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 & 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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August 28, 2020

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INTRODUCTION

On August 14, 2020, this Court ordered the parties to: (1) address the impact of the Supreme Court's opinion in *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020), on this case, and (2) explain the propriety of remanding the case to the district court to apply the Supreme Court's opinion in the first instance. As explained below, the Supreme Court's opinion resolves the States' statutory authority and procedural claims, but leaves several of the claims unaffected, including the arbitrary and capricious claim, contrary to law claims, and constitutional claims. Given the current posture of the case and the claims that remain pending, the case should be remanded to the district court so that this case may be resolved on the merits.

BACKGROUND

On December 18, 2018, Plaintiff States filed the operative second amended complaint challenging the interim final rules (IFRs) and the final Exemption Rules. ER 129-196. The States asserted that both the IFRs and the Exemption Rules violate the Administrative Procedure Act (APA) because they were procedurally deficient, exceeded defendants' statutory authority, were arbitrary and capricious, were contrary to Section 1554 of the ACA (42 U.S.C. § 18114(1), (2)) and Section 1557 of the ACA (42 U.S.C. § 18116), and violate the Establishment Clause and

the Equal Protection Clause. ER 129-196; *see also* Dkt. No. 174 at 9-15.[1] On December 19, 2018, the States promptly moved for a preliminary injunction to halt implementation of the Rules. Defendants filed the full 805,099-page administrative record on January 7, 2019—a mere four days before the motion hearing. Dkt. Nos. 206, 169.

On January 13, 2019, the district court issued a preliminary injunction, concluding that the States were likely to succeed on their claims that the Exemption Rules were not authorized by either the Affordable Care Act (ACA), ER 21-24, 38-39, or the Religious Freedom Restoration Act, *id.* at ER 24-37; and were arbitrary and capricious due to the agencies' failure to provide a reasoned explanation for disregarding facts supporting their prior policy, *id.* at 37-38. The court did not address the States' additional claims that the Exemption Rules were procedurally invalid, contrary to law, or unconstitutional.

In issuing its decision, the district court highlighted the expedited nature of its preliminary injunction, noting that "[a]s this case proceeds to a merits determination, the Court will have to determine how to develop the relevant record" and "the parties' positions on the legal issues . . . will need to be laid out in substantially greater detail for the Court to sufficiently address the merits of this

[1] All court docket (Dkt.) citations are to the district court's docket.

claim on a full record in the next stages of the case." ER 37-38. In granting preliminary relief, the district court ordered the parties to devise a "plan for expeditiously resolving this matter on the merits." ER 45. Neither defendants nor intervenors sought to stay the preliminary injunction, either in this Court or in the district court.

The parties submitted a proposed schedule (Dkt. No. 273), and the district court scheduled dispositive cross-motions to be completed by August 15, 2019. Dkt. No. 275. In accordance with this schedule, the parties fully briefed all legal issues in cross-motions for summary judgment. *See, e.g.*, Dkt. Nos. 311 (States' Motion for Summary Judgment), 366 (Defendants' Motion to Dismiss, Motion for Summary Judgment), 368 (March for Life's Motion to Dismiss, Motion for Summary Judgment), 370 (Little Sisters' Motion to Dismiss, Motion for Summary Judgment), 385 (States' Opposition to Defendants' and Intervenors' Motions), 388 (Defendants' Reply), 389 (Little Sisters' Reply), 391 (March for Life's Reply), and 392 (States' Sur-Reply).

Before the district court ruled on the pending dispositive cross-motions, this Court issued its decision affirming the preliminary injunction. *California v. U.S. Dep't of Health & Human Servs.*, 941 F.3d 410 (9th Cir. 2019). This Court held that the agencies likely lacked statutory authority to issue the Exemption Rules, and thus declined to reach the district court's further conclusion that the Exemption

Rules were likely arbitrary and capricious. *Id*. at 424-431. This Court stated that it would "reach the full merits of this issue, if necessary, upon review of the district court's decision on the permanent injunction." *Id*. at 431. Defendants and intervenors filed petitions for writs of certiorari.

On January 17, 2020, the Supreme Court granted petitions for writs of certiorari in the related cases, *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, No. 19-431, and *Trump v. Pennsylvania*, No 19-454. In light of this development, the district court ordered the underlying action stayed and held all pending motions in abeyance. Dkt. No. 411.

On July 8, 2020, the Supreme Court issued its decision in *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania* and *Trump v. Pennsylvania*, 140 S. Ct. 2367 (2020). The Court held that the ACA "gives [the Health Resources and Services Administration] broad discretion to define preventive care and screenings and to create religious and moral exemptions." *Id*. at 2381. The Court further held that the Exemption Rules are not procedurally invalid. *Id*. at 2384-86. The Court did not reach the issue of whether the Exemption Rules are arbitrary and capricious. *See id*. at 2387 (Alito, J., concurring) ("[w]e now send these cases back to the lower courts, where the [States] are all but certain to pursue their argument that the current rule is flawed on yet another ground, namely, that it is arbitrary and capricious and thus violates the APA"); *id*. at 2398, 2399 (Kagan, J., concurring in

judgment) (noting that the issue of whether the Rules are arbitrary and capricious "is now ready for resolution, unaffected by today's decision," and explaining that several "aspects of the Departments' handiwork may [] prove arbitrary and capricious"). Nor did the Court decide whether the Rules are contrary to Sections 1554 or 1557 of the ACA, or violate any constitutional provision.

On July 9, 2020, the Supreme Court granted the petitions for writs of certiorari in this case, vacated the judgment, and remanded the case to this Court for further proceedings. *HHS v. California*, 2020 WL 3865243 (July 9, 2020); *Little Sisters of the Poor v. California*, 2020 WL 3865245 (July 9, 2020); *March for Life v. California*, 2020 WL 3865244 (July 9, 2020).[2]

On the same day, the district court directed the parties to meet and confer and file a joint status report "indicating how they intend to proceed in this action, including any requested briefing schedule, following the Supreme Court's opinion." Dkt. No. 416. In accordance with the district court's order, the parties filed a status report wherein they agreed "that supplemental briefing addressing the import of the Supreme Court's decision and its impact on Plaintiffs' claims and the pending dispositive motions is appropriate." Dkt. No. 421. The parties further agreed that "[o]nce the Ninth Circuit has remanded the matter to [the district

[2] *See* https://www.supremecourt.gov/orders/courtorders/070920zor_i425.pdf.

court], the parties will promptly meet and confer and propose a supplemental briefing schedule within five business days." *Id*.

The States do not plan to seek another preliminary injunction. The States plan to proceed to a resolution on the merits, and expect that the district court will promptly issue a final judgment addressing all remaining claims.

DISCUSSION

1. The Supreme Court's recent opinion resolves two of the States' claims—that the Exemption Rules exceed defendants' statutory authority and are procedurally invalid under the APA. The Supreme Court concluded that HRSA possesses "broad discretion to define preventive care and screenings and to create religious and moral exemptions," 140 S. Ct. at 2381, and that the Exemption Rules are not procedurally invalid, *id*. at 2384. Accordingly, the States' analogous claims are no longer viable. The States' remaining claims, namely, that the Rules are arbitrary and capricious, contrary to law, and violate certain constitutional provisions, are unaffected by the decision. Because the district court's preliminary injunction order was premised in part on the States' statutory authority claim, this Court should remand to the district court to determine in the first instance what, if anything, still remains of that preliminary injunction order. *Clark v. Chappell*, 936 F.3d 944, 971-72 (9th Cir. 2019) (remanding for the "benefit of the district court's analysis" on a new legal standard).

2. The case should be remanded to the district court to apply the Supreme Court's opinion in the first instance given the posture of this case and the States' remaining claims.

The current posture of this case supports remand. First, the district court should determine in the first instance what remains of its original preliminary injunction order in light of the Supreme Court's opinion. *Shirk v. U.S. ex rel. Dep't of Interior*, 773 F.3d 999, 1007-08 (9th Cir. 2014) (remanding case where an argument has been "briefed only cursorily before this Court" and to allow the district court to apply the proper standard "in the first instance with the benefit of full briefing"). Such a determination may, however, prove unnecessary given that the court is poised to rule on the underlying merits of this case. Pending before the district court are the parties' dispositive cross-motions. The parties have already met and conferred regarding how to proceed toward a judgment on the merits in an expeditious manner while also addressing the import of the Supreme Court's recent decision. In contrast, these consolidated interim appeals stem from the district court's preliminary injunction. Allowing the district court to proceed toward a final judgment on all outstanding issues would be judicially efficient. Second, the States do not plan to seek another preliminary injunction. The States anticipate that the district court can rule on the remaining issues in a prompt manner given

that the merits briefing is complete, although the parties agree that some supplemental briefing is necessary to address the Supreme Court's decision.

The claims that remain following the Supreme Court's decision also support remand. With regard to the States' remaining arbitrary and capricious claims, courts of appeals typically "benefit from development of the record" and "from [a] decision by the district court in the first instance." *Planned Parenthood of Greater Wash. & N. Idaho v. U.S. Dep't of Health & Human Servs.*, 946 F.3d 1100, 1114 (9th Cir. 2020). As this Court has explained, determining whether an agency action was arbitrary and capricious "require[s] intensive factfinding and fact application." *Id*. at 1115. "The district court must determine which facts the agency had before it, which factors the agency assessed, which conclusions the agency made, and whether the agency provided a reasoned explanation for the change, among many considerations." *Id*. (citations omitted).

In this case, the district court has yet to render final determinations on these factual issues with regard to the States' arbitrary and capricious arguments. For example, the court will have to determine whether defendants failed to provide a reasonable explanation for their policy reversal (Dkt. No. 311 at 37); whether defendants properly considered the serious reliance interests at stake (*id*. at 38-39); whether defendants disregarded extensive record evidence to wrongly claim that the contraceptive mandate has not yielded benefits (*id*. at 41-43); whether

defendants failed to reasonably account for the costs of the Rules (*id*. at 43); whether defendants overlooked Congress's intent that HRSA assess the efficacy and safety of preventive care measures (*id*. at 43-44); whether defendants' justifications are implausible because the Exemption Rules are not tailored to address the purported problems that the Rules identify (*id*. at 44-46); whether defendants failed to respond to comments from medical associations describing the medical consensus about contraceptives' efficacy (*id*. at 46-48); whether defendants failed to respond to comments outlining the negative financial and health impacts of unintended pregnancy (*id*. at 48-50); and whether defendants failed to respond to comments concerning the Exemption Rules' impact on patients experiencing domestic violence (*id*. at 50-51). Permitting the district court to address these factual issues in the first instance, using the administrative record, would benefit both this Court and the parties.

In addition, at no point in these proceedings has either the district court or this Court ruled on the States' remaining contrary-to-law claims, including the States' argument that the Exemption Rules violate Section 1554 and Section 1557 of the ACA. *Planned Parenthood of Greater Wash. & N. Idaho*, 946 F.3d at 1110 ("In general, an appellate court does not decide issues that the trial court did not decide."). Like the arbitrary and capricious claims, the Section 1554 claim involves review of the underlying administrative record, and will necessitate

factual findings by the district court. Specifically, the court will need to determine whether the Exemption Rules create "any unreasonable barriers" to medical care or "impede[] timely access to health care services." 42 U.S.C. § 18114(1), (2); *see, e.g.*, Dkt. No. 311 at 35-36 (citing record evidence to support the States' position that the Exemption Rules will result in women losing full and equal healthcare coverage, which necessarily will create additional barriers for women seeking healthcare); Dkt. No. 385 at 40-41. Thus, like the arbitrary and capricious claims, it would be prudent to allow the district court the opportunity to evaluate these fact-specific claims and the administrative record in the first instance.

As to the States' Section 1557 claim, this section of the ACA states that an "individual shall not . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity" on the basis of sex. 42 U.S.C. § 18116(a); 20 U.S.C. § 1681(a). As the States explained before the district court, the Exemption Rules violate Section 1557 because they permit employers to exclude women from full and equal participation in their employer-sponsored health plan, deny women full and equal healthcare benefits, and license employers to discriminate on the basis of sex. Dkt. No. 311 at 36-37. This claim, too, should proceed in the district court to allow the court to address this issue in the first instance.

As to the States' remaining constitutional claims, these claims should also proceed on remand, particularly given that as "a fundamental rule of judicial restraint, [the court] must consider nonconstitutional grounds for decision before reaching any constitutional questions." *In re Ozenne*, 841 F.3d 810, 814 (9th Cir. 2016) (internal quotation marks and citations omitted).

CONCLUSION

The case should be remanded to the district court for further proceedings consistent with the Supreme Court's decision in *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*.

Dated: August 28, 2020

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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.