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June 11, 2019

Patricia S. Dodszuweit
Clerk of Court
U.S. Court of Appeals for the Third Circuit
21400 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106-1790

By CM/ECF

Re: *Commonwealth of Pennsylvania & State of New Jersey v. President United States of America et al.*, Nos. 17-3752, 18-1253, 19-1129 & 19-1189 (Argued May 21, 2019) (McKee, Shwartz, Fuentes)

Dear Ms. Dodszuweit:

Appellees Pennsylvania and New Jersey respectfully respond to the Court's request for additional briefing addressing how parallel litigation in the Ninth Circuit challenging the Rules at issue in this case affects the question of whether the district court abused its discretion in entering a nationwide injunction.¹ Argument in the Ninth Circuit was held on June 6, 2019.

In that litigation, California and four other states initially sued to block the IFRs, and the district court entered a nationwide preliminary injunction. *California v. HHS*, 281 F. Supp. 3d 806, 832 (N.D. Cal. 2017). The Ninth Circuit affirmed the decision on the merits, but limited the scope of the injunction. *California v. Azar*, 911 F.3d 558, 585 (9th Cir. 2018). It found that the "present record" did not justify a nationwide injunction, and specifically faulted the district court's decision to stay the case pending appeal. *Id.* at 583-84. Plaintiffs in that case—now joined by nine other states—then sought a new injunction of the Final Rules. That motion was

¹ The States have endeavored to keep this letter as brief as possible while fully responding to the Court's request. To the extent this submission is subject to the word limitation in Rule 28(j) for citations of supplemental authorities, the States respectfully seek leave to exceed that limitation.

granted, and the district court entered an injunction limited to the plaintiff states. *California v. HHS*, 351 F. Supp. 3d 1267, 1300-01 (N.D. Cal. 2019). Defendants and Intervenors subsequently appealed, and the case was argued this past week.

In this case, the government pointed to the pending appeal in the Ninth Circuit in urging the Court to limit the scope of the injunction entered by the district court. Specifically, the government argued that affirmance of the nationwide injunction here would render a potential reversal by the Ninth Circuit “completely and utterly meaningless.” Arg. Tr. 83:19-20 (May 21, 2019). The Ninth Circuit panel asked about this assertion, questioning the government at length as to why the panel should not wait for this Court to rule before issuing a decision, given that, by the government’s own argument, affirmance of the injunction here would render that case “meaningless.”² The government responded that, even if this Court affirms the nationwide injunction, it “would still need relief [in the Ninth Circuit],” leading Judge Graber to observe, “That contradicts what counsel said to the Third Circuit. Flatly contradicts it.”³

The apparent contradiction in the government’s arguments simply underscores that each case must be evaluated on its own facts.⁴ Where a district court exercises its discretion to fashion an injunction it determines to be necessary to grant the plaintiffs complete relief, that injunction should not be subsequently limited based on potential developments in separate litigation involving different plaintiffs. The district court here conducted a thoughtful and detailed examination of the relevant considerations (including those that led the Ninth Circuit to limit the scope of the initial injunction) and determined that only a nationwide injunction would grant the parties complete relief. J.A. 115-123. That decision was correct, and certainly not an abuse of discretion.⁵ In fact, the government rests its argument

² Video of Oral Argument, *California v. Little Sisters of the Poor*, No. 19-15072, https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000015818, at 5:20-9:00 (9th Cir. June 6, 2019).

³ *Id.* at 6:25-7:30.

⁴ In the district court, the government argued that a nationwide injunction would unfairly grant *Massachusetts* relief, since its challenge to the Rules had been dismissed. J.A. 795 (arguing that a nationwide injunction would “give[e] someone a win they didn’t get when they litigated in a court in their district”). It repeated that argument in its opening brief here. *See* Br. for Appellant 81 (Feb. 15, 2019). The dismissal of *Massachusetts*’ lawsuit was subsequently reversed by the First Circuit. *Massachusetts v. HHS*, 923 F.3d 209, 214 (1st Cir. 2019).

⁵ As explained in the amicus brief submitted by the Public Interest Law Center and Affiliated Organizations (Mar. 25, 2019), nationwide injunctions are

to the contrary largely on assertions it did not raise before the district court, *see* Br. for Appellants 82-83, while failing to confront many of the considerations that the court did take into account, *see, e.g.*, J.A. 120 (citing fact that, each year, “Pennsylvania takes in 32,000 out-of-state students alone”).

While this appeal has proceeded, the States have moved expeditiously for summary judgment in the district court and asked that court to vacate the Rules, as is the ordinary remedy for unlawful regulations. *Council Tree Communications v. FCC*, 619 F.3d 235, 258 & n.13 (3d Cir. 2010); *see also* J.A. 117. Affirming the preliminary injunction will maintain the status quo only until the district court rules on the States’ motion. But if the injunction were narrowed in some way—and the government still has not explained *how* it could practically be narrowed while fully protecting Pennsylvania and New Jersey—the Rules would go into effect in many states, only to be revoked later if the summary judgment motion is granted. Such a result would be far more disruptive than leaving the current injunction in place while this case proceeds.

For these reasons, the district court’s injunction should be affirmed.

Respectfully submitted,

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cc (by CM/ECF): Counsel of Record

well within the equitable discretion of district courts and consistent with the longstanding traditions of American and English jurisprudence.

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing document 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: June 11, 2019

/s/ Michael J. Fischer
MICHAEL J. FISCHER