why the Government Will Lose

This case is not a close call. CMS is wrong on the applicable fire-safety rules. CMS has flagrantly violated the Religious Freedom Restoration Act by punishing Saint Francis's longstanding, uninterrupted free exercise of its religion by maintaining an enclosed candle in its chapels. And CMS has inexplicably failed to apply a separate "unreasonable hardship" exception from its (incorrect) code interpretation.

Becket has a long and successful history of suing HHS and other state actors for RFRA, RLUIPA, and First Amendment violations. At the Supreme Court, we won *Hobby Lobby*,[6] *Little Sisters of the Poor*[7] (twice),[8] *Holt*,[9] *Fulton*,[10] and *Agudath Israel*.[11] Several of those were unanimous. And this is one of the most egregious violations we have ever seen.

Commission on the subject. Saint Francis sent its second waiver request to CMS the next day. Saint Francis sent a third waiver request to CMS on March 23. And CMS once more sent a waiver request to CMS on March 29.

5 "I suppose it is tempting, if the only tool you have is a hammer, to treat everything as if it were a nail." Abraham Maslow, *The Psychology of Science* 15 (1966).

6 *Burwell v. Hobby Lobby,* 573 U.S. 682 (2014).

7 *Little Sisters of the Poor v. Pennsylvania,* 140 S.Ct. 2367 (2020).

8 *Zubik v. Burwell,* 578 U.S. 403 (2016).

9 *Holt v. Hobbs,* 574 U.S. 352 (2015).

10 *Fulton v. Philadelphia,* 141 S.Ct. 1868 (2021).

11 *Roman Catholic Diocese of Brooklyn v. Cuomo,* 141 S.Ct. 63 (2020).

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I. CMS's position is at odds with the applicable fire codes and standards.

Start with the applicable fire-safety standards. CMS uses the National Fire Protection Association (NFPA) Codes and Standards. Saint Francis's chapel sanctuary candle fully meets those requirements.

It is true that the NFPA classifies "candles in chapels" as "flame-producing equipment."[12] But outside of a patient care room, the NFPA prohibits only "open flames within . . . [one foot] of a nasal cannula" (a medical device to provide supplemental oxygen therapy).[13] Of course, Saint Francis's sanctuary candle is not in a patient care room, and by design and location it is never within one foot of a nasal cannula.

In fact, the NFPA expressly permits sanctuary candles: "securely supported altar candles in churches that are well separated from any combustible material are permitted."[14] And while authorities may prohibit open flames or candles "where circumstances make such conditions hazardous,"[15] overwhelming evidence shows that sacred flames for the worship of God are not hazardous conditions.

Indeed, Saint Francis's chapel regularly passes annual reviews by the local fire marshal. The chapel has multiple sprinkler heads directly above the sanctuary, along with significant exhaust ducts. The sanctuary candle itself is in a double-encased lamp, mounted and elevated far from any prying nasal cannulas or other oxygen enriching devices. This is not Mrs. O'Leary's barn.

II. CMS has violated the Religious Freedom Restoration Act.

Congress enacted the Religious Freedom Restoration Act[16] in 1993 "to provide very broad protection for religious liberty."[17] "Placing Congress' intent beyond dispute, RFRA specifies that it 'applies to all Federal law, and the implementation of that law, whether statutory or otherwise.'"[18] A person (including a religious non-profit)

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[12] NFPA 99 A.11.5.1.1.2 (2012 ed.).

[13] NFPA 11.5.1.1.2 (2012 ed.).

[14] NFPA Annex 9.3 (2012 ed.).

[15] NFPA 1.10.1.6 (2012 ed.).

[16] 42 U.S.C. § 2000bb *et seq.*

[17] *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014).

[18] *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020) (quoting 42 U.S.C. § 2000bb-3(a)).

whose religious exercise is burdened in violation of RFRA "may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief."[19] That relief includes injunctions and "a right to seek damages against Government employees" in their personal capacities.[20]

RFRA prohibits the federal government from (A) imposing substantial burdens on religious exercise, absent (B) a compelling interest that is (C) furthered through the least restrictive means available.[21] In a RFRA action, Saint Francis would prevail on each prong.

A. Substantial burden.

The substantial burden on religious exercise is beyond question. RFRA defines "exercise of religion" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[22] The Supreme Court has emphasized that "the exercise of religion involves not only belief and profession but the performance of (or abstention from) physical acts that are engaged in for religious reasons."[23]

Saint Francis's sacramental candles are an exercise of religion. The living flame is both compelled by Ecclesial Laws and central to Saint Francis' religious belief that a perpetually burning candle symbolizes the eternal, everlasting and undying Presence of Jesus Christ. Extinguishing that living flame would require the health system to undermine its mission, transgress Ecclesial Laws, and break from its own tradition of worship of the Blessed Sacrament.

It is no answer to claim, as the surveyor did, that some other chapels have adopted electric candles. "This argument dodges the question that RFRA presents . . . and

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19 42 U.S.C. § 2000bb-1(c).

20 *Tanzin v. Tanvir*, 141 S. Ct. 486, 492 (2020). In recent Becket cases, First Amendment violations resulted in personal financial liability for the officials who violated those rights. *See, e.g., Intervarsity Christian Fellowship/USA v. Univ. of Iowa*, 5 F.4th 855, 867 (8th Cir. 2021); *Bus. Leaders In Christ v. Univ. of Iowa*, 991 F.3d 969, 986 (8th Cir. 2021) (holding that individual university officials should be held personally responsible for discriminating against a religious student organization); *see also Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1754 (2020) (noting potential application of RFRA in cases involving federal law's application to private actors).

21 *Tanzin*, 141 S. Ct. at 489.

22 42 U.S.C. §§ 2000bb-2, 2000cc-5(7)(A).

23 *Hobby Lobby*, 573 U.S. at 710 (internal quotation marks omitted).

instead addresses a very different question that the federal courts have no business addressing," that is, "whether the religious belief asserted in a RFRA case is reasonable."[24] Saint Francis is entitled to draw the line where it believes it must, and "it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith."[25]

The severe economic consequences Saint Francis faces are a textbook substantial burden. A "law that operates so as to make the practice of religious beliefs more expensive in the context of business activities imposes a burden on the exercise of religion."[26] If Saint Francis fails to comply, the government will shut down Saint Francis's ability to see Medicare, Medicaid, and CHIP patients, effectively shuttering Saint Francis in its entirety. "Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists."[27]

B. Compelling interest.

RFRA places the burden on the government to demonstrate that its actions advance an interest of the highest order.[28] It's not enough to point to the importance of fire safety in the abstract. Instead, RFRA "requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law *'to the person'*—the particular claimant whose sincere exercise of religion is

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[24] *Id.* at 724.

[25] *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 715-16 (1981) ("[T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith.").

[26] *Hobby Lobby*, 573 U.S. at 710 (cleaned up); *see also id.* at 720 (substantial burden where "the economic consequences will be severe" if religious plaintiffs "do not yield to [the government's] demand").

[27] *Thomas*, 450 U.S. at 717-18.

[28] *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006) (government must "demonstrat[e] that application of the [substantial] burden to the person [whose religious exercise is frustrated] . . . furthers a compelling governmental interest.") (quoting 42 U.S.C. § 2000bb-1(b)).

being substantially burdened."[29] The court hearing Saint Francis's case will "loo[k] beyond broadly formulated interests and . . . scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants."[30] In other words, the test looks at "the marginal interest in enforcing" the government's misinterpretation of the fire safety standard on Saint Francis's sacramental candle.[31]

The government will fail that test—miserably. For decades, the living flame has endured, and the government has raised zero concerns. There have been no fire safety issues from the sacred flame. Saint Francis already takes extensive precautions.

CMS also permits multiple other flames. There are over a dozen prudently managed flames around the hospital: from flames in the kitchen (pilot lights for stoves and ovens), to gas dryers in the laundry room, to flames in gas water heaters, to welding for electrical and construction purposes. Yet the government permits these flames, used for secular reasons, while prohibiting flames in a chapel, used for religious reasons.[32] An interest that is pursued only some of the time is not an interest of the highest order.[33]

Nor is an interest compelling when the government has broad discretion to grant waivers. The Social Security Act broadly authorizes the government to grant discretionary waivers from fire and safety requirements, including to accommodate religion.[34] "The fact that the Act itself contemplates that exempting certain people from its requirements would be 'consistent with the public health and safety'"

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[29] *O Centro,* 546 U.S. at 430-431 (quoting 42 U.S.C. § 2000bb-1(b)) (emphasis added).

[30] *Hobby Lobby*, 573 U.S. at 726-27.

[31] *Id.* at 727; *see also Holt v. Hobbs*, 574 U.S. 352, 361 (2015) (where government "policy puts petitioner to th[e] choice" of violating religious tenets or facing discipline, "it substantially burdens his religious exercise").

[32] *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546-47 (1993) (where government restricts religious conduct and "fails to enact feasible measures to restrict . . . alleged harm of the same sort, the interest given in justification of the restriction is not compelling").

[33] *Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868, 1881 (2021).

[34] 42 U.S.C. § 1395x(c)(9)(c).

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undermines an assertion of a compelling governmental interest in forcing Saint Francis to extinguish its sanctuary flame for fire safety reasons.[35]

C. Least restrictive means.

RFRA also requires the government to show that it is using "the least restrictive means of furthering [a] compelling governmental interest."[36] This "standard is exceptionally demanding."[37] A statute or regulation is the least restrictive means only if "no alternative forms of regulation would [accomplish the compelling interest] without infringing [religious exercise] rights."[38]

It strains credulity to insist that rigid application of the waivable prohibition against an open, unattended flame—no matter the safety precautions—is the least restrictive means of furthering the government's compelling interest.

The government's discretionary waivers prove the point. Even before RFRA, the Supreme Court explained that where the government "has in place a system of individual exemptions, it may not refuse to extend that system to cases of religious hardship."[39] Thus the presence of discretionary waivers proves not just a RFRA violation, but also a violation of the First Amendment.[40]

The very existence of a statutory provision granting the government authority to issue waivers with respect to "fire and safety requirements" itself "demonstrate[s] that it has at disposal an approach that is less restrictive than requiring" Saint Francis to extinguish its sanctuary lamp.[41]

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[35] *O Centro*, 546 U.S. at 432–33; *see also Fulton*, 141 S. Ct. at 1881-82 (government's "asserted interests are insufficient" where it "fails to show that granting . . . an exception will put those goals at risk").

[36] *Id.* at 424.

[37] *Hobby Lobby*, 573 U.S. at 728.

[38] *Sherbert v. Verner*, 374 U.S. 398, 407 (1963).

[39] *Emp. Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 884 (1990)

[40] *Fulton*, 141 S. Ct. at 1879 ("The creation of a formal mechanism for granting exceptions renders a policy not generally applicable," and thus subject to strict scrutiny under the First Amendment, "regardless whether any exceptions have been given, because it invites the government to decide which reasons for not complying with the policy are worthy of solicitude." (cleaned up)).

[41] *Hobby Lobby*, 573 U.S. at 730 (finding least restrictive means not shown where "HHS has already established an accommodation for nonprofit organizations with religious objections" to contraceptive mandate).

Short of granting a waiver, the government *still* has other less restrictive means available. It could ask that Saint Francis add additional shielding, or inspect the flame to confirm it is nowhere near oxygen equipment. It could accept Saint Francis's proposal to add tile on the wall and floor around the candle. The fact that the government hasn't even entertained such alternatives shows that it has not and cannot demonstrate that it is using the least restrictive means for furthering its interest in fire safety.[42]

III. A limited waiver for Saint Francis's chapel candles is warranted.

The government can fix all of this today. No lawsuits, no damages, no interruption of critical healthcare for the Tulsa community. CMS should issue a waiver to Saint Francis, permitting it to keep an open flame in its chapels for religious purposes. The Social Security Act's waiver provision is directly on point:

> with respect to the fire and safety requirements . . . the Secretary . . . may waive, for such period as he deems appropriate, specific provisions of such requirements *which if rigidly applied* would result in *unreasonable hardship* for such a facility and which, if not applied, *would not jeopardize the health and safety of patients*.[43]

The government is rigidly (mis)applying the applicable fire safety standards. It is causing unreasonable hardship to Saint Francis's ability to put its religious mission into practice. And, as a decades-long safety record can attest, Saint Francis's existing fire safety precautions are more than up to the task of protecting the health and safety of patients. The statute supports an accommodation, and RFRA and the First Amendment demand one.

* * *

"No one after lighting a lamp puts it in a cellar, but on the lampstand so that those who enter may see the light."[44] In its quixotic quest, CMS would instead, quite literally, snuff the lamp out. The law forbids that.

Whether CMS grants a waiver now (voluntarily), or after a court order (expensively) is up to CMS. Either way, I'd rate the risk to CMS as "high."

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[42] *Id.* at 728 (RFRA violated where the government "has not shown that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties").

[43] 42 U.S.C. § 1395x(c)(9)(c).

[44] Luke 11:33 (New Revised Standard Version – Catholic Edition).

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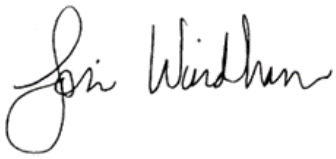
Sincerely,



Lori Windham
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