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 & 18-1253

PLAINTIFF-APPELLEE'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO GOVERN FURTHER PROCEEDINGS

Plaintiff-Appellee the Commonwealth of Pennsylvania respectfully submits this reply brief in support of its motion to govern further proceedings in this matter.[1] Recent developments in this case have confirmed that the Commonwealth's proposal to remand the current appeal, leaving the current injunction in place, presents the most efficient and orderly process for resolving this litigation.

[1] *See* Mot. to Govern Further Proceedings filed by the Commonwealth of Pennsylvania (Nov. 28, 2018) ("Pa. Mot.").

THIS COURT SHOULD REMAND THIS APPEAL WHILE THE DISTRICT COURT ADDRESSES THE FINAL RULES

As the Commonwealth stated in its motion, it intends to file an amended or supplemental complaint and seek an injunction prohibiting the enforcement of the final rules, and to that end, it previously filed a motion to lift the stay in the district court. *See* Pa. Mot. at 5. At a hearing held today, the district court agreed to lift the stay and set a briefing schedule for the Commonwealth's injunction motion.[2] The court scheduled a hearing on the motion for January 10, 2019, and indicated that a ruling would be issued before January 14. That ruling will certainly be appealed, so under any circumstances this matter will be before this Court again in short order.

In light of the pending proceedings in the district court, the best course of action is for the Court to remand this appeal. The Little Sisters' argument[3] that the

[2] Under that schedule, the Commonwealth agreed to file an amended or supplemental complaint challenging the final rules by Friday, December 14, and a motion for a preliminary injunction by Monday, December 17. The district court indicated that a written order memorializing the schedule would issue soon.

[3] *See* Defendant-Intervenor-Appellant's Response to Motions to Govern Further Proceedings at 2 (Dec. 4, 2018) ("Little Sister's Resp."). Both the Little Sisters and the federal defendants blur the distinction between a remand leaving the current injunction in place, which is what Pennsylvania has requested, and a dismissal of this appeal. *See id.*; Federal Defendants' Response to the Commonwealth of Pennsylvania's Motion to Govern Further Proceedings at 3 (Dec. 6, 2018) ("There is thus no basis for the Commonwealth to argue, as it nevertheless has, that the appeal should be dismissed now…."). The Commonwealth does not argue that the appeal is subject to dismissal now; rather,

Commonwealth may not request such relief is incorrect: this Court's rules provide that a party may move for "summary action," to include "remanding … a judgment, decree or order," for any of several reasons, including that "a change in circumstances warrants such action." 3d Cir. L.A.R. 27.4.[4] Here, the final rules issued by the federal defendants present exactly such "a change in circumstance" warranting a remand to the district court.

The alternative would waste judicial resources without moving this case any closer to a final resolution. Since briefing in this appeal is not yet complete, it is highly unlikely that this Court could schedule the case for submission—much less issue a decision—before January 14.[5] And any decision this Court did issue on the

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it contends that it will become moot in the near future, and that a remand now is therefore the best course of action.

[4] Pursuant to Internal Operating Procedure 10.6, this Court can remand an appealed order provided the parties have an opportunity to argue for or against such action and the panel agrees unanimously. Because the federal defendants and Little Sisters have had the opportunity to respond to the Commonwealth's motions, this Court has authority to grant the Commonwealth's motion.

[5] The Little Sisters suggest that this appeal could be expedited so that a decision could issue by January 14. *See* Little Sisters' Resp. at 1. But neither the Little Sisters nor the federal defendants have moved to expedite the appeal during the months it has been pending, and the fact that the enjoined IFRs will be superseded in the coming weeks is not a reason to expedite it now.

IFRs would be relevant only until that day, when the final rules supersede the IFRs.[6]

Both the federal defendants and the Little Sisters continue to argue that this appeal will not become moot on January 14, 2019. The Commonwealth disagrees, for the reasons explained in its motion. *See* Pa. Mot. at 5-6. But if this Court chooses to remand the current appeal, it will be unnecessary to address this issue. A remand would allow the district court to modify or vacate the existing injunction (or issue a new one), as appropriate, in response to the Commonwealth's motion. That decision will be appealed to this Court, thus squarely presenting all of the issues in this case in a single appeal. Since the original injunction will no longer exist, it will be unnecessary to decide whether it would have been moot.

Earlier today, the Court of Appeals for the Ninth Circuit issued a decision underscoring this point, in a case involving a similar challenge to the IFRs brought

[6] The cases cited by the Little Sisters, Resp. Br. 3–4, are inapt. Both *Dow Chem. Co. v. EPA*, 605 F.2d 673, 677 (3d Cir. 1979) and *Solar Turbines Inc. v. Seif*, 879 F.2d 1073, 1078 (3d Cir. 1989) involved petitions for review directly to the Third Circuit. After withdrawing the challenged regulatory action, the EPA in each case claimed the entire petition was moot. 878 F.2d at 1078; 605 F.2d at 677. Both times, this Court rejected the claim of mootness by the agency itself, holding that if agency action "were alone sufficient to render a live dispute moot, the timing and venue of judicial review could be effectively controlled by the agency." 605 F.2d at 679; *accord* 878 F.2d at 1079. No such concerns are present here. Rather, the Commonwealth, as the party challenging the regulatory action, seeks to facilitate effective judicial review of the final rules.

by California and four other states. *See* Opinion, *California et al. v. Azar et al.*, No. 18-15144, Dkt. No. 136-1 (9th Cir. Dec. 13, 2018). Unlike this case, that appeal had been fully briefed and argued when the final rules were issued, so the court requested supplemental briefing from the parties after argument on the effect of the final rules. In its opinion today, the Ninth Circuit acknowledged the likelihood that the case would become moot but concluded that it did not need to address it because "mootness is not an issue until the final rules supersede the IFRs as expected on January 14, 2019." *Id.* at 11. Given the likelihood that this Court will not rule by January 14, it would, by contrast, be required to address the mootness question if the appeal were to proceed.

The federal defendants and the Little Sisters argue that the presence of certain issues in this appeal that will recur in the Commonwealth's challenge to the final rules weigh against remanding the case. In fact, addressing those issues now would only complicate matters further. For instance, both the federal defendants and the Little Sisters continue to insist that this Court should address Pennsylvania's standing. But as the Commonwealth explained, the final rules are now estimated to affect more than twice as many women as were the IFRs, thus increasing the harm to Pennsylvania residents and the costs to the Commonwealth. *See* Pa. Mot. at 8. As a result, a decision on Pennsylvania's standing to challenge

the IFRs would not answer the question whether the Commonwealth has standing to challenge the final rules.

The Little Sisters' continued reliance on the litigation in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) and *Zubik v. Burwell*, 136 S. Ct. 1557 (2016), is misplaced. *See* Little Sisters Resp. at 4–5. In *Hobby Lobby*, the plaintiffs challenged the application of the contraceptive mandate to them, and the mandate itself did not change during the pendency of the litigation. *See Women's Preventive Service Guidelines* (2011).[7] In *Zubik*, the plaintiffs similarly challenged the requirement that they either comply with the mandate or utilize the so-called "accommodation" process. Both cases thus involved assertions that it was unlawful for the agencies to impose specific obligations on plaintiffs – and not, as this case does, allegations that agency regulations are invalid in their entirety.

Finally, no party will suffer prejudice as a result of a remand. Under any scenario, there will be another appeal in this case, and the timing of that appeal will determine when this matter is ultimately resolved in this Court. So the proposals put forward by the federal defendants and the Little Sisters will not expedite a resolution; to the contrary, they may delay one by further complicating matters. Moreover, the Commonwealth is not responsible for the timing of the final rules:

[7] https://www.hrsa.gov/womens-guidelines/index.html.

rather, the federal defendants chose to release them while this appeal was pending, thirteen months after issuing the IFRs. Neither the federal defendants nor the Little Sisters moved to expedite the appeal of the district court's preliminary injunction. And, as the Commonwealth explained (Pa. Resp. at 7-8), the Little Sisters are fully protected by a permanent injunction they recently obtained at the conclusion of their separate lawsuit challenging the contraceptive mandate.[8]

CONCLUSION

For the reasons set forth above, the Commonwealth respectfully requests that its motion be granted and that that this case be remanded to the district court.

Respectfully submitted,

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Dated: December 13, 2018

/s/ Michael J. Fischer

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[8] As a result, the Little Sisters are no longer facing any "continued uncertainty." *See* Little Sisters Resp. at 5-6. Rather, the federal government may not enforce the contraceptive mandate against them.

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing document, and any attachments thereto, 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: December 13, 2018 *<u>/s/ Michael J. Fischer</u>*
MICHAEL J. FISCHER