Nos. 17-3752 & 18-1253

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 RESPONSE TO MOTIONS TO GOVERN FURTHER PROCEEDINGS

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RESPONSE

The Little Sisters of the Poor Saints Peter and Paul Home ("Little Sisters") submits this response to Plaintiff-Appellee Pennsylvania's motion to remand the case to the district court. For the reasons explained below, the Little Sisters also oppose the Defendants-Appellants' motion to hold the case in abeyance.

The federal defendants' latest "final" rules do not moot this case. As Pennsylvania seems to recognize, this Court can still provide relief by resolving each of Plaintiffs' claims, warranting no remand. *See Knox v. SEIU, Local 1000*, 567 U.S. 298, 307-08 (2012) (case was not moot because partial relief was hypothetically possible). Furthermore, there is no prejudice to Pennsylvania in continuing this case without further delay. It is not necessary to resolve this case by January 14, but the Little Sisters repeat that they would not oppose a motion to expedite it in order to resolve Pennsylvania's concerns.

Pennsylvania's motion should be denied for several reasons. First, Pennsylvania does not argue that this appeal is currently moot, only that it will become moot on January 14, and thus, Pennsylvania has no grounds to move to dismiss the appeal until that time. That may be why it includes only three sentences of cursory argument regarding mootness

in its motion. Moreover, since this is an appeal that the federal defendants and the Little Sisters have taken as of right, 28 U.S.C. § 1292(a)(1), Pennsylvania cannot unilaterally dismiss the Defendants' appeal. Nor can it seek to remand the case *unless* there is no Article III jurisdiction. *See, e.g.*, 16AA Charles A. Wright et al., Fed. Practice and Procedure § 3988 (4th ed. 2018) ("appeal may be dismissed on motion of the *appellant*"). Since the appeal is not moot, Pennsylvania as appellee may not bring this appeal back to the district court to change its case.

Second, the final rules do not moot Pennsylvania's substantive claims, and Pennsylvania does not claim that they do. Since the district court ruled on the substance of the rules, and the substance has not changed, there is no reason this Court cannot provide relief on those claims, and Pennsylvania cites no authority that it may not. The cases they cite involve inapposite situations where the *substance* of the final rules rendered certain claims moot, not their mere existence. In *Association of American Physicians*, a final rule that replaced the IFR with "substantive changes" to the rule mooted the claims, as the parties recognized in that case. *Ass'n of Am. Physicians & Surgeons v. Sebelius*, 746 F.3d 468, 472 (D.C. Cir. 2014). In *Center for Biological Diversity*, the Ninth Circuit held that an appeal was moot because the final rule had already brought about

the Plaintiff's "ultimate objective," making it impossible for the Court to offer further relief. *Ctr. for Biological Diversity v. Lohn*, 511 F.3d 960, 964 (9th Cir. 2007).

The Third Circuit has recognized that a case does not have to be remanded in a situation analogous to this one. In *Dow Chem. Co. v. EPA*, this Court considered procedural and substantive challenges to an EPA rule, which the EPA withdrew as a result of the litigation. 605 F.2d 673, 680 (3d Cir. 1979). The EPA maintained, however, that the rule was "within its statutory authority" and indicated that a new rule would take "precisely the same substantive position adopted in the withdrawn rule." *Id.* at 677, 678. The Court thus found that the Article III requirements for standing were met in the case. It reasoned further that because the agency's position would not change, "delaying adjudication . . . would require both the parties and the Court to undergo considerable additional expense and effort for no valid reason." *Id.* at 680.

Likewise, in *Solar Turbines Inc. v. Seif*, this Court found that "mere withdrawal" of a regulation did not "effectuate avoidance of review," particularly where the agency "has not altered its position on the merits." 879 F.2d 1073, 1079 (3d Cir. 1989). Here, Pennsylvania's objections to the substance of the regulations at issue will remain the same before and

after January 14, because the substance of the regulations remains the same.

Third, Pennsylvania's desire to return to the district court continues to implicate the question of whether the district court has jurisdiction to hear the case under Article III, including whether Pennsylvania has suffered any injury in fact at all. The Little Sisters and the federal defendants have briefed that question in this Court already, and Pennsylvania will have a chance to respond. But because Pennsylvania has failed to show a concrete injury, this Court's guidance to the district court on Article III standing is warranted at this juncture.

Fourth, Pennsylvania admits in its motion that its procedural claims are not moot, but it intends to press them even after the final rules take effect. Penn. Mot. at 6-7. It suggests that the district court should address this issue in the first instance, but does not suggest any evidence it would submit other than the final rules themselves, which are already before this Court and which are subject to judicial notice. *See Furnari v. Warden, Allenwood Fed. Corr. Inst.*, 218 F.3d 250, 255 (3d Cir. 2000).

Indeed, in prior litigation on the same mandate, the courts of appeals in both *Hobby Lobby* and *Zubik* considered preliminary injunctions rulings on regulations that had changed over the course of the litigation.

See Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs., 778 F.3d 422, 428 n.3 (3d Cir. 2015) and *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1163-64 (10th Cir. 2015*)*, *vacated and remanded sub nom. Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (noting that the regulations had changed since the district court's order); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1124 (10th Cir. 2013), *aff'd sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (addressing pending proposed rules). There, as here, the core issues remained live and warranted judicial review. While the federal government is often in the business of tweaking its regulations—and has done so many times over with this particular mandate—that is not a reason to send litigants back to start each time.

Finally, Pennsylvania is not prejudiced by this Court retaining the pending appeal and deciding the issues Pennsylvania raises. Since Pennsylvania has not yet submitted its brief, and since it has had over three weeks since the final rules were published, it can incorporate any arguments it wants to address in its response brief on a schedule this Court may set. However, for the Little Sisters of the Poor, the cost of delay is continued uncertainty about the validity of their religious

exemption, a high cost after five years of remaining in the limbo of pending litigation.

CONCLUSION

For these reasons, the Little Sisters respectfully request that this Court deny Pennsylvania's and the federal defendants' motions to govern further proceedings and set a briefing schedule.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I hereby certify that this document 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 1158 words, according to the count of Microsoft Word.

Dated: December 4, 2018

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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: December 4, 2018

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