IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

COMMONWEALTH OF PENNSYLVANIA, Plaintiff-Appellee, v. PRESIDENT, UNITED STATES OF AMERICA et al., Defendants-Appellants, and LITTLE SISTERS OF THE POOR SAINTS PETER AND PAUL HOME, Intervenor-Defendant-Appellant.	Nos. 17-3752 and 18-1253

FEDERAL DEFENDANTS' RESPONSE TO THE COMMONWEALTH OF PENNSYLVANIA'S MOTION TO GOVERN FURTHER PROCEEDINGS

Pennsylvania's contention that the government's appeal should be dismissed on mootness grounds should be rejected. As an initial matter, even Pennsylvania does not and cannot argue that the appeal is currently moot, given that the final rules do not go into effect until January 14, 2019. Moreover, even after that date, there would be no basis to dismiss this appeal as moot or to decline to address the threshold standing issue on appeal.

1. Pennsylvania does not, and indeed cannot, claim that the appeal is *currently* moot. *See* Pa. Mot. at 5 (contending only that the appeal will become moot on January 14, 2019, when the final rules take effect). There is thus no basis for the Commonwealth to argue, as it nevertheless has, that the appeal should be dismissed now, in anticipation of the appeal becoming moot in the future. Indeed, Pennsylvania's suggestion that the appeal should be dismissed now is particularly inappropriate given that the district court is likely to rule on Pennsylvania's anticipated motion for a preliminary injunction of the final rules before those rules take effect. And in that case, as we noted in our motion to govern (at 11), any appeal of the district court's new ruling could be consolidated with the current appeal.

2. But even once the final rules take effect, and even if the district court has not yet ruled on Pennsylvania's preliminary-injunction motion by that time, there would still be no basis to dismiss this appeal as moot.

As an initial matter, our motion explained (at 6-9) that regardless of mootness, it remains appropriate for this Court to determine the standing question presented by the appeal, because that issue remains

live and will persist even when the final rules take effect. *See, e.g.*, *Common Cause of Pa. v. Pennsylvania*, 558 F.3d 249, 256 n.2 (3d Cir. 2009) (deciding appeal on ground that plaintiffs lacked standing without considering whether claims were moot).

Moreover, Pennsylvania is mistaken in contending (Mot. at 5) that this appeal will become moot when the final rules take effect on January 14, 2019. There is no relevant distinction between this case and *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993), where the Supreme Court rejected the argument that the case became moot when the challenged ordinance was replaced by a new ordinance after the Court granted certiorari. Because the new ordinance was "sufficiently similar" to the repealed ordinance and the "gravamen of [the plaintiff's] complaint" remained, the Court retained jurisdiction and addressed the question presented by the appeal. *Id.* at 662 & n.3; *see also Nextel West Corp. v. Unity Township*, 282 F.3d 257, 261-64 (3d Cir. 2002) (holding that amendment "did not sufficiently alter" the challenged ordinance to moot the case).

Here, too, because the final rules do not remove the challenged features of the interim rules, and because "the 'gravamen of [Pennsylvania's] complaint [about the interim rules] remains," Pennsylvania's substantive challenges to the rules are not moot, *Nextel*, 282 F.3d at 262 (quoting *Northeastern Fla. Chapter*, 508 U.S. at 662).

CONCLUSION

For the foregoing reasons, the Court should not dismiss this appeal, but rather hold it in abeyance pending disposition by the district court of Pennsylvania's anticipated motion for a preliminary injunction of the final rules.

Respectfully submitted,

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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 565 words, according to the count of Microsoft Word.

/s/ Karen Schoen
Karen Schoen
Counsel for the Federal Government

CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2018, I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Karen Schoen
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