

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

<hr/>)
Commonwealth of Pennsylvania,))
))
<i>Plaintiff-Appellee,</i>))
))
v.)	Nos. 17-3752 & 18-1253
))
President United States of America et al.,))
))
<i>Defendants-Appellants,</i>))
))
and))
))
Little Sisters of the Poor, Saints Peter))
and Paul Home,))
))
<i>Intervenor-Defendant-Appellant.</i>))
<hr/>))

**PLAINTIFF-APPELLEE’S RESPONSE TO MOTIONS TO GOVERN
FURTHER PROCEEDINGS**

Plaintiff-Appellee the Commonwealth of Pennsylvania respectfully submits this combined response to the motions to govern further proceedings filed by the federal defendants and the Little Sisters of the Poor in the above matter.¹ In their respective motions, all three parties acknowledge that the district court has the

¹ See Mot. to Govern Further Proceedings filed by Federal Defendants (Nov. 28, 2018) (“Fed. Def. Mot.”); Defendant-Intervenor-Appellant’s Mot. to Set Briefing Schedule (Nov. 28, 2018) (“Little Sisters’ Mot.”). The Commonwealth also filed a motion to govern further proceedings the same day. See Mot. to Govern Further Proceedings filed by the Commonwealth of Pennsylvania (Nov. 28, 2018) (“Pa. Mot.”).

discretion to lift the stay currently in place and rule on whether the final rules should be enjoined. To that end, the Commonwealth has already moved to lift the stay, and the Court has scheduled a status conference for later this week.² Where the parties disagree is on the question of what should happen to this appeal while these proceedings play out in the district court. The Commonwealth has moved to remand this case, the federal defendants have moved to hold it in abeyance, and the Little Sisters have moved to proceed with this appeal while the district court addresses the final rules.

As explained further below, a remand is the most efficient course of action and would best facilitate this Court's orderly review of this case. Either a remand or a period of abeyance (followed by a consolidation of this appeal with the anticipated appeal of the district court's ruling on the final rules) would allow the district court to consider the final rules in the first instance and thus permit this Court to address all issues presented by this lawsuit at one time. Allowing this appeal to proceed simultaneous to the district court proceedings, however, would

² See ECF No. 83, No. 17-4540 (Dec. 7, 2018). If the district court agrees to lift the stay, the Commonwealth anticipates filing a motion seeking leave to file a supplemental complaint and a motion for a preliminary injunction of the final rules shortly thereafter.

waste judicial resources and do nothing to bring this case closer to an ultimate resolution.

I. EITHER A REMAND OR AN ABEYANCE WOULD ALLOW THE DISTRICT COURT TO ADDRESS THE FINAL RULES IN THE FIRST INSTANCE.

The federal defendants propose that the Court hold this case in abeyance pending disposition of the Commonwealth's anticipated motion for an injunction of the final rules. *See* Fed. Def. Mot. at 1. This proposal would, according to the federal defendants, "allow consolidation of this appeal with an anticipated appeal from the district court's preliminary-injunction ruling concerning the final rules." *Id.* at 11. Like the Commonwealth's proposal for a remand, this course of action would allow the district court to consider the final rules in the first instance. And if the appeals are subsequently consolidated, it would similarly allow this Court to address the issues presented by this case in a single appeal.

The primary advantage of remanding this appeal is that it would allow the district court to modify or withdraw the current injunction, as appropriate, while holding the appeal in abeyance would require the district court to leave the current injunction in place as it rules on the Commonwealth's motion for a new injunction. If the district court grants the Commonwealth's request for an injunction of the final rules, its previous injunction of the IFRs will be irrelevant, since the final

rules, by their terms, supersede the IFRs.³ However, if this Court retains jurisdiction of this appeal while the district court proceeds, the district court will be unable to modify or withdraw that injunction, leaving this Court in the position of having to review two separate injunctions, one of which is no longer of any practical significance.

Similarly, as the federal defendants acknowledge, once the district court's decision on the Commonwealth's motion for an injunction of the final rules is appealed to this Court, it would be necessary to move for consolidation of the two appeals. Def. Mot. at 11. If the current appeal were remanded, however – such that the district court could modify or withdraw the original injunction, as appropriate – there would be no need to file additional motions in this Court.

While these issues should not significantly hamper this Court's ultimate review of this case, the Commonwealth respectfully submits that a remand would allow for a more orderly process in both the district court and this Court.⁴

³ See, e.g., 83 Fed. Reg. at 57,536 (“The primary purpose of this rule is to finalize, with changes in response to public comments, the interim final regulations....”).

⁴ The federal defendants spend much of their motion arguing that this appeal will not become moot on January 14, 2019, or, in the alternative, that this Court should address Pennsylvania's standing before addressing mootness. See Fed. Def. Mot. at 6-11. The Little Sisters similarly argue that this appeal will not become moot. See Little Sisters' Mot. at 2-3. But the cases they cite find exceptions to the mootness doctrine where the *agency* relies on a subsequent change to a statute or

II. SIMULTANEOUS PROCEEDINGS IN THIS COURT AND THE DISTRICT COURT WOULD WASTE JUDICIAL RESOURCES AND LEAD TO CONFUSION.

The Little Sisters propose that this Court set a briefing schedule to continue the current appeal without allowing the district court to rule on the final rules in the first instance. They argue that the Commonwealth should address the impact of the final rules in its response brief in this Court, while also acknowledging that the Commonwealth may seek an injunction blocking the final rules in the district court.⁵ In other words, the Little Sisters propose that this Court and the district court simultaneously address the impact of the final rules. Such a process would

regulation to argue that the case is moot. In such situations, “[c]ourts are understandably reluctant to permit agencies to avoid judicial review, whenever they choose, simply by withdrawing the challenged rule.” *Dow Chem. Co. v. U.S. E.P.A.*, 605 F.2d 673, 678 (3d Cir. 1979) (discussed in Little Sisters’ Mot. at 2-3); *see also Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 662 (1993) (rejecting application of mootness doctrine under which “a defendant could moot a case by repealing the challenged statute and replacing it with one that differs only in some insignificant respect.”) (discussed in Fed. Def. Mot. at 9, 10). Such is not the case here: the Commonwealth is not trying to “avoid judicial review” of the challenged action, but rather facilitate effective judicial review of the final rules.

⁵ *See* Little Sisters’ Mot. at 3 (“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.”); *id.* (“Pennsylvania is not prevented from seeking relief from the final rule below while this appeal is ongoing.”).

waste judicial resources while frustrating, rather than aiding, this Court's ultimate review of this case.

Any decision by the district court on the Commonwealth's motion for an injunction of the final rules will be subject to appeal to this Court, and a decision in the current appeal would not dictate the outcome of that subsequent appeal. While the prevailing party in this appeal would be free to make any arguments it wished as to the effect of that decision, the subsequent appeal would still require resolution by this Court. While the Little Sisters assert that the parties can simply address issues presented by the final rules in their briefing in the current appeal, the reality is that the final rules were issued on the basis of a new administrative record, which is not currently before this Court. The Little Sisters and the federal defendants both argue that this Court can address the Commonwealth's standing in this appeal, but neither acknowledges that, as the Commonwealth explained in its own motion, the federal defendants now estimate that the final rules will affect more than twice as many women as the IFRs. *See Pa. Mot.* at 8. As a result, moving forward with the current appeal while the district court is addressing the final rules would lead to confusion without advancing the ultimate resolution of this case.

The Little Sisters conclude with the argument that their proposal will allow them to achieve "final certainty" in their litigation over the contraceptive mandate

sooner. *See* Little Sisters’ Mot. at 3. In reality, they have already achieved “final certainty.” The Little Sisters state that they “have been in litigation to protect their rights regarding this federal mandate since 2013.” But they omit that the litigation they filed in 2013 actually ended several months ago with judgment in their favor. In May of this year, shortly after this Court allowed them to intervene in this case, the Little Sisters filed an unopposed motion for a permanent injunction in their 2013 lawsuit.⁶ *See* Unopposed Motion to Reopen Case and for Entry of Permanent Injunction and Declaratory Relief, ECF No. 80, *Little Sisters of the Poor v. Sebelius*, No. 13-cv-2611 (D. Colo. May 16, 2018). That motion was granted, and as a result the federal defendants are permanently barred from enforcing the contraceptive mandate against the Little Sisters. *See* Order Reopening Case and

⁶ The Little Sisters’ 2013 lawsuit (filed in the District of Colorado) was consolidated before the Supreme Court with *Zubik v. Burwell* and other cases challenging the mandate. In *Zubik*, the Court vacated all of the judgments of the courts of appeals and remanded the cases so that the parties could enter into discussions that would allow them to “arrive at an approach going forward that accommodates petitioners’ religious exercise while at the same time ensuring that women covered by petitioners’ health plans ‘receive full and equal health coverage, including contraceptive coverage.’” 136 S. Ct. 1557, 1560 (2016). On remand, the Little Sisters’ lawsuit remained pending in the Tenth Circuit for nearly two years, with neither party taking any action to move it forward. *See Little Sisters of the Poor v. Azar*, No. 13-1540 (10th Cir.). The Little Sisters then moved for a permanent injunction shortly after this Court reversed the district court’s denial of their motion to intervene in this case. *See Commonwealth of Pennsylvania v. President United States of Am.*, 888 F.3d 52 (3d Cir. 2018).

Granting Permanent Injunction, ECF No. 82 (May 29, 2018). So the Little Sisters have already achieved certainty – and, regardless, there is no basis to expect that simultaneous proceedings in this Court and the district court would bring about a speedier resolution of this case.

CONCLUSION

For the reasons set forth above, the Commonwealth respectfully requests that the motions to govern filed by the federal defendants and the Little Sisters be denied, and that that this case be remanded to the district court.

Respectfully submitted,
JOSH SHAPIRO
Attorney General
Commonwealth of Pennsylvania

Dated: December 10, 2018

/s/ Michael J. Fischer
MICHAEL J. FISCHER
Chief Deputy Attorney General
AIMEE D. THOMSON
Deputy Attorney General
Office of Attorney General
Strawberry Square
Harrisburg, PA 17120
(215) 560-2171
mfischer@attorneygeneral.gov

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing document, and any attachments thereto, to be electronically filed with the Clerk of the Court for the U.S. Court of Appeals for the Third 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.

Dated: December 10, 2018

/s/ Michael J. Fischer

MICHAEL J. FISCHER