No. 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 & HUMAN SERVICES, *et al.*,
Defendants-Appellants,

AND

THE LITTLE SISTERS OF THE POOR JEANNE JUGAN RESIDENCE,
Intervenor-Defendant-Appellant,

AND

MARCH FOR LIFE EDUCATION DEFENSE FUND,
Intervenor-Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of California
No. 17-cv-05783-HSG
Hon. Haywood S. Gilliam, Jr., Judge

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May 20, 2019

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INTRODUCTION

The district court entered the preliminary injunction that is the subject of these appeals on January 13, 2019. ER 1-45. The next day, the Eastern District of Pennsylvania entered a nationwide preliminary injunction regarding the same final rules challenged here. *See Pennsylvania v. Trump*, 351 F. Supp. 3d 791 (E.D. Pa. 2019). On April 29, 2019, this Court ordered the parties to address the following questions: (1) Are these appeals moot due to the nationwide injunction issued in Pennsylvania because this Court could not grant effective relief to any aggrieved party? (2) How, if at all, does the fact that the nationwide injunction was issued by a district court outside of this circuit affect the analysis of mootness? *See* Dkt. No. 131. As explained below, the preliminary injunction in *Pennsylvania* does not render these appeals moot.

DISCUSSION

An appeal is moot only "if no live controversy remains at the time the court of appeals hears the case." *NASD Dispute Resolution, Inc. v. Judicial Council of State of Cal.*, 488 F.3d 1065, 1068 (9th Cir. 2007). A live controversy exists if "the appellate court can give the appellant any effective relief in the event that it decides the matter on the merits in his favor." *Id.* (internal citations omitted).

Here, the preliminary injunction entered by the district court below bars the federal defendants from implementing the challenged Exemption Rules within the

geographic boundaries of the plaintiff States. The controversy over the propriety of that injunction remains live. While the separate preliminary injunction in *Pennsylvania* is nationwide in scope, it is the subject of a pending appeal (to which the plaintiffs here are not parties), and could be vacated or narrowed as a result of that appeal. The preliminary injunction at issue here thus remains critical to protecting the States' interests. Conversely, obtaining *vacatur* of this preliminary injunction is necessary for defendants to obtain the relief that they seek—the ability to implement the final rules—because the relief at issue in *Pennsylvania* is preliminary and does not finally resolve the legality of the challenged rules.[1]

This Court and other federal appellate courts frequently resolve appeals of preliminary injunctions in similar postures—*i.e.*, after district courts in other circuits have issued nationwide preliminary injunctions involving the same defendants and addressing the same conduct. For example, district courts in Hawaii and Maryland entered nationwide preliminary injunctions regarding President Trump's Executive Order No. 13,780, which temporarily suspended entry of nationals from several predominantly Muslim countries. Both the Fourth and Ninth Circuits considered the merits of the federal government's appeals from

[1] As discussed below, the central consideration here is whether a court in a parallel action has granted complete and final relief, not where that court sits. The fact that a district court outside of this circuit issued the nationwide injunction in *Pennsylvania* does not alter the mootness analysis. *See* Dkt. No. 131.

those preliminary injunctions and affirmed them in substantial part without raising any mootness concerns. *See Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017), *vacated and remanded by Trump v. Hawaii*, 138 S. Ct. 377 (2017); *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017), *vacated and remanded by Trump v. Int'l Refugee Assistance Project*, 138 S. Ct. 353 (2017). More recently, this Court reviewed and affirmed a nationwide preliminary injunction regarding the rescission of the Deferred Action for Childhood Arrivals program, even though the Eastern District of New York had entered an identical nationwide preliminary injunction. *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 501, 511 (9th Cir. 2018) (citing *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401 (E.D.N.Y. 2018)), *petition for cert. filed*, No. 18-587.

The Court's exercise of jurisdiction in such cases is consistent with longstanding precedent.[2] "The mere pendency of parallel actions seeking the same relief does not of itself moot either action." 13B Wright & Miller, Federal Practice and Procedure § 3533.2.1 (3d ed. 2008). Nor does the entry of provisional relief in

[2] Additionally, this approach fosters the orderly resolution of important legal issues by the courts. If the first district court order granting nationwide provisional relief mooted all parallel actions challenging the same conduct, that would incentivize plaintiffs to seek the broadest possible relief as quickly as possible—while potentially "foreclos[ing] litigation in other districts" and thus "depriv[ing] appellate courts of a wider range of perspectives." *California v. Azar*, 911 F.3d 558, 584, 585 (9th Cir. 2018).

a parallel action. When a court in a parallel action has granted such relief, it is possible that the provisional relief may be vacated on appeal or that the court may decline to grant permanent relief. *See id.* ("Mootness may be denied because the decision is subject to reopening or appeal . . . ."). Because a preliminary injunction does not permanently (or finally) prevent the defendants from undertaking the challenged action, there remains a live controversy between the defendants and plaintiffs who are challenging the same conduct in other forums.[3]

To be sure, it is possible for a pending appeal to become moot if complete and permanent relief is granted in a parallel action. In *NASD Dispute Resolution,* for example, this Court held that the appeal was moot because both this Court and the California Supreme Court, in separate cases, had issued final rulings on the merits that provided the appellants with the same relief that they sought in the appeal. *See*

[3] *See, e.g.*, *North Stevedoring & Handling Corp. v. Int'l Longshoremen's and Warehousemen's Union, Local No. 60*, 685 F.2d 344, 346 (9th Cir. 1982) (appeal of temporary restraining order not mooted by NLRB preliminary injunction preventing the same conduct because, among other things, "[i]f the NLRB ultimately finds that the Teamsters' picket line was not an unfair labor practice, and if the dispute between the Teamsters and Anchorage Cold Storage is not settled, then the Teamsters' picket line may go up again"); *cf. Leroy v. Great Western United Corp.*, 443 U.S. 173, 178 (1979) (injunction "did not moot the case" because the meaning of the statutory provision "will remain open unless and until the District Court's judgment is finally affirmed"); *Dollar Rent A Car of Washington, Inc. v. Travelers Indem. Co.*, 774 F.2d 1371, 1372 n.1 (9th Cir. 1985) (appeal not moot where arbitration panel had ruled on the merits of the dispute but the district court had not yet "confirmed the arbitration panel's decision").

488 F.3d at 1068.[4] Similarly, in *New York v. Heckler*, 719 F.2d 1191 (2d Cir. 1983), Judge Friendly argued in dissent that an appeal from a permanent injunction was moot because a separate district court had entered a judgment permanently enjoining the challenged regulations, which the D.C. Circuit had recently affirmed. *See id.* at 1198 (Friendly, J., dissenting) ("What we are doing is simply rendering an advisory opinion . . . which can have no legal consequences to any of the parties."). The majority disagreed, observing that the plaintiffs in the *New York* suit "actually obtained injunctive relief against the Secretary . . . before she was enjoined in the District of Columbia," and concluding that a live controversy remained between the parties. *Id.* at 1195 n.6. But even if the contrary rationale expressed in the dissent was correct, it focused on the permanent and nearly final nature of the judgment in the District of Columbia case.[5] There is no indication that Judge Friendly's reasoning would apply to a case in the present posture.

CONCLUSION

The present appeals are not moot.

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[4] *See also Lombardo v. Warner*, 481 F.3d 1135, 1137 (9th Cir. 2007) (en banc) (appeal was moot because Oregon Supreme Court struck down challenged state statute); *Enrico's Inc. v. Rice*, 730 F.2d 1250, 1253-1254 (9th Cir. 1984) (similar).

[5] *See Heckler*, 719 F.2d at 1198 (Friendly, J., dissenting) ("The only way by which the Secretary can escape the force of the injunction issued in the District of Columbia is by obtaining a grant of certiorari and reversal by the Supreme Court."); *id.* at 1197 n.1 (the possibility that the District of Columbia permanent injunction would be vacated or modified was "utterly unrealistic").

Dated: May 20, 2019

Respectfully submitted,

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STATEMENT OF RELATED CASES

The States are not aware of any related cases, as defined by Ninth Circuit Rule 28-2, that are currently pending in this Court and are not already consolidated here.

CERTIFICATE OF SERVICE

I certify that on May 20, 2019, I electronically filed the foregoing document with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all other participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: May 20, 2019 *s/ Nimrod Pitsker Elias*

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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