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.
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,
Intervenor-Defendant-Appellant.

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,

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
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 OF INTERVENOR-DEFENDANT-APPELLANT MARCH FOR LIFE

No. 19-15150

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SUPPLEMENTAL BRIEF OF INTERVENOR-DEFENDANT-APPELLANT MARCH FOR LIFE

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INTRODUCTION

This appeal is not moot, notwithstanding the nationwide injunction entered by a Pennsylvania district court in *Pennsylvania. v. Trump*, 351 F. Supp. 3d 791, 830-35 (E.D. Pa. 2019). That court presumed this case would continue to be litigated even as it entered its injunction. Given the unique circumstances presented by these various state challenges to the Final Rules, that injunction contravenes Supreme Court guidance on the proper scope of injunctions, ignores the strictures of Article III standing, and is as infirm as the nationwide injunction this Court recently vacated in the present case. This Court is therefore not bound by it, and need not stay its hand in resolving this matter.

ARGUMENT

I. The nationwide injunction entered by the Pennsylvania district court conflicts with Supreme Court guidance as to the proper scope of injunctions.

"[I]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Despite this admonition, the Pennsylvania district court erroneously granted relief not only to the parties before it, but to all parties anywhere, on a nationwide basis. Full relief—presuming the plaintiffs were entitled to it—could have been granted to Pennsylvania and New Jersey alone by limiting the injunction to those particular plaintiffs in their respective states. Because there was no class certified, the district court lacked a legal or factual basis to conclude that other jurisdictions not

before it needed or warranted protection. "[T]he only interests at stake [in Pennsylvania] [were] those of the named plaintiffs," so the district court erred in granting a nationwide injunction. *McKenzie v. City of Chicago*, 118 F.3d 552, 555 (7th Cir. 1997) (citing *Baxter v. Palmigiano*, 425 U.S. 308, 310 n.1 (1976)).

II. The nationwide injunction entered by the Pennsylvania district court conflicts with Supreme Court guidance regarding Article III standing.

The nationwide injunction entered by the Pennsylvania district court also clashes with the Supreme Court's standing doctrine. *E.g.*, *Rhode Island v. Massachusetts*, 37 U.S. 657, 718 (1838) (courts have equitable power "to render a judgment or decree upon the rights *of the litigant parties*") (emphasis added); *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (consistent with the principle that "Article III of the Constitution limits the exercise of the judicial power to Cases and Controversies," "a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought"). None of the nonparties to the Pennsylvania case established standing there, and the plaintiffs did not seek to certify a class either. The district court therefore had no idea whether any of them had suffered or would suffer any harm, or if they even desired protection. Granting the nationwide injunction without requiring a particular showing of harm was inconsistent with Article III. *E.g.*, *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 163 (2010) (where parties did "not represent a class," they "could not seek to enjoin . . . an order on the ground that it might cause harm to other parties"); *Zepeda v. U.S. I.N.S.*, 753 F.2d 719, 727 (9th Cir.

1983) ("A federal court may . . . not attempt to determine the rights of persons not before the court.").

III. The injunction entered by the Pennsylvania district court is as infirm as the one this Court recently reversed.

The district court here initially entered a nationwide injunction as to the IFRs. This Court reversed, concluding that the "injunction must be narrowed to redress only the injury shown as to the plaintiff states," especially because no nationwide impact had been established. *California v. Azar*, 911 F.3d 558, 584 (9th Cir. 2018). The same infirmity afflicts the Pennsylvania district court's injunction—it too was issued without the showing of "nationwide impact" this Court has indicated is necessary to warrant such expansive relief. *Id.* This Court should not stay its hand based on such an improvidently granted injunction, especially with the Third Circuit's oral argument in that case scheduled for May 21, 2019, a proceeding that could result in reversal.

IV. The Supreme Court's preference for development of the law, along with concerns for judicial economy, caution against a finding of mootness.

Declaring this case moot would cause the very harms this Court adumbrated in its December 13, 2018 opinion, and it would waste judicial resources. *Azar*, 911 F.3d at 583.

First, a mootness declaration here would prevent "percolation in, and diverse opinions from, state and federal appellate courts," which "may yield a better informed and more enduring final pronouncement." *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting) (cleaned up). Indeed, the Supreme Court has indicated that

such "percolation" is particularly important when courts have to deal with important and complex questions like the ones presented in these parallel challenges implicating the Departments' regulation of the ACA. *United States v. Mendoza*, 464 U.S. 154, 160 (1984) ("Government litigation frequently involves legal questions of substantial importance," and limiting lower courts to "only one final adjudication" "substantially thwart[s] the development of important questions of law by freezing the first final decision rendered on a particular legal issue."). *Accord, e.g.*, *L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011) ("nationwide injunctive relief may be inappropriate where a regulatory challenge involves important or difficult questions of law, which might benefit from development in different factual contexts and in multiple decisions by the various courts of appeals").

Second, a mootness declaration would deprive nonparties to the Pennsylvania case the opportunity "to litigate in other forums." *Azar*, 911 F.3d at 583. Such a result forces affected parties to intervene in faraway proceedings at the risk of not being heard. And it encourages and rewards forum shopping by cementing a resolution of the issue in a single jurisdiction. *Id.*

These harms are particularly acute here, where the Pennsylvania district court justified its decision to issue a nationwide injunction in part by pointing to *this* case as evidence that "percolation" would continue. *Trump*, 351 F. Supp. 3d at 834-35 (*quoting Califano*, 442 U.S. at 701-2) (dismissing the idea that its nationwide injunction would "foreclose[e] adjudication by a number of different courts" because of the "parallel

litigation in the Ninth Circuit"). In other words, the Pennsylvania district court *presumed* courts in other jurisdictions would continue to hear cases despite its nationwide injunction. Absent that presumption, the Pennsylvania district court may very well have concluded that its own nationwide injunction was improper.

Dismissing this case as moot would also waste judicial resources and the parties' time. The order of the Pennsylvania district court is on appeal to the Third Circuit and scheduled for oral argument on May 21, 2019. If this Court orders dismissal based on an error made by a district court some 3000 miles away and the Third Circuit then reverses, the parties and the courts in this circuit would have to start from scratch, wasting the efforts and resources that went into a year and a half of complex litigation. Fortunately, under the circumstances presented by these multiple challenges to the Final Rules, that result is neither compelled nor countenanced by the Supreme Court's guidance regarding the proper scope of injunctions, Article III, or common sense.

CONCLUSION

For the foregoing reasons, this matter is not moot. This Court should therefore continue to exercise jurisdiction and resolve this appeal.

Dated: May 20, 2019

Respectfully submitted,

/s/ Kevin H. Theriot

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CERTIFICATE OF COMPLIANCE

I hereby certify that 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 Garamond font, a proportionally spaced font. I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 1,231 words, excluding the parts of the brief exempted under Rule32(a)(7)(B)(iii), according to the count of Microsoft Word.

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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/ Kevin H. Theriot
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