

Nos. 18-15144, 18-15166, 18-15255

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

THE STATE OF CALIFORNIA, *et al.*,  
*Plaintiffs-Appellees*,

v.

ALEX M. AZAR II, IN HIS OFFICIAL CAPACITY AS ACTING SECRETARY OF THE U.S.  
DEPARTMENT OF HEALTH & HUMAN SERVICES, *et al.*,  
*Defendants-Appellants*,

AND

THE LITTLE SISTERS OF THE POOR JEANNE JUGAN RESIDENCE,  
*Intervenor-Defendant-Appellant*,

AND

MARCH FOR LIFE EDUCATION DEFENSE FUND,  
*Intervenor-Defendant-Appellant*.

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**On Appeal from the United States District Court  
for the Northern District of California**

**APPELLEES' OPPOSITION TO MOTION TO EXTEND TIME TO FILE  
PETITION FOR REHEARING**

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January 16, 2019

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The Federal Defendants have asked this Court to stay the deadline to file a petition for panel rehearing or for rehearing en banc in this case.

Plaintiffs-Appellees respectfully oppose this motion because the Mandate has issued and the appeals are moot.

This Court issued its opinion and judgment in these appeals on December 13, 2018. The Court expeditiously issued the Mandate on that same date. *See* ECF No. 137-1; *United States v. Cote*, 51 F.3d 178, 182 (9th Cir. 1995) (issuance of the mandate, reverts jurisdiction in the district court). This Court orders the mandate to issue immediately upon the filing of a disposition only in exceptional circumstances, such as “cases where a petition for rehearing, or petition for writ of certiorari would be legally frivolous; or where an emergency situation requires that the action of the Court become final and mandate issue at once.” *See* Circuit Advisory Committee Note to Rule 41-1. Such circumstances arose in this case because the Federal Defendants, despite continuing to litigate the validity of the preliminary injunction enjoining the Interim Final Rules (IFRs), proceeded to issue Final Rules on the eve of argument, and with an effective date of 60 days later (January 14, 2019). In light of the immediate issuance of the mandate, Plaintiffs-Appellees acted expeditiously to proceed in the

district court, having already litigated the threshold issue of preliminary relief regarding the Final Rules. *See also United States v. King*, 419 F.3d 1035, 1036 (9th Cir. 2005) (per curiam) (party must demonstrate “extraordinary circumstances” to recall the mandate).

Furthermore, these appeals are now moot, and therefore a petition for rehearing would be legally frivolous. As this Court recognized, the Final Rules “are set to supersede the IFRs and become effective on January 14, 2019.” Opinion at 10. These appeals sought review of the district court’s preliminary injunction, which rested solely on its conclusion that the IFRs are likely to be procedurally invalid under the APA. Thus, this Court stated that “[i]f the final rules become effective as planned on January 14, there will be no justiciable controversy regarding the procedural defects of IFRs that no longer exist.” *Id.* January 14th has passed and the IFRs are no longer in effect. While the Court determined that it had jurisdiction to issue its opinion prior to January 14, 2019, it stated that “[w]e agree with the parties that mootness is not an issue until the final rules supersede the IFRs as expected on January 14, 2019.” Accordingly, these appeals are now moot.

In sum, the Federal Defendants have not sought to lift the Mandate and these appeals are now moot. The entrance of a stay in these appeals is not warranted.

Dated: January 16, 2019

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on January 16, 2019, I electronically filed the foregoing document with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all other participants in this case are registered CM/ECF users and that services will be accomplished by the appellate EM/EC system.

Date: January 16, 2019

s/Karli Eisenberg