

No. 17-3752

In the United States Court of Appeals for the Third Circuit

COMMONWEALTH OF PENNSYLVANIA,

Plaintiff-Appellee,

v.

DONALD J. TRUMP, *et al.*

Defendants-Appellants,

and

LITTLE SISTERS OF THE POOR SAINTS PETER AND PAUL HOME,

Defendant-Intervenor-Appellant

On Appeal from the United States District Court

for the Eastern District of Pennsylvania

No. 2:17-cv-04540-WB

**DEFENDANT-INTERVENOR-APPELLANT'S
REPLY IN SUPPORT OF MOTION TO SET BRIEFING
SCHEDULE**

Mark Rienzi

Lori H. Windham

Diana M. Verm

The Becket Fund for Religious Liberty

1200 New Hampshire Ave, NW,

Suite 700

Washington, D.C. 20036

(202) 955-0095

mrienzi@becketlaw.org

*Counsel for Defendant-Intervenor-
Appellant*

REPLY IN SUPPORT OF MOTION TO SET BRIEFING SCHEDULE

Pennsylvania's response to the Little Sisters' motion to set a briefing schedule and the federal defendants' motion to stay the briefing offers no reason to send the Little Sisters' appeal back to the district court. Indeed, Pennsylvania's recent actions in the district court, and the district court's orders from last week, only confirm that the issues in this appeal remain live and in need of resolution.

Since Pennsylvania filed its response to this motion, the district court held a status conference, lifted the stay in the district court, ordered Pennsylvania to file an amended complaint and motion for preliminary injunction, and set a hearing for the preliminary injunction motion for January 10, 2019, to be decided before the final rules take effect on January 14. Dkt. 88, attached as Exhibit A. In its opinion lifting the stay, the district court acknowledged that the substance of the departments' final rules "largely reiterate the provisions of the IFRs." Dkt. 87 at 2, attached as Exhibit B.

Pennsylvania's amended complaint confirms that the issues already briefed in this appeal—standing, the procedural validity of the IFRs, and the substantive validity of granting a religious exemption under the APA and ACA—remain at the core of the case. Dkt. 89 at 32-35.

The interests of judicial efficiency and finality lie not in sending the case back to the district court, but in a final decision on this appeal with as few interruptions as possible. At this juncture, the preliminary injunction appeal has been pending for a year, and two parties have filed opening briefs. Restarting appeals each time the government changes an administrative rule is a recipe for never-ending litigation, always going back to start when the administrative state makes a tweak. That is the opposite of how the Supreme Court and this Court treated the first several years of contraceptive mandate cases. *See Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 428 n.3 (3d Cir. 2015) and *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1163-64 (10th Cir. 2015), *both vacated and remanded sub nom. Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (noting that the regulations had changed since the district court's order); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1124 (10th Cir. 2013), *aff'd sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (addressing pending proposed rules).

Now that it is clear that any proceedings in the district court will be concluded by mid-January, the most efficient course is to continue with this appeal and either (a) set a briefing schedule now that is long enough to allow the parties to address any new district court action that occurs

in the next few weeks, or (b) hold the appeal in abeyance until mid-January and set a briefing schedule at that time. But under no circumstances does it make sense to force the parties to abandon the appeal that has been ongoing for a year and that raises the core issues relevant to the interim and final rules and start anew.

In its response, Pennsylvania does not argue that this Court lacks Article III jurisdiction, but instead suggests that the policy reasoning behind this Court’s prior decisions suggest that a remand is advisable, because it is the plaintiff seeking a remand rather than the government defendants. Opp. at 4 n.2 (citing *Dow Chem. Co. v. EPA*, 605 F.2d 673, 678 (3d Cir. 1979)). But here, the policy considerations are the same as in *Dow Chemical*. This Court has Article III jurisdiction to decide this case, and Pennsylvania, as the appellee, not the appellant, should not be able to decide when it would like to return to the district court.¹ Moreover, the government’s position on this question does not change the policy consideration that remanding the case gives the government the power to “avoid judicial review” by adjusting its regulations, a power that

¹ For the first time in its reply brief in support of its motion to govern proceedings, Pennsylvania cites to L.A.R. 27.4, and indicates that its motion should be termed a motion for summary action. It has waived that option since it did not raise it until this late hour. See *United States v. Heilman*, 377 F. App’x 157, 197-98 (3d Cir. 2010). In any case, the final rules do not present a sufficient “change of circumstances” when they were anticipated all along and they do not change the substance of Pennsylvania’s claims.

could, in this case, disadvantage the Little Sisters. *Dow Chem. Co.*, 605 F.2d at 678.

Pennsylvania makes much of the fact that the Little Sisters have achieved an injunction in their Tenth Circuit case. *See Br.* at 10, 21. But Pennsylvania's lawsuit is based on the theory that the relief the Little Sisters received in that case is unconstitutional. As long as this lawsuit is ongoing with a potential to reach the Supreme Court, the Little Sisters' interests remain at stake, and a swift resolution of the Little Sisters' constitutional rights remains important. By contrast, the only interest Pennsylvania has identified in returning to the district court is that the federal defendants have re-estimated of the number of people affected by the final rules. *Opp.* at 6. But Pennsylvania does not explain why it cannot address that fact on appeal in this Court, or how it could change the district court's reasoning.

In its motion, Pennsylvania concedes that a period of abeyance in the district court would meet its interests. *Opp.* at 2. If this Court wishes to wait for the district court to issue a preliminary decision on the final rules, the Little Sisters suggest that the most efficient path forward is to either set a briefing schedule now that allows the parties a short time after mid-January to take any such decision into account, or hold the

appeal in a limited abeyance for a set number of days before Pennsylvania's response brief is due.

CONCLUSION

The Little Sisters respectfully request that this Court grant their motion to set a briefing schedule.

Respectfully submitted,

/s/ Mark Rienzi

Mark Rienzi

Lori Windham

Diana Verm

The Becket Fund for Religious Liberty

1200 New Hampshire Ave. NW,

Suite 700

Washington, DC 20036

Telephone: (202) 955-0095

Facsimile: (202) 955-0090

mrienzi@becketlaw.org

Nicholas M. Centrella

Conrad O'Brien PC

1500 Market Street, Suite 3900

Philadelphia, PA 19102-2100

Telephone: (215) 864-8098

Facsimile: (215) 864-0798

ncentrella@conradobrien.com

Counsel for the Little Sisters

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)(C), because it contains 1022 words, according to the count of Microsoft Word.

Dated: December 17, 2018

/s/ Mark Rienzi
Mark Rienzi
The Becket Fund for Religious
Liberty
1200 New Hampshire Ave. NW,
Suite 700
Washington, DC 20036
Telephone: (202) 955-0095
Facsimile: (202) 955-0090
mrienzi@becketlaw.org

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

Dated: December 17, 2018

/s/ Mark Rienzi

Mark Rienzi

The Becket Fund for Religious Liberty
1200 New Hampshire Ave. NW, Suite
700

Washington, DC 20036

Telephone: (202) 955-0095

Facsimile: (202) 955-0090

mrienzi@becketlaw.org

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF
PENNSYLVANIA ,

Plaintiff,

v.

**DONALD J. TRUMP, DONALD J.
WRIGHT, UNITED STATES
DEPARTMENT OF HEALTH AND
HUMAN SERVICES, STEVEN T.
MNUCHIN, UNITED STATES
DEPARTMENT OF THE TREASURY,
RENE ALEXANDER ACOSTA AND THE
UNITED STATES DEPARTMENT OF
LABOR,**

Defendants,

**LITTLE SISTERS OF THE POOR
SAINTS PETER AND PAUL HOME,
Intervenor-Defendant.**

CIVIL ACTION

NO. 17-4540

ORDER

AND NOW, this 14th day of December, 2018, upon consideration of Plaintiff's Motion to Lift Stay of District Court Proceedings (ECF No. 81), and Defendants' responses thereto (ECF Nos. 82 & 85), **IT IS HEREBY ORDERED** that the Motion is **GRANTED** and the Clerk of Court shall transfer this case to the Court's active docket.

IT IS FURTHER ORDERED that:

1. Plaintiff shall supplement or amend its complaint and file a Motion for Preliminary Injunction no later than December 17, 2018;
2. Defendants shall file briefing in response to Plaintiff's Motion for Preliminary Injunction no later than January 3, 2019;
3. Plaintiff shall file any reply briefing in further support of their Motion for a Preliminary Injunction no later than January 7, 2019;
4. Any *amicus curiae* briefs shall be filed no later than January 7, 2019;

5. A Hearing on Plaintiff's Motion for Preliminary Injunction shall commence on **Thursday, January 10, 2019 at 9:00 a.m.** before the Honorable Wendy Beetlestone, in Courtroom 3B, 601 Market Street, Philadelphia, Pennsylvania, 19106.

BY THE COURT:

/s/Wendy Beetlestone, J.

WENDY BEETLESTONE, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF
PENNSYLVANIA ,

Plaintiff,

v.

**DONALD J. TRUMP, DONALD J.
WRIGHT, UNITED STATES
DEPARTMENT OF HEALTH AND
HUMAN SERVICES, STEVEN T.
MNUCHIN, UNITED STATES
DEPARTMENT OF THE TREASURY,
RENE ALEXANDER ACOSTA AND THE
UNITED STATES DEPARTMENT OF
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Defendants,

**LITTLE SISTERS OF THE POOR
SAINTS PETER AND PAUL HOME,
Intervenor-Defendant.**

CIVIL ACTION

NO. 17-4540

MEMORANDUM OPINION

Plaintiff, the Commonwealth of Pennsylvania, initially brought this suit to block two Interim Final Rules (“IFRs”) issued by Defendants Donald J. Trump, *et al.* (“Federal Defendants”), which permitted employers to opt out of providing no-cost contraceptive coverage on the basis of sincerely held religious beliefs or sincerely held moral convictions. On December 15, 2017, the Court issued a preliminary injunction enjoining Federal Defendants from enforcing the IFRs, ruling that the IFRs likely violated both procedural and substantive requirements of the Administrative Procedure Act. Federal Defendants then appealed the preliminary injunction. On February 8, 2018, Federal Defendants moved to stay District Court proceedings, arguing that the appeal presented dispositive legal questions, which, if resolved in favor of Federal Defendants, would obviate the need for further litigation. Plaintiff agreed to the stay. On the same day, the

Court granted the motion and stayed proceedings.¹

On November 7, 2018, Federal Defendants issued new Final Rules, which are scheduled to take effect on January 14, 2019. *See* 83 Fed. Reg. 57,536 & 57,592. The Final Rules largely reiterate the provisions of the IFRs, though certain alterations have been made to the text, and different notice and comment procedures were employed. Plaintiff now moves to lift the stay in order to challenge the Final Rules. Federal Defendants do not oppose. Intervenor-Defendant, however, does oppose, arguing that the appeal of the preliminary injunction remains pending, and thus “[i]t would be premature . . . to lift the stay.”

Generally, the filing of a notice of appeal “is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.” *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58–59 (1982). However, “[a]n appeal from the grant or denial of a preliminary injunction does not divest the trial court of jurisdiction or prevent it from taking other steps in the litigation while the appeal is pending.” 11A Wright & Miller, Fed. Prac. & Pro. § 2962 (3d ed.); *see also In re Merck & Co., Inc. Sec. Litig.*, 432 F.3d 261, 268 (3d Cir. 2005) (observing that the district court retains the power to “modify or grant injunctions” following an appeal). “The power to stay a proceeding pending appeal is derived from the inherent power of a court to efficiently manage its own docket.” *Smith v. Manasquan Bank*, 2018 WL 2958664, at *1 (D.N.J. June 13, 2018). “When circumstances have changed such that the court’s reasons for imposing the stay no longer exist or are inappropriate, the court may lift the stay.” *Canady v. Erbe Elektromedizin GmbH*, 271 F. Supp. 2d 64, 74 (D.D.C. 2002).

In light of the issuance of the Final Rules, a continued stay of District Court proceedings

¹ Intervenor-Defendant Little Sisters of the Poor Saints Peter and Paul Home was permitted to intervene following the issuance of the stay.

is no longer warranted. The IFRs are now set to expire on the date that the Final Rules will take effect—one month from today. By its terms, the preliminary injunction enjoins only the enforcement of the IFRs, and would have no effect on the enforcement of the Final Rules. Thus, in the absence of further proceedings, the preliminary injunction effectively will expire along with the IFRs in one month's time.

Further, the issuance of the Final Rules raises new legal issues. Most obviously, Federal Defendants promulgated the Final Rules following a notice and comment procedure that appears to differ from the previous procedure employed for the IFRs. Accordingly, while portions of the analysis relevant to the IFRs may apply to the Final Rules, certain conclusions underlying the preliminary injunction may be inapt in this new context.

By the same token, the changes made to the Final Rules raise the prospect that the appeal of the preliminary injunction will not fully or expeditiously resolve this litigation. Prior to the issuance of the Final Rules, the appeal of the preliminary injunction had the effect of bringing dispositive legal questions before the Third Circuit. Now, however, the Final Rules raise new legal issues, which are not before the Court of Appeals. In any event, the parties have not yet fully briefed the appeal, and thus it does not appear that this Court will have the benefit of Third Circuit guidance prior to the date that the Final Rules are slated to take effect.

For the reasons given, the stay shall be lifted. An appropriate order follows.

BY THE COURT:

/s/Wendy Beetlestone, J.

WENDY BEETLESTONE, J.