

No. 17-3752

In the United States Court of Appeals for the Third Circuit

COMMONWEALTH OF PENNSYLVANIA,
Plaintiff-Appellee,

v.

DONALD J. TRUMP, *et al.*
Defendants-Appellants

and

LITTLE SISTERS OF THE POOR SAINTS PETER AND PAUL HOME,
Defendant-Intervenor-Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
No. 2:17-cv-04540-WB

**DEFENDANT-INTERVENOR-APPELLANT'S
MOTION TO SET BRIEFING SCHEDULE**

Mark Rienzi
Lori H. Windham
Diana M. Verm
The Becket Fund for Religious Liberty
1200 New Hampshire Ave, NW,
Suite 700
Washington, D.C. 20036
(202) 955-0095
mrienzi@becketlaw.org
*Counsel for Defendant-Intervenor-
Appellant*

MOTION TO SET BRIEFING SCHEDULE

Appellant Little Sisters of the Poor, Saints Peter and Paul Home (“Little Sisters”) respectfully moves this Court to set a briefing schedule that continues this appeal. On November 7, 2018, the federal defendants in this appeal issued a final rule, published on November 15, to replace the Fourth Interim Final Rule (IFR) challenged by the plaintiff Pennsylvania in this appeal. 83 Fed. Reg. 57,536 (Nov. 15, 2018). The rule will be effective on January 14, 2019. The rule considers the comments submitted on the Fourth IFR, and it maintains a substantively identical religious exemption for groups like the Little Sisters of the Poor.¹ The Little Sisters respectfully submit that the final rule does not change the substantive questions at issue in this appeal and request that a briefing schedule be set that moves the case along at speed.

¹ Compare 82 Fed. Reg. 47,792, 47,835 (Oct. 13, 2017) (“The exemption of this paragraph (a) will apply to the extent that an entity described in paragraph (a)(1) of this section objects to its establishing, maintaining, providing, offering, or arranging (as applicable) coverage, payments, or a plan that provides coverage or payments for some or all contraceptive services, based on its sincerely held religious beliefs.”) with 83 Fed. Reg. at 57,590 (“The exemption of this paragraph (a) will apply to the extent that an entity described in paragraph (a)(1) of this section objects, based on its sincerely held religious beliefs, to its establishing, maintaining, providing, offering, or arranging for (as applicable): (i) Coverage or payments for some or all contraceptive services; or (ii) A plan, issuer, or third party administrator that provides or arranges such coverage or payments.”).

ARGUMENT

On December 15, 2017, the District Court entered a preliminary injunction against the interim final rules on both procedural and substantive grounds. Appx.7. This appeal from that injunction has been pending since December 21, 2017. The federal defendants-appellants and the Little Sisters filed opening briefs on September 21, 2018. The final rule does not moot this appeal, and it should not slow the briefing any further than it already has.

Because the district court ruled on the substantive merits of the IFRs, and because that substance has not changed in the final rule, this appeal still presents issues that this Court can best resolve: whether Pennsylvania has standing to bring this case, and whether the substance of the federal government's regulation is arbitrary, capricious, and contrary to established law under the Administrative Procedure Act. *See* Appx.23, 43 (holding that Pennsylvania had standing to bring the suit and that the IFRs violate the APA); *see also, e.g., Dow Chem. Co. v. EPA*, 605 F.2d 673, 680 (3d Cir. 1979) (where the EPA revoked a challenged regulation, but substantive questions remained on appeal, Court found that “delaying adjudication . . . would require both the parties and the Court to undergo considerable additional expense and

effort for no valid reason.”); *Solar Turbines Inc. v. Seif*, 879 F.2d 1073, 1079 (3d Cir. 1989) (“mere withdrawal” of a regulation did not “effectuate avoidance of review” where agency had “not altered its position on the merits . . .”).

Pennsylvania has filed a motion to open briefing in the district court for purposes of requesting a preliminary injunction that extends to the final rule. Dkt. 81. Since the rule does not take effect until January 14, the Little Sisters would not oppose a request to expedite this appeal for resolution by that date, but in any case, Pennsylvania is not prevented from seeking relief from the final rule below while this appeal is ongoing. Since the final rules became public on November 7, Pennsylvania has now had three weeks to prepare to address them in its response brief, and any further delay in the briefing schedule is unwarranted.

The Little Sisters have been in litigation to protect their rights regarding this federal mandate since 2013. The government has changed the mandate several times since then, resulting in multiple delays. Allowing this case to extend any longer than it already has delays final certainty for the Little Sisters on their right to serve the poor without the threat of disastrous fines for their religious beliefs.

CONCLUSION

The Little Sisters respectfully request that this Court grant their motion to set a briefing schedule.

Respectfully submitted,

/s/ Mark Rienzi

Mark Rienzi

Lori Windham

Diana Verm

The Becket Fund for Religious Liberty

1200 New Hampshire Ave. NW,

Suite 700

Washington, DC 20036

Telephone: (202) 955-0095

Facsimile: (202) 955-0090

mrienzi@becketlaw.org

Nicholas M. Centrella

Conrad O'Brien PC

1500 Market Street, Suite 3900

Philadelphia, PA 19102-2100

Telephone: (215) 864-8098

Facsimile: (215) 864-0798

ncentrella@conradobrien.com

Counsel for the Little Sisters

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I hereby certify that this motion complies with the requirements of Rule 27(d)(1)(E) because it has been prepared in 14-point Century Schoolbook, a proportionally spaced font, and that it complies with the type-volume limitation of Rule 27(d)(2)(A), because it contains 718 words, according to the count of Microsoft Word.

Dated: November 28, 2018

/s/ Mark Rienzi
Mark Rienzi
The Becket Fund for Religious
Liberty
1200 New Hampshire Ave. NW,
Suite 700
Washington, DC 20036
Telephone: (202) 955-0095
Facsimile: (202) 955-0090
mrienzi@becketlaw.org

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

Dated: November 28, 2018

/s/ Mark Rienzi

Mark Rienzi

The Becket Fund for Religious Liberty
1200 New Hampshire Ave. NW, Suite
700

Washington, DC 20036

Telephone: (202) 955-0095

Facsimile: (202) 955-0090

mrienzi@becketlaw.org