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June 14, 2019

Via CM/ECF

Ms. Molly C. Dwyer
Clerk of Court
United States Court of Appeals
for the Ninth Circuit
James R. Browning Courthouse
95 Seventh Street
San Francisco, California 94103

Re: *California v. U.S. Department of Health and Human Services*, Nos. 19-15072, 19-15118, and 19-15150 (argued June 6, 2019)

Dear Ms. Dwyer:

During oral argument in this case, the panel inquired about the relationship between this case and the parallel Third Circuit case involving a nationwide injunction, especially in light of the government's statements at oral argument in that case. We write to inform the panel that the plaintiffs there submitted a letter to the Third Circuit panel about the oral argument in this case (attached), and the

government filed a response (attached).

Respectfully submitted,

Brinton Lucas

/s/ Sharon Swingle

Sharon Swingle
Lowell V. Sturgill Jr.
Karen Schoen

Counsel for the Federal Government

cc: Counsel of record (via CM/ECF)

CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2019, I electronically filed the foregoing letter 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/ Sharon Swingle
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June 11, 2019

Patricia S. Dodszuweit
Clerk of Court
U.S. Court of Appeals for the Third Circuit
21400 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106-1790

By CM/ECF

Re: *Commonwealth of Pennsylvania & State of New Jersey v. President United States of America et al.*, Nos. 17-3752, 18-1253, 19-1129 & 19-1189 (Argued May 21, 2019) (McKee, Shwartz, Fuentes)

Dear Ms. Dodszuweit:

Appellees Pennsylvania and New Jersey respectfully respond to the Court's request for additional briefing addressing how parallel litigation in the Ninth Circuit challenging the Rules at issue in this case affects the question of whether the district court abused its discretion in entering a nationwide injunction.[1] Argument in the Ninth Circuit was held on June 6, 2019.

In that litigation, California and four other states initially sued to block the IFRs, and the district court entered a nationwide preliminary injunction. *California v. HHS*, 281 F. Supp. 3d 806, 832 (N.D. Cal. 2017). The Ninth Circuit affirmed the decision on the merits, but limited the scope of the injunction. *California v. Azar*, 911 F.3d 558, 585 (9th Cir. 2018). It found that the "present record" did not justify a nationwide injunction, and specifically faulted the district court's decision to stay the case pending appeal. *Id.* at 583-84. Plaintiffs in that case—now joined by nine other states—then sought a new injunction of the Final Rules. That motion was

[1] The States have endeavored to keep this letter as brief as possible while fully responding to the Court's request. To the extent this submission is subject to the word limitation in Rule 28(j) for citations of supplemental authorities, the States respectfully seek leave to exceed that limitation.

granted, and the district court entered an injunction limited to the plaintiff states. *California v. HHS*, 351 F. Supp. 3d 1267, 1300-01 (N.D. Cal. 2019). Defendants and Intervenors subsequently appealed, and the case was argued this past week.

In this case, the government pointed to the pending appeal in the Ninth Circuit in urging the Court to limit the scope of the injunction entered by the district court. Specifically, the government argued that affirmance of the nationwide injunction here would render a potential reversal by the Ninth Circuit "completely and utterly meaningless." Arg. Tr. 83:19-20 (May 21, 2019). The Ninth Circuit panel asked about this assertion, questioning the government at length as to why the panel should not wait for this Court to rule before issuing a decision, given that, by the government's own argument, affirmance of the injunction here would render that case "meaningless."[2] The government responded that, even if this Court affirms the nationwide injunction, it "would still need relief [in the Ninth Circuit]," leading Judge Graber to observe, "That contradicts what counsel said to the Third Circuit. Flatly contradicts it."[3]

The apparent contradiction in the government's arguments simply underscores that each case must be evaluated on its own facts.[4] Where a district court exercises its discretion to fashion an injunction it determines to be necessary to grant the plaintiffs complete relief, that injunction should not be subsequently limited based on potential developments in separate litigation involving different plaintiffs. The district court here conducted a thoughtful and detailed examination of the relevant considerations (including those that led the Ninth Circuit to limit the scope of the initial injunction) and determined that only a nationwide injunction would grant the parties complete relief. J.A. 115-123. That decision was correct, and certainly not an abuse of discretion.[5] In fact, the government rests its argument

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[2] Video of Oral Argument, *California v. Little Sisters of the Poor*, No. 19-15072, https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000015818, at 5:20-9:00 (9th Cir. June 6, 2019).

[3] *Id.* at 6:25-7:30.

[4] In the district court, the government argued that a nationwide injunction would unfairly grant *Massachusetts* relief, since its challenge to the Rules had been dismissed. J.A. 795 (arguing that a nationwide injunction would "give[e] someone a win they didn't get when they litigated in a court in their district"). It repeated that argument in its opening brief here. *See* Br. for Appellant 81 (Feb. 15, 2019). The dismissal of Massachusetts' lawsuit was subsequently reversed by the First Circuit. *Massachusetts v. HHS*, 923 F.3d 209, 214 (1st Cir. 2019).

[5] As explained in the amicus brief submitted by the Public Interest Law Center and Affiliated Organizations (Mar. 25, 2019), nationwide injunctions are

to the contrary largely on assertions it did not raise before the district court, *see* Br. for Appellants 82-83, while failing to confront many of the considerations that the court did take into account, *see, e.g.,* J.A. 120 (citing fact that, each year, "Pennsylvania takes in 32,000 out-of-state students alone").

While this appeal has proceeded, the States have moved expeditiously for summary judgment in the district court and asked that court to vacate the Rules, as is the ordinary remedy for unlawful regulations. *Council Tree Communications v. FCC*, 619 F.3d 235, 258 & n.13 (3d Cir. 2010); *see also* J.A. 117. Affirming the preliminary injunction will maintain the status quo only until the district court rules on the States' motion. But if the injunction were narrowed in some way—and the government still has not explained *how* it could practically be narrowed while fully protecting Pennsylvania and New Jersey—the Rules would go into effect in many states, only to be revoked later if the summary judgment motion is granted. Such a result would be far more disruptive than leaving the current injunction in place while this case proceeds.

For these reasons, the district court's injunction should be affirmed.

Respectfully submitted,

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well within the equitable discretion of district courts and consistent with the longstanding traditions of American and English jurisprudence.

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing document 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: June 11, 2019 /s/ Michael J. Fischer
MICHAEL J. FISCHER

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June 14, 2019

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Ms. Patricia S. Dodszuweit
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United States Court of Appeals
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21400 U.S. Courthouse
601 Market Street
Philadelphia, Pennsylvania 19106

Re: *Commonwealth of Pennsylvania et al. v. President, United States of America et al.*, Nos. 17-3752, 18-1253, 19-1129, and 19-1189 (argued May 21, 2019)

Dear Ms. Dodszuweit:

We write in response to the letter filed by the States on June 11, 2019. This Court invited the States to address a specific statement by the government at oral argument when urging vacatur of the nationwide injunction in this case. Namely, the government said that, even if the Ninth Circuit in parallel litigation (*California v. Azar*, No. 19-15118) were to vacate the injunction there on behalf of 14 other States, that decision would be rendered "utterly meaningless" by the nationwide injunction here in the sense that those 14 States "would still all get complete relief" due to this injunction.

Notably, despite taking 20 days and approximately 870 words to file a response, the States do not actually dispute the government's statement—and indeed, they cannot, because it is obviously correct.

That is the inescapable and pernicious effect of nationwide injunctions: they essentially create a one-way class action, where plaintiffs only need to win one case while the defendant must run the table. *See City of Chicago v. Sessions*, 888 F.3d 272, 298 (7th Cir. 2018) (Manion, J., concurring in the judgment and dissenting in part), *reh'g en banc granted*, Order of June 4, 2018, *reh'g en banc vacated as moot*, Order of Aug. 10, 2018. That alone is reason why this Court should at a minimum narrow the scope of the injunction here, even if it does not vacate the injunction on the merits.

Lacking any real response to the statement this Court asked about, the States instead try to confuse matters. They focus on an exchange during oral argument in the Ninth Circuit. There, in response to the panel's suggestion that it should wait for this Court to rule before issuing a decision, the government urged the panel to decide that case promptly—a position that one of the judges said contradicts the government's argument before this Court that a win on the merits in the Ninth Circuit would be rendered meaningless by a loss on the nationwide injunction in this Court.

But there is no contradiction whatsoever. The government was correct in this Court that a Ninth Circuit win would be meaningless in the sense that the Ninth Circuit plaintiffs would continue to get the benefit of the nationwide injunction here. And the government was correct in the Ninth Circuit that the court there nevertheless should rule promptly. In light of the compliance burdens and threat of contempt, Congress has provided a statutory right to an expedited appeal of preliminary injunctions. 28 U.S.C. §§ 1292(a), 1657(a). Thus, a prompt ruling in the Ninth Circuit matters despite the nationwide injunction here, not just because this Court may (and should) reverse this injunction, but also because a reversal in the Ninth Circuit would at least free the government from its duties under the second and separately enforceable injunction there.

Moreover, wholly apart from the government's interest in a prompt ruling by the Ninth Circuit despite the nationwide injunction here, the judiciary itself has such an interest. The Supreme Court has repeatedly recognized the benefit of having multiple courts weigh in on issues that it may ultimately have to resolve. *See, e.g.*, *United States v.*

Mendoza, 464 U.S. 154, 160 (1984); *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Again, that nationwide injunctions impede such judicial percolation is further reason why they are improper. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring). The nationwide injunction here is apparently causing Ninth Circuit judges to consider exercising their case-management discretion in disregard of both the importance of percolation of legal issues among the appellate courts and the government's statutory right to an expedited appeal of a preliminary injunction, and that distortion of the judicial process underscores why this Court should at the very least narrow the scope of the injunction.[1]

Respectfully submitted,

Hashim M. Mooppan
Deputy Assistant Attorney General

/s/ Sharon Swingle
Sharon Swingle
Lowell V. Sturgill Jr.
Karen Schoen

Counsel for the Federal Government

cc: Counsel of record (via CM/ECF)

[1] Going beyond this Court's invitation, the States also reprise their merits argument that a nationwide preliminary injunction is permissible because a final judgment vacating the rules on a nationwide basis purportedly would be appropriate under the APA. But as we explained in our opening brief (at 84-86), while the APA instructs courts to "set aside" unlawful agency action, 5 U.S.C. § 706(2), it does not specify as to whom, and thus does not speak clearly enough to displace the traditional equitable principle that relief should be no broader than necessary to redress the plaintiff's own injuries—a principle, moreover, that the APA expressly reaffirms in its provision concerning preliminary rather than permanent relief, *id.* § 705 ("to the extent necessary to prevent irreparable injury").

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