Nos. 19-15072, 19-15118, and 19-15150

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF CALIFORNIA *et al.*,

Plaintiffs-Appellees,

v.

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES *et al.*,

Defendants-Appellants,

and

THE LITTLE SISTERS OF THE POOR JEANNE JUGAN RESIDENCE,

Intervenor-Defendant-Appellant,

and

MARCH FOR LIFE EDUCATION AND DEFENSE FUND,

Intervenor-Defendant-Appellant.

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

SUPPLEMENTAL BRIEF FOR THE FEDERAL APPELLANTS

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On January 13, 2019, the district court below entered a preliminary injunction barring the government from implementing the challenged rules in the fourteen plaintiff States. *See* ER 1-45. It is indisputable that the government had standing to appeal the injunction at that point. A day later, a district court in Pennsylvania entered a preliminary injunction barring the government from enforcing the challenged rules against anyone nationwide. *See Pennsylvania v. Trump*, 351 F. Supp. 3d 791 (E.D. Pa. 2019). This Court has asked whether that intervening action mooted the government's appeal of the injunction in this case.

A case becomes moot when "it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013). But "[a]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Id.* Here, as a matter of both law and logic, the entry of the nationwide preliminary injunction in *Pennsylvania* did not eliminate the parties' continuing concrete interest in the validity of the injunction entered in this case.

1. To begin, the parties have a continuing interest in the injunction entered in this case because the *Pennsylvania* injunction is neither final nor permanent. The possibility that the *Pennsylvania* injunction may not persist is sufficient reason to conclude that this appeal is not moot.

As the Supreme Court recognized in *Chafin*, "[c]ourts often adjudicate disputes where the practical impact of any decision is not assured." 568 U.S. at 175. For example, the Court has heard the government's appeal from the reversal of a criminal conviction even after the defendants had been deported, because of the possibility that "the defendants might 're-enter this country on their own' and encounter the consequences of [the Court's] ruling." *Id.* at 176 (quoting *United States v. Villamonte-Marquez*, 462 U.S. 579, 581 n.2 (1983)).

Accordingly, a ruling by another court does not moot a case when further review of that ruling is being pursued. *See, e.g.*, *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 291 n.7 (2005) (Delaware Supreme Court ruling did not render similar action moot, because defendant "will petition [the U.S. Supreme] Court for a writ of certiorari"); *National Wildlife Fed'n v. Burford*, 677 F. Supp. 1445, 1453

(D. Mont. 1985) (action to set aside coal leases was not mooted by a judgment in another action voiding the leases, because post-judgment motions remained pending and appeal of the judgment was still possible), *aff'd*, 871 F.2d 849 (9th Cir. 1989).

The nationwide injunction in *Pennsylvania* thus does not moot this appeal, because the government's appeal of that injunction is pending. *See Pennsylvania v. President*, Nos. 17-3752, 18-1253, 19-1129, & 19-1189 (3d Cir.) (oral argument scheduled for May 21, 2019). If the government were to prevail in that appeal, the nationwide injunction would be lifted, freeing the government to implement the challenged rules in the fourteen plaintiff States here if this Court also were to vacate the more limited injunction the district court issued below. That is a sufficiently concrete interest to allow both appeals to go forward. And that is especially so because the *Pennsylvania* injunction is only a preliminary injunction—it remains possible the district court there may itself reconsider and deny a permanent injunction, leaving the injunction here as the only one on the books.

2. Even if the *Pennsylvania* injunction were permanent and final, the parties still would have a continuing interest in the validity of the

injunction entered in this case. That is because the injunction here is a separate judicial order that creates distinct rights and responsibilities for the parties with respect to future enforcement.

The Supreme Court has held that a "judgment adverse" to a defendant is "an adjudication of legal rights which constitutes the kind of injury cognizable" on appellate review, because the judgment has "disabling effects upon" the defendant and a successful appeal would eliminate those effects. *ASARCO Inc. v. Kadish*, 490 U.S. 605, 618-19 (1989). And conversely, a plaintiff that "obtains a judgment in its favor acquires a 'judicially cognizable' interest in ensuring compliance with that judgment." *Salazar v. Buono*, 559 U.S. 700, 712 (2010) (plurality opinion). All of this remains true even when a judgment in a different case has entered the same substantive relief: the order in each case remains separately enforceable against the defendants by the plaintiffs in each case. Here, even assuming the *Pennsylvania* injunction remains on the books, the government has a cognizable interest in not being subject to *additional* enforcement proceedings with respect to the injunction in this case, and the States have a cognizable interest in being able *themselves* to enforce the injunction they obtained (rather

than relying on the Commonwealth of Pennsylvania to enforce the nationwide injunction it obtained).

3. The analysis above is not affected by the fact that the *Pennsylvania* injunction was issued by a district court outside this circuit. But that geographic fact does underscore the practical problems with any contrary conclusion.

If the existence of one nationwide injunction mooted the appeal of all injunctions of narrower scope entered within a different circuit, that would necessarily mean the entry of *two* or more nationwide injunctions entered in different circuits would moot *any* appeal from *any* injunction. After all, a circuit court's vacatur of the nationwide injunction before it would not itself grant relief against the nationwide injunctions pending in other circuits, and there would be no logical basis for allowing an appeal to proceed in one case but not the rest.

This, of course, would exacerbate the problems with nationwide injunctions. In addition to improperly allowing a single district court or circuit court to enter relief governing non-parties throughout the country, *see California v. Azar*, 911 F.3d 558, 583-84 (9th Cir. 2018); *United States v. Mendoza*, 464 U.S. 154, 163 (1984), nationwide

injunctions could be wielded by district courts to insulate their decisions from appellate review altogether. The doctrine of mootness should not be construed to compel such a perverse result.

4. Indeed, although this Court has not expressly held as much, its prior practice is consistent with the fundamental and commonsense principle that a nationwide injunction entered in another circuit does not moot an appeal from a parallel injunction entered in this circuit. For example, in *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017), this Court adjudicated the government's appeal of an injunction against an executive order even though another circuit had already upheld a nationwide injunction barring enforcement of the same executive order, *see International Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017). Likewise, in *Regents of the University of California v. U.S. Department of Homeland Security*, 908 F.3d 476 (9th Cir. 2018), this Court adjudicated the government's appeal of an injunction against certain aspects of the rescission of an executive policy even though a district court in another circuit had issued a nationwide injunction against the same aspects of the rescission, *see Batalla Vidal v. Nielsen*,

279 F. Supp. 3d 401 (E.D.N.Y. 2018), *appeal docketed*, No. 18-485 (2d Cir. Feb. 20, 2018).

5. In any event, even assuming the *Pennsylvania* injunction has rendered the government's appeal moot, the proper disposition would still be to vacate the injunction below, for two reasons. First, when "the vagaries of circumstance" render a party's appeal moot, the "established practice" is to vacate the judgment below, because that party "ought not in fairness be forced to acquiesce in the judgment." *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 22, 25 (1994). Second, if the *Pennsylvania* injunction moots the government's appeal, it likewise moots the States' underlying claims. The States would have no cognizable interest in obtaining an injunction, for the same reason the government would have no cognizable interest in vacating the injunction. And if the States' claims have become moot, then this Court can and must vacate the injunction in the States' favor. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 71-75 (1997). Of course, the absurdity of vacating the States' injunction and dismissing their claims as moot just underscores the error in concluding that the government's appeal is moot.

CONCLUSION

For the foregoing reasons, the government's appeal is not moot.

Respectfully submitted,

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MAY 2019

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Century Schoolbook, a proportionally spaced font.

I further certify that, pursuant to 9th Cir. R. 32-3, this brief complies with the page limit in this Court's order dated April 29, 2019, because this brief contains 1,376 words, excluding the parts of the brief exempted under Rule 32(f), according to the count of Microsoft Word, and the word count divided by 280 does not exceed 5 pages.

/s/ Lowell V. Sturgill Jr.
Lowell V. Sturgill Jr.

CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth 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/ Lowell V. Sturgill Jr.
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