

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

**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 Secretary of the U.S.
Department of Health and Human Services, *et al.*,

Defendants-Appellants,

and

THE LITTLE SISTERS OF THE POOR JEANNE JUGAN
RESIDENCE; MARCH FOR LIFE EDUCATION AND
DEFENSE FUND,

Intervenors-Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

**SUPPLEMENTAL BRIEF OF INTERVENOR-DEFENDANT-
APPELLANT THE LITTLE SISTERS OF THE POOR
JEANNE JUGAN RESIDENCE**

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SUPPLEMENTAL BRIEF

Pursuant to this Court's order of April 29, 2019, Dkt. 131, Defendant-Intervenor-Appellant Little Sisters of the Poor Jeanne Jugan Residence submits this supplemental brief on the question of whether this case is moot in light of a nationwide preliminary injunction issued by the Eastern District of Pennsylvania that enjoined enforcement of the regulations at issue in this appeal. *See Pennsylvania v. Trump*, 351 F. Supp. 3d 791 (Jan. 14, 2019).

ARGUMENT

I. This appeal is not moot.

The nationwide preliminary injunction entered in the Eastern District of Pennsylvania does not moot this appeal, as it is not enforceable in this Circuit.

Under this panel's prior decision in *California v. Azar*, the law of this case and of the Ninth Circuit is that a nationwide injunction is invalid without evidence that harm will occur in locations outside the plaintiff states. 911 F.3d 558, 584 (9th Cir. 2018) ("[W]hile the record before the district court was voluminous on the harm to the plaintiffs, it was not developed as to the economic impact on other states."). In *Pennsylvania v. Trump*, the district court made no finding of harm in any states other

than plaintiffs Pennsylvania and New Jersey. *See* 351 F. Supp. 3d at 833. Rather, the district court held that it must enjoin the Final Rules nationwide because non-citizens who potentially lost contraceptive coverage could attempt to use those states' resources, or because their citizens could be employed by out-of-state employers. *Id.* But the states there did not provide evidence of out-of-state employers who would make use of the Final Rules in the plaintiff states, or of state residents who worked for out-of-state employers who would make use of the Final Rule, and the court found no evidence of harm to anyone in the Ninth Circuit, or in any of the Plaintiff States in this case. *See id.* at 834 ("The States concede, for example, that there is no evidence that any citizen of the States physically commutes to New Mexico, so an injunction that covers the Land of Enchantment appears 'broader than [] necessary.' . . . The same can be said for a host of other states.").

The Pennsylvania injunction, therefore, does not comply with the law of this Circuit and is not enforceable in this Court. *See United States v. AMC Entm't, Inc.*, 549 F.3d 760, 771 (9th Cir. 2008) (citing *Zuniga v. United Can Co.*, 812 F.2d 443, 450 (9th Cir. 1987)) ("[W]hen the Ninth

Circuit or any of its coequal circuit courts issue an opinion, the pronouncements become the law of that geographical area.”).

The Plaintiff States here thus could potentially receive relief from this Court that they do not have elsewhere, particularly since they are not even parties to the Pennsylvania case.¹ Likewise, a ruling against the Plaintiffs in this Court would not interfere with Judge Beetlestone’s order or a Third Circuit order upholding the Pennsylvania injunction.

Furthermore, the Pennsylvania injunction is preliminary, it has been appealed to the Third Circuit, and it is subject to a different determination on the merits in the district court, *see Scheduling Order, Pennsylvania*, No. 17-4540 (E.D. Pa. Apr. 5, 2019), Dkt. 161 (scheduling summary judgment briefing). Even if the Third Circuit upholds the nationwide injunction, it will still be only a temporary injunction, leaving open the question of whether the plaintiffs in this case are entitled to both the temporary and permanent injunctions they have sought.

¹ The Little Sisters maintain that the States cannot receive relief from this Court because they have not provided evidence of a redressable injury from the Final Rules. *See* Br. 22-24. But that is a question of the States’ standing at the outset, not of mootness at a later date.

A decision that this appeal is moot would have severe practical consequences, magnifying the inherent harms of nationwide injunctions that this Court has already recognized. *See California*, 911 F.3d at 583. For example, the first district court judge to grant a nationwide injunction against a regulation could extinguish litigation in every other jurisdiction in the country, rewarding races to the courthouse, encouraging judicial decisions made in haste, depriving nonparties of the chance to present facts and arguments, and preventing both the percolation of splits of authority and “the development of [the] law.” *Id.* This would allow judges and parties to intentionally or unintentionally create “potential for ‘substantial interference with another court’s sovereignty.’” *Id.* at 584 n.9 (citation omitted).

The Pennsylvania district court cited this case as an example of a case that would continue *despite* its nationwide injunction. *Pennsylvania*, 351 F. Supp. 3d at 834 (“the parallel litigation in the Ninth Circuit evidences” that a nationwide injunction does not necessarily foreclose adjudication in other courts). That court, at least, did not intend to interfere with this Court’s proceedings. Because the Pennsylvania injunction cannot bind this Court and cannot be enforced in this Court, the case is not moot

because this Court can determine the propriety of the injunction below and the rights of the parties in this Circuit.

II. If the Court decides that the appeal is moot, it should vacate the injunction and order the complaint dismissed.

Should the panel decide that the nationwide injunction moots this appeal because an order in the States' favor would not grant effective relief to any party, the Court should find the entire case moot and vacate the district court's preliminary injunction and order the complaint dismissed.

Where a case becomes moot for reasons beyond the parties' control, including judicial decisions in other cases, Courts must generally vacate the judgment below with directions to dismiss the case. *See NASD Dispute Resolution, Inc. v. Judicial Council of State of Cal.*, 488 F.3d 1065, 1070 (9th Cir. 2007); 13C Charles Alan Wright et al., Fed. Prac. & Proc. Juris § 3533.10 (3d ed. 2019). Should the Pennsylvania injunction moot this appeal, that is exactly the situation here. To moot the appeal alone would make the district court's ruling, an injunction that applies in 13 states and the District of Columbia, effectively unreviewable

despite the lack of Article III jurisdiction.² Any mootness of the appeal thus applies equally to the preliminary injunction and the case as a whole.

Respectfully submitted this 20th day of May 2019.

/s/ Mark L. Rienzi

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² Four more states, Oregon, Colorado, Michigan, and Nevada, have sought similar relief from the district court.

CERTIFICATE OF COMPLIANCE

I certify that:

This brief complies with the length limits permitted by this Court's order of April 29, 2019, Dkt. 131, and 9th Circuit Rule 32-3.

The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). The brief contains 1,045 words, excluding the parts of the brief exempted under Rule 32(f), and the word count divided by 280 does not exceed 5 pages.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 20, 2019.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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