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June 14, 2019

Via CM/ECF

Ms. Patricia S. Dodszuweit
Clerk
United States Court of Appeals
for the Third Circuit
21400 U.S. Courthouse
601 Market Street
Philadelphia, Pennsylvania 19106

Re: *Commonwealth of Pennsylvania et al. v. President, United States of America et al.*, Nos. 17-3752, 18-1253, 19-1129, and 19-1189 (argued May 21, 2019)

Dear Ms. Dodszuweit:

We write in response to the letter filed by the States on June 11, 2019. This Court invited the States to address a specific statement by the government at oral argument when urging vacatur of the nationwide injunction in this case. Namely, the government said that, even if the Ninth Circuit in parallel litigation (*California v. Azar*, No. 19-15118) were to vacate the injunction there on behalf of 14 other States, that decision would be rendered “utterly meaningless” by the nationwide injunction here in the sense that those 14 States “would still all get complete relief” due to this injunction.

Notably, despite taking 20 days and approximately 870 words to file a response, the States do not actually dispute the government’s statement—and indeed, they cannot, because it is obviously correct.

That is the inescapable and pernicious effect of nationwide injunctions: they essentially create a one-way class action, where plaintiffs only need to win one case while the defendant must run the table. *See City of Chicago v. Sessions*, 888 F.3d 272, 298 (7th Cir. 2018) (Manion, J., concurring in the judgment and dissenting in part), *reh'g en banc granted*, Order of June 4, 2018, *reh'g en banc vacated as moot*, Order of Aug. 10, 2018. That alone is reason why this Court should at a minimum narrow the scope of the injunction here, even if it does not vacate the injunction on the merits.

Lacking any real response to the statement this Court asked about, the States instead try to confuse matters. They focus on an exchange during oral argument in the Ninth Circuit. There, in response to the panel's suggestion that it should wait for this Court to rule before issuing a decision, the government urged the panel to decide that case promptly—a position that one of the judges said contradicts the government's argument before this Court that a win on the merits in the Ninth Circuit would be rendered meaningless by a loss on the nationwide injunction in this Court.

But there is no contradiction whatsoever. The government was correct in this Court that a Ninth Circuit win would be meaningless in the sense that the Ninth Circuit plaintiffs would continue to get the benefit of the nationwide injunction here. And the government was correct in the Ninth Circuit that the court there nevertheless should rule promptly. In light of the compliance burdens and threat of contempt, Congress has provided a statutory right to an expedited appeal of preliminary injunctions. 28 U.S.C. §§ 1292(a), 1657(a). Thus, a prompt ruling in the Ninth Circuit matters despite the nationwide injunction here, not just because this Court may (and should) reverse this injunction, but also because a reversal in the Ninth Circuit would at least free the government from its duties under the second and separately enforceable injunction there.

Moreover, wholly apart from the government's interest in a prompt ruling by the Ninth Circuit despite the nationwide injunction here, the judiciary itself has such an interest. The Supreme Court has repeatedly recognized the benefit of having multiple courts weigh in on issues that it may ultimately have to resolve. *See, e.g.*, *United States v.*

Mendoza, 464 U.S. 154, 160 (1984); *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Again, that nationwide injunctions impede such judicial percolation is further reason why they are improper. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring). The nationwide injunction here is apparently causing Ninth Circuit judges to consider exercising their case-management discretion in disregard of both the importance of percolation of legal issues among the appellate courts and the government's statutory right to an expedited appeal of a preliminary injunction, and that distortion of the judicial process underscores why this Court should at the very least narrow the scope of the injunction.[1]

Respectfully submitted,

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Deputy Assistant Attorney General

/s/ Sharon Swingle
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Counsel for the Federal Government

cc: Counsel of record (via CM/ECF)

[1] Going beyond this Court's invitation, the States also reprise their merits argument that a nationwide preliminary injunction is permissible because a final judgment vacating the rules on a nationwide basis purportedly would be appropriate under the APA. But as we explained in our opening brief (at 84-86), while the APA instructs courts to "set aside" unlawful agency action, 5 U.S.C. § 706(2), it does not specify as to whom, and thus does not speak clearly enough to displace the traditional equitable principle that relief should be no broader than necessary to redress the plaintiff's own injuries—a principle, moreover, that the APA expressly reaffirms in its provision concerning preliminary rather than permanent relief, *id.* § 705 ("to the extent necessary to prevent irreparable injury").

CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2019, I electronically filed the foregoing letter with the Clerk of the Court for the United States Court of Appeals for the Third 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/ Sharon Swingle
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