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.

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,

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 FOR THE FEDERAL APPELLANTS

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STATEMENT

1. In this case, California and several other States challenge rules exempting employers with religious or moral objections to the contraceptive-coverage mandate, a regulatory requirement adopted by the Departments of Health and Human Services (HHS), Labor, and the Treasury pursuant to the Patient Protection and Affordable Care Act. Holding that the States were likely to succeed on, or at a minimum had raised serious questions regarding, their claim that neither the Affordable Care Act nor the Religious Freedom Restoration Act (RFRA) authorized the rules, the district court issued a preliminary injunction barring implementation of the rules in the plaintiff States. *See California v. HHS*, 351 F. Supp. 3d 1267, 1284-97, 1301 (N.D. Cal. 2019). The district court also concluded that the States were likely to prevail on their claim that the agencies failed to provide a reasoned explanation for their change in policy. *See id.* at 1296.

This Court affirmed the preliminary injunction, concluding that the district court did not abuse its discretion in determining that the agencies likely lacked authority to issue the rules. *See California v. HHS*, 941 F.3d 410, 424, 431 (9th Cir. 2019). The Court found it

unnecessary to reach the district court's holding that the States were likely to prevail on their claim that the agencies failed to provide a reasoned explanation for their change in policy. "We will reach the full merits of this issue, if necessary," the Court stated, "upon review of the district court's decision on the permanent injunction." *Id.* at 431.

2. Pennsylvania and New Jersey brought a separate challenge to the rules. The district court in that case issued a preliminary injunction barring implementation of the rules on a nationwide basis, *see Pennsylvania v. Trump*, 351 F. Supp. 3d 791 (E.D. Pa. 2019), and the Third Circuit affirmed, *see Pennsylvania v. President*, 930 F.3d 543 (3d Cir. 2019).

The Supreme Court reversed. *See Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020). The Court concluded, "[u]nder a plain reading of the statute," that the Affordable Care Act gives the Health Resources and Services Administration (HRSA), a component of HHS, "broad discretion" not only to define the preventive care and screenings that must be covered under 42 U.S.C. § 300gg-13(a)(4) but also "to create the religious and moral exemptions" from such coverage requirements. *Id.* at 2381. Because the Affordable

Care Act "provided a basis for [the] exemptions," the Court found it unnecessary to decide whether RFRA independently authorized the religious exemption. *Id.* at 2382. But the Court rejected any argument that the agencies "could not even consider RFRA as they formulated the religious exemption from the contraceptive mandate," *id.* at 2382-83, observing that if the agencies had not "look[ed] to RFRA's requirements or discuss[ed] RFRA at all," they "would certainly be susceptible to claims that the rules were arbitrary and capricious for failing to consider an important aspect of the problem," *id.* at 2384.

The Supreme Court also rejected the argument that the rules were procedurally invalid on the ground that they were "preceded by a document entitled 'Interim Final Rules with Request for Comments,' not a document entitled 'General Notice of Proposed Rulemaking.'" *Little Sisters*, 140 S. Ct. at 2384. The interim rules' request for comments, the Court held, "readily satisfie[d]" the Administrative Procedure Act's notice-and-comment requirements. *Id.*; *see also id.* at 2385-86.

3. Following its decision in *Little Sisters*, the Supreme Court granted the petitions for certiorari in this case, vacated the judgment,

and remanded for further consideration in light of *Little Sisters*. *See HHS v. California*, No. 19-1038, ___ S. Ct. ____, 2020 WL 3865243 (July 9, 2020) (mem.). This Court then directed the parties to "submit simultaneous supplemental briefs addressing the impact of the Supreme Court's opinion on this case, and explaining the propriety of remanding the case to the district court to apply the Supreme Court's opinion in the first instance."

ARGUMENT

This Court Should Remand to the District Court to Decide the Merits of the States' Remaining Claims

In light of the Supreme Court's decision in *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020), this Court should remand to the district court to decide the merits of the States' remaining claims. In *Little Sisters*, the Supreme Court held that the agencies had statutory authority to create the religious and moral exemptions at issue in this case. The district court's preliminary injunction thus cannot be upheld on the grounds on which it was previously upheld by this Court. Instead, the validity of the preliminary injunction turns on the merits of the district court's additional holding

that the States were likely to prevail on their claim that the agencies failed to provide a reasoned explanation for their change in policy.

This Court previously declined to reach that issue, however, explaining that the Court would address it, "if necessary, upon review of the district court's decision on the permanent injunction." *California v. HHS*, 941 F.3d 410, 431 (9th Cir. 2019). In light of that statement, we suggest that this Court remand for the district court to consider the States' "arbitrary and capricious" claim (and any other remaining claims) in the context of the parties' pending motions for summary judgment, which have been fully briefed and taken under submission by the district court. This approach would also permit the district court to consider the effect of the Supreme Court's ruling in *Little Sisters* on the plaintiff States' claim.

Indeed, even absent remand, the district court has jurisdiction to decide the pending motions for summary judgment. Judicial economy would thus be best served by the district court's prompt assessment of the States' "arbitrary and capricious" claim on summary judgment—particularly given the "limited scope of [this Court's] review" on appeal of the preliminary injunction. *California*, 941 F.3d at 431 (emphasizing

that "review here is limited to abuse of discretion" and explaining that "[a]t this stage, mere disagreement with the district court's conclusions is not sufficient reason for us to reverse the district court's decision regarding a preliminary injunction" (internal quotation marks and brackets omitted)). At this stage of the proceedings, judicial economy counsels in favor of remand to the district court.

CONCLUSION

For the foregoing reasons, this Court should remand for the district court to consider the merits of the States' remaining claims in the context of the pending motions for summary judgment.

Respectfully submitted,

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August 28, 2020

*The Acting Assistant Attorney General is recused in this matter.

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

I hereby certify 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 Century Schoolbook, a proportionally spaced font. I further certify that, pursuant to 9th Cir. R. 32-3, this brief complies with the page limit in this Court's order dated August 13, 2020, because this brief contains 1,073 words, excluding the parts of the brief exempted under Rule 32(f), according to the count of Microsoft Word, and the word count divided by 280 does not exceed 15 pages.

/s/ Karen Schoen
Karen Schoen

CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2020, 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/ Karen Schoen
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