IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Commonwealth of Pennsylvania, *Plaintiff-Appellee*, v. President United States of America et al., *Defendants-Appellants*, and Little Sisters of the Poor, Saints Peter and Paul Home, *Intervenor-Defendant-Appellant*.	Nos. 17-3752 & 18-1253

MOTION TO GOVERN FURTHER PROCEEDINGS

Plaintiff-Appellee the Commonwealth of Pennsylvania respectfully submits this motion to govern further proceedings in the above matter. This appeal challenges the district court's entry of a preliminary injunction prohibiting the enforcement of two Interim Final Rules (IFRs) issued by the Defendant-Appellant federal agencies. During the pendency of the appeal, the federal defendants issued two final rules that will supersede the IFRs as of January 14, 2019. As a result, this appeal will become moot on that date.

In light of these changed circumstances, the Commonwealth respectfully submits that this case should be remanded to the district court. A remand will permit the district court to consider the legality of the final rules in the first instance, which would then allow this Court to more effectively address all of the issues presented by this case at one time. In the alternative, the Commonwealth requests that the Court maintain the current stay until the final rules become effective on January 14, 2019, at which time this appeal would be subject to dismissal as moot.

BACKGROUND

The Women's Health Amendment to the Patient Protection and Affordable Care Act (ACA), as implemented by the Health Resources and Services Administration, mandates that covered health care plans provide contraceptive services, free of cost-sharing, for the women they insure. 42 U.S.C. § 300gg-13(a)(4); *see also* Health Resources & Services Administration, *Women's Preventive Service Guidelines* (2011 & 2016).[1] On October 6, 2017, the federal defendants issued the two IFRs, which created broad exemptions from this mandate. The first, the "Religious Exemption IFR" allowed non-governmental

[1] https://www.hrsa.gov/womens-guidelines/index.html#2 (2011 guidelines); https://www.hrsa.gov/womens-guidelines-2016/index.html (2016 guidelines).

entities with religious objections to contraception—including publicly traded corporations—to deny coverage for contraceptive services to their employees or students.[2] The second, the "Moral Exemption IFR" allowed nonprofits, closely-held for profit entities, and institutions of higher education to do the same based on moral objections.[3] The IFRs were issued without notice and comment and went into effect immediately.

On October 11, 2017, the Commonwealth filed its complaint in this matter, alleging that the IFRs were unlawfully issued in violation of the Administrative Procedure Act (APA) and other statutory and constitutional provisions. JA 82-114. The Commonwealth further alleged that many Pennsylvania women who were denied contraceptive coverage as a result of the IFRs would be forced to rely on government-funded programs, causing the Commonwealth irreparable harm. JA 106-08. The Commonwealth moved for a preliminary injunction of the IFRs, which the district court granted on December 15, 2017. JA 7-52. The court found that the federal defendants had issued the IFRs without notice and comment in

[2] *Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act*, 82 Fed. Reg. 47792 (Oct. 13, 2018).

[3] *Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act*, 82 Fed. Reg. 47838 (Oct. 13, 2018).

violation of the APA, and further found that the exemptions themselves were arbitrary, capricious, and contrary to the requirements of the ACA. *Id.*

The federal defendants and Intervenor-Defendant Little Sisters of the Poor, Saints Peter and Paul Home (the "Little Sisters") both appealed from the grant of the preliminary injunction, and the appeals were subsequently consolidated. JA 1, 4. The federal defendants subsequently moved for a stay of the district court proceedings while the appeal proceeded, which was granted. JA 80. On November 7, 2018, while the consolidated appeals were pending—and more than 13 months after issuance of the IFRs—the federal defendants issued two new rules that "finalize" the IFRs. These new rules were published in the Federal Register on November 15, 2018, and are scheduled to go into effect January 14, 2019.[4]

The final rules "adopt as final" much of the regulatory language of the IFRs, but make certain changes in response to public comments. *See, e.g.*, 83 Fed. Reg. at 57,537; *id.* at 57,556. As a result, they are necessarily based on a different administrative record that includes, in part, some 110,000 total public comments. 83 Fed. Reg. at 57,540; *id.* at 57,596. Notably, the final rules project that—despite

[4] *Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act*, 83 Fed. Reg. 57,536 (Nov. 15, 2018); *Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act*, 83 Fed. Reg. 57,592 (Nov. 15, 2018)

making few changes to the substance of the IFRs—they will cause more than twice as many women to lose contraceptive coverage. *Compare* 82 Fed. Reg. at 47,821 (estimating that 31,700 women will lose contraceptive coverage due to employers that claim the religious exemption IFR), *with* 83 Fed. Reg. at 57,540 (estimating that 70,500 women will lose contraceptive coverage due to employers that claim the religious exemption final rule).

On November 9, 2018, the federal defendants and the Commonwealth jointly moved to stay the briefing schedule in this appeal to allow the parties to file motions to govern further proceedings in light of the issuance of the final rules. This Court granted the motion and stayed the briefing schedule, pending the filing of such motions. On November 26, 2018, the Commonwealth filed a motion with the district court to lift the stay so that it could seek leave to file a supplemental complaint and a new motion for a preliminary injunction challenging the final rules. The district court has not yet acted on that motion.

DISCUSSION

When the final rules become effective, this appeal will be moot. "Generally, an appeal will be dismissed as moot when events occur during its pendency which prevent the appellate court from granting any effective relief." *Gen. Elec. Co. by Levit v. Cathcart*, 980 F.2d 927, 934 (3d Cir. 1992) (cleaned up). These events include the issuance of a subsequent rule that supersedes a challenged rule or

regulation. *E.g.*, *Ass'n of Am. Physicians & Surgeons v. Sebelius*, 746 F.3d 468, 473 (D.C. Cir. 2014); *Ctr. For Biological Diversity v. Lohn*, 511 F.3d 960, 963–64 (9th Cir. 2007).

The injunction on appeal in this case prevents the agencies from enforcing the IFRs. As of January 14, 2019, the IFRs will be superseded by the final rules. Briefing in this appeal is not complete, so it is highly unlikely that it could be submitted to a panel of this Court—much less decided—before that date. Moreover, the Commonwealth intends to seek injunctive relief in the district court to prevent the implementation of the final rules. Given that the district court's ruling on that request will almost certainly be appealed to this Court, a decision in the current appeal will not be the final word in this matter. Under these circumstances, the best course of action is to remand this case to the district court, with the current injunction in place, so that that court may consider the legality of the final rules and, if warranted, issue a new injunction or modify the current one—which will then allow this Court to address all of the issue raised in this case in a single appeal.

Remand is further warranted because the final rules raise several new issues, which are best addressed by the district court in the first instance. For instance, the federal defendants will likely contend that they have cured their failure to follow the APA's notice-and-comment procedures by accepting comments prior to issuing

the final rules.[5] The Commonwealth disagrees, as this Court has recognized that "the provision of post-promulgation notice and comment procedures cannot cure the failure to provide such procedures prior to the promulgation of the rule at issue." *Nat. Res. Def. Council, Inc. v. EPA*, 683 F.2d 752, 767–68 (3d Cir. 1982). Regardless, this issue is best addressed by the district court in the first instance.

Furthermore, the APA requires federal agencies to "consider and respond to significant comments received during the period for public comment," and provide a statement of the "basis and purpose" of each final rule. *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015) (citing 5 U.S.C. § 553(c); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)). In this statement, the agency must answer all "vital questions[] raised by comments which are of cogent materiality." *United States v. Nova Scotia Food Prod. Corp.*, 568 F.2d 240, 252 (2d Cir. 1977). So even if the federal defendants can successfully argue that they complied with their notice-and-comment obligations by accepting comments after issuing the IFRs, the final rules may still be challenged on the ground that they failed to adequately address the comments they received. Determining whether an

[5] In a filing in a separate case challenging the IFRs, the federal defendants made a similar argument. *See* Supplemental Brief for the Federal Appellants at 6, Dkt. No. 125, *California et al. v. Azar et al.*, No 18-15144 (9th Cir. Nov. 16, 2018).

agency has complied with this obligation necessarily requires a review of the administrative record, which is best initially performed by the district court.

Finally, both the federal defendants and the Little Sisters have argued that the Commonwealth lacks standing and that the IFRs will not cause irreparable harm. In rejecting these arguments, the district court relied in part on the federal defendants' assertion that the IFRs would cause "at least 31,700 women to lose contraceptive coverage." JA 20, 44-45 (citing 82 Fed. Reg. at 47,821). But the final rules now estimate that more than twice this number—at least 70,500 women—will lose coverage. 83 Fed. Reg. at 57,578.[6] So the district court's findings were based on a record that, by the federal defendants' own admission, actually underestimated the harm to be caused by the IFRs. Remand will allow for consideration of the full administrative record and allow the district court—and, ultimately, this Court—to arrive at a more complete assessment of the harm caused by the rules.

CONCLUSION

For the reasons set forth above, the Commonwealth respectfully requests that this case be remanded to the district court. In the alternative, the

[6] To explain this discrepancy, the federal defendants assert that a "closer examination of the data" warranted the higher number. 83 Fed. Reg. at 57,576.

Commonwealth requests that the Court maintain the current stay until the final rules become effective on January 14, 2019, at which time this appeal will be subject to dismissal.

Respectfully submitted,

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Dated: November 28, 2018

/s/ Michael J. Fischer

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CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing document, and any attachments thereto, to be electronically filed with the Clerk of the Court for the U.S. Court of Appeals for the Third Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: November 28, 2018 */s/ Michael J. Fischer*
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