Nos. 18-15144, 18-15166, 18-15255

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 ACTING SECRETARY OF THE U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, *et al.*, *Defendants-Appellants*,

THE LITTLE SISTERS OF THE POOR JEANNE JUGAN RESIDENCE, MARCH FOR LIFE EDUCATION AND DEFENSE FUND, *Intervenors-Defendants-Appellants*,

On Appeal from the United States District Court
for the Northern District of California

BRIEF OF ADMINISTRATIVE LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS

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INTEREST OF AMICI CURIAE

Amici are professors of administrative law and related public law subjects at institutions across the United States.[1] Amici have extensive experience studying and teaching the Administrative Procedure Act and doctrines of administrative law, including the doctrines implicated by this case. They share a scholarly interest in the proper application of procedural and substantive limits on federal agency action. With this brief, they seek to bring to the Court's attention settled principles of administrative law that are central to the resolution of this appeal.

Amici submit this brief solely on their own behalf and not as representatives of their universities. The names of amici are listed in the Appendix, with institutional affiliations provided for purposes of identification.

SUMMARY OF ARGUMENT

This case involves the type of administrative agency error that regularly leads reviewing courts to enjoin agency action. In promulgating the new Religious Exemption and Moral Exemption Rules, the Departments of Health and Human Services, Treasury, and Labor (the "Departments") acted contrary to the procedures delineated by the Administrative Procedure Act ("APA") and to basic requirements for reasoned decision making. Courts have regularly set aside

[1] The brief is submitted pursuant to Fed. R. App. P. 29, and Ninth Circuit Rule 29(a)(2). All parties have consented to the submission of amicus curiae briefs in this case.

agency action in the face of the sort of garden-variety violations of administrative law that occurred here.

Together, the Religious Exemption Rule and the Moral Exemption Rule dramatically expand the availability of exemptions from the contraceptive coverage requirement promulgated under the Patient Protection and Affordable Care Act ("ACA"). As the "proverbial exception that swallows the rule," these new exemptions will allow employers to stop providing contraceptive coverage to women and to "impose [their own] normative construct[s] regarding a woman's place in the world" based upon nothing more than a "sincerely held moral conviction." *Pennsylvania v. Trump*, 281 F. Supp. 3d 553, 577 (E.D. Pa. 2017). Thus, the Departments have attempted to undermine the contraceptive coverage requirement by expanding the existing religious exemption and adopting an entirely new moral exemption.

Before promulgating these sweeping exemptions from the contraceptive coverage requirement, the Departments should have conducted notice-and-comment rulemaking under Section 553 of the APA, but they did not. As this Court has emphasized, the exceptions to the APA's notice-and-comment requirement should be construed narrowly given the importance of notice-and-comment rulemaking for the quality and accountability of agency decisionmaking.

See United States v. Valverde, 628 F.3d 1159, 1164-65 (9th Cir. 2010). None of the narrow exceptions to the notice-and-comment requirement applies here.

The Departments argue that they had "good cause" under Section 553(b)(B) to resolve regulatory uncertainty by promulgating sweeping exemptions from the contraceptive coverage requirement without notice and comment. But Section 553(b)(B)'s "good cause" exception does not authorize the Departments to skip notice and comment simply because, in their view, time was of the essence for regulated entities. In addition, the Departments argue that Congress authorized them to bypass notice and comment without demonstrating "good cause" under Section 553(b)(B) by specifying that they "may promulgate" interim final rules. But nowhere in the ACA or in any other statute did Congress authorize the Departments to bypass notice and comment and ignore Section 553(b)(B). Congress's grant of interim final rulemaking authority has legal effect: It is a factor in a reviewing court's analysis of the Departments' "good cause" determination. But this general grant does not, without more, exempt the Departments from making that determination when bypassing notice and comment.

In skipping notice-and-comment rulemaking, the Departments did not adequately explain their decision to reverse course by drastically expanding the Religious Exemption and by creating the Moral Exemption out of whole cloth. Based upon their factual findings concerning the impact on women's health of

access to contraceptive coverage, the Departments had previously concluded that there was a compelling governmental interest in ensuring that women have access to contraceptive coverage—a conclusion that the Supreme Court assumed as well in *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751, 2785-86 (2014) (Kennedy, J., concurring). Now, with no relevant change in the underlying facts, the Departments have reversed course entirely, without acknowledging the harmful impacts of their new policy on women's health. The Departments' rush to judgment is just one example of many recent attempts by the Executive Branch to bypass congressionally-imposed limits on executive action. Since the APA's enactment in 1946, federal courts have enforced these well-established limits as a matter of course, as the District Court did in this case.

For these reasons, the Court should affirm the District Court's preliminary injunction.

ARGUMENT

I. THE GOOD CAUSE AND STATUTORY AUTHORIZATION EXCEPTIONS TO THE APA'S REQUIREMENT OF NOTICE AND COMMENT ARE NARROWLY CONSTRUED

The Departments argue that the District Court applied the wrong legal standards in concluding that they violated the APA by promulgating an interim final rule without notice and comment. *See* App. Br. 51, 59-62. To the contrary, the District Court correctly described the "good cause" exception to Section 553's notice-and-comment requirement as a narrow one. *See California v. HHS*, 281 F. Supp. 3d 806, 825 (N.D. Cal. 2017). And the District Court rightly reasoned that subsequent statutes do not modify the APA's notice-and-comment requirement unless it is clear that Congress intended that result. *See id.* at 826.

In 1946, Congress imposed the basic procedural requirements that continue to govern rulemaking to this day. The APA requires a federal agency to publish a "[g]eneral notice of proposed rulemaking" in the Federal Register and, after such notice, to "give interested persons an opportunity to participate in the rulemaking" through submission of comments, views, or arguments. 5 U.S.C. § 553. These requirements are subject to only a few limited exceptions for statements of general policy, procedural, organizational, and interpretive rules, or when "the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." *Id.* § 553(b)(B). Section 553

reflects Congress's "judgment that . . . notions of fairness and informed administrative decisionmaking require that agency decisions be made only after affording interested persons notice and an opportunity to comment." *Paulsen v. Daniels*, 413 F.3d 999, 1004-05 (9th Cir. 2005) (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979)). By adopting notice-and-comment requirements in the APA, Congress deliberately struck a compromise between expediency and the rule of law. *See Am. Bus. Ass'n v. United States*, 627 F.2d 525, 528 (D.C. Cir. 1980) (explaining that notice-and-comment procedure "was one of Congress's most effective and enduring solutions to the central dilemma it encountered in writing the APA[:] reconciling the agencies' need to perform effectively with the necessity that 'the law must provide that the governors shall be governed and the regulators shall be regulated'" (quoting S. Doc. No. 248, 79th Cong., 2d Sess. 244 (1946))).

As a result, in construing Section 553, a federal court must not "disrupt the statutory scheme" that Congress enacted by "impos[ing] upon the agency its own notion of which procedures are 'best.'" *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 547, 549 (1978). By the same token, however, the courts also must ensure that agencies adhere to the procedural requirements that Congress did impose. This Court has recognized that the requirement of notice and comment "should be closely guarded." *Buschmann v. Schweiker*, 676 F.2d 352,

357 (9th Cir. 1982) (internal quotation marks and citations omitted). For this reason, "exceptions to notice-and-comment rulemaking under the APA are narrowly construed and only reluctantly countenanced." *Mid Continent Nail Corp. v. United States*, 846 F.3d 1364, 1380 & n.12 (Fed. Cir. 2017) (internal quotation marks omitted) (citing cases from twelve circuit courts of appeals). As this Court has explained, a narrow construction of exceptions to Section 553 "is consistent with Congress's clear intent to preserve the statutory purpose of informal rulemaking." *Alcaraz v. Block*, 746 F.2d 593, 612 (9th Cir. 1984).

In particular, this Court has warned that the good cause exception threatens to "swallow the rule" requiring notice and comment unless it is limited to cases where "delay would do real harm." *See Buschmann*, 676 F.2d at 357 (explaining further that case law has "indicated that the good cause exception should be interpreted narrowly"). The good cause exception is most commonly invoked for emergencies, but this Court has insisted that the emergency be real and not of the agency's own making. *See Valverde*, 628 F.3d at 1164-67. An agency that cites a bare interest in resolving regulatory uncertainty or offers mere speculation about the harm of delaying action has not "overcome [the] high bar" necessary to invoke the good cause exception. *Id.*

Federal courts have also been reluctant to conclude that a subsequent statute authorizes an agency to bypass Section 553's notice-and-comment requirement.

The APA itself "provides that no subsequent statute shall be deemed to modify it 'except to the extent that it does so expressly.'" *Castillo-Villagra v. INS*, 972 F.2d 1017, 1025 (9th Cir. 1992) (quoting 5 U.S.C. § 559). Though Congress need not use magic words to modify the APA's requirements, "[e]xemptions from the terms of the [APA] are not lightly to be presumed." *Marcello v. Bonds*, 349 U.S. 302, 310 (1955).

II. THE DEPARTMENTS DID NOT HAVE "GOOD CAUSE" TO SKIP NOTICE AND COMMENT

In determining whether an agency has properly invoked the good cause exemption, this Court "proceeds case-by-case, sensitive to the totality of the factors at play." *Alcaraz*, 746 F.2d at 612. An agency's simple assertion that skipping notice and comment was necessary is not "good cause" authorizing the agency to bypass Section 553's procedural requirements. *See Buschmann*, 676 F.2d at 357. Instead, the agency must demonstrate that promulgating a rule without notice and comment is necessary to avoid a "real harm," not a merely speculative one. *Valverde*, 628 F.3d at 1167.

A. Notice and Comment Would Not Have Been Impracticable

The Departments first argue that notice and comment was "impracticable" under Section 553(b), but this is little more than a makeweight.[2] As this Court has

[2] The Departments do not argue that notice and comment was "unnecessary." Nor could they reasonably do so. *See Riverbend Farms, Inc. v.*

defined it, "[n]otice and comment is 'impracticable' when the agency cannot 'both follow section 553 and execute its statutory duties.'" *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1484 n.2 (9th Cir. 1992) (quoting *Levesque v. Block*, 723 F.2d 175, 184 (1st Cir. 1983)). Where, for example, Congress has imposed a deadline on agency decisionmaking, that is not dispositive by itself but may weigh in favor of a finding of good cause. *See Levesque*, 723 F.2d at 184; *cf. NRDC v. Evans*, 316 F.3d 904, 912 (9th Cir. 2003) (holding that agency had failed to demonstrate good cause when it "did not demonstrate that some exigency apart from generic complexity of data collection and time constraints interfered with" compliance with APA rulemaking requirements). But no such statutory deadline is present here. Instead, the Departments pointed to ongoing litigation concerning the contraceptive coverage requirement, including several courts' requests for periodic status reports on the Departments' policy position. *See* Religious Exemption Rule, 82 Fed. Reg. 47,792, 47,814 (2017); *cf. Zubik v. Burwell*, 136 S. Ct. 1557, 1560 (2016) ("We anticipate that the Courts of Appeals will allow the parties sufficient time to resolve any outstanding issues . . . ."). But the Departments did not even attempt to explain how this pending litigation demonstrated that they needed to skip notice and comment in order to fulfill their statutory duties.

Madigan, 958 F.2d 1479, 1484 n.2 (9th Cir. 1992) ("Notice and comment is 'unnecessary' when the regulation is technical or minor." (internal quotation marks and citations omitted)).

B. Notice and Comment Would Not Have Been Contrary to the Public Interest

Instead, the Departments' only real argument for good cause is that notice and comment would have been "contrary to the public interest." *See* App. Br. 54. Section 553(b)(B)'s reference to the public interest "'requires that public rule-making procedures shall not prevent an agency from operating.'" *Riverbend Farms*, 958 F.2d at 1484 n.2 (quoting *Levesque*, 723 F.2d at 184). Where, for example, "announcement of a proposed rule would enable the sort of financial manipulation the rule sought to prevent," there is good cause to skip notice-and-comment rulemaking because "'the interest of the public would be defeated by any requirement of advance notice.'" *Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749, 755 (D.C. Cir. 2001) (quoting United States Department of Justice, Attorney General's Manual on the Administrative Procedure Act 31 (1947)).

It should be clear that no such problem is present in this case. Skipping notice and comment was not necessary "to prevent [the Departments' rules] from being evaded." *Id.* Nor do the Departments claim otherwise. Instead, they argue that dispensing with notice and comment was necessary to benefit entities regulated by the ACA by eliminating uncertainty and regulatory burdens. *See* App. Br. 54-55 (citing Religious Exemption Rule, 82 Fed. Reg. at 47,814); *id.* at 59 (citing Moral Exemption Rule, 82 Fed. Reg. 47,838, 47,855 (2017)). Accepting

the Departments' argument would allow the good cause exception to swallow Section 553's procedural requirements.

1. The Departments' Desire to Resolve Regulatory Uncertainty Does Not By Itself Constitute Good Cause

An agency's desire to eliminate uncertainty is not by itself good cause. This Court held as much in *Valverde*, which concluded that an agency's "interest in eliminating uncertainty does not justify [its] having sought to forego notice and comment." 628 F.3d at 1167; *see id.* ("If 'good cause' could be satisfied by an Agency's assertion that 'normal procedures were not followed because of the need to provide immediate guidance and information[,] . . . then an exception to the notice requirement would be created that would swallow the rule.'" (quoting *Zhang v. Slattery*, 55 F.3d 732, 746 (2d Cir. 1995))).[3] The Departments can no

[3] *Valverde* concerned a Department of Justice regulation that applied the Sex Offender Registration and Notification Act ("SORNA") retroactively to sex offenders who were convicted before the statute's enactment. 628 F.3d at 1167. Some federal courts concluded, contra *Valverde*, that the DOJ had good cause to bypass notice-and-comment rulemaking, but they did not rest upon uncertainty without more. Indeed, the Eleventh Circuit made clear that while uncertainty "does count to some extent," it "alone may not have established the good cause exception." *United States v. Dean*, 604 F.3d 1275, 1280 (11th Cir. 2010); *see United States v. Gould*, 568 F.3d 459, 470 (4th Cir. 2009) (concluding that agency had good cause where delay "could reasonably be found to put the public safety at greater risk," in addition to "need for legal certainty"). And other federal circuit courts of appeals have agreed with *Valverde*'s holding that "[t]he desire to eliminate uncertainty, by itself, cannot constitute good cause." *United States v. Reynolds*, 710 F.3d 498, 510 (3d Cir. 2013); *see United States v. Johnson*, 632 F.3d 912, 929 (5th Cir. 2011) ("'[D]esire to provide immediate guidance, without more, does not suffice for good cause.'" (quoting *United States v. Cain*, 583 F.3d 408, 421 (6th Cir. 2009))).

more rely upon their desire to resolve uncertainty than the Attorney General could in *Valverde*. Here, too, the Departments have cited resolving "uncertainty" as good cause to forgo notice and comment. *See* Religious Exemption Rule, 82 Fed. Reg. at 47,814. Here, too, Congress has not signaled that time is of the essence. And here, too, the Departments' willingness to "fully consider comments" submitted after promulgating the interim final rule casts doubt upon their reason for skipping notice and comment. *See id.*

In any event, the Departments' asserted concern about uncertainty is belied by the fact that the Religious Exemption Rule and the Moral Exemption Rule depart so significantly from the prior rules. The Departments did not merely tweak the rules or make minor modifications to address issues that arose in prior litigation. Rather, as the District Court noted, the interim final rules "are much broader in scope, and introduce an entirely new moral conviction basis for objecting to the contraceptive mandate." *California*, 281 F. Supp. 3d at 828. Far from *resolving* uncertainty for interested parties and affected organizations, the interim final rules introduce *more* uncertainty to the regulatory scheme.

2. The Departments' Desire to Eliminate Regulatory Burdens Does Not By Itself Constitute Good Cause

Though the Departments' briefs on appeal make much of their desire to resolve regulatory *uncertainty*, the Departments emphasized in their rulemakings their desire to eliminate regulatory *burdens* in finding that good cause existed to

forgo notice and comment. *See* Religious Exemption Rule, 82 Fed. Reg. at 47,814-15; Moral Exemption Rule, 82 Fed. Reg. at 47,849. As the Departments put it, "[i]f [they] were to publish a notice of proposed rulemaking instead of these interim final rules, many more months could pass before the current Mandate is lifted from the entities receiving the expanded exemption, during which time those entities would be deprived of the relief clearly set forth in these interim final rules." Religious Exemption Rule, 82 Fed. Reg. at 47,814. It is always the case, however, that an agency can eliminate regulatory burdens more quickly by promulgating a deregulatory interim final rule rather than by conducting notice-and-comment rulemaking. And so, here too, the Departments' justification for skipping notice and comment threatens to swallow the notice-and-comment requirement.

The D.C. Circuit has recognized that the good cause exception of Section 553(b)(B) requires more than the agency's desire to eliminate regulatory burdens as quickly as possible. In *Environmental Defense Fund v. EPA*, 716 F.2d 915, 917, 920-21 (D.C. Cir. 1983), the D.C. Circuit held that "it was not at all reasonable for [the agency] to rely on the good cause exception" simply because of "an alleged pressing need to avoid industry compliance with regulations that were to be eliminated." The core issue on appeal in that case involved the award of attorneys' fees to a "prevailing party" under the Equal Access to Justice Act, unless "the

position of the United States was substantially justified." *See id.* at 916 (quoting 28 U.S.C. § 2412 (Supp. V 1981)). In the course of resolving that issue, the D.C. Circuit had to consider whether the EPA had reasonably invoked the good cause exception under Section 553(b)(B). The agency asserted that "it was 'essential to take action [] before the regulated community expend[ed] resources.'" *Id.* at 920 (quoting 47 Fed. Reg. 7842 (1982)). Concluding that any "emergency" was of the agency's own making, the D.C. Circuit held that "there was no legitimate reason whatsoever for EPA to ignore the commands of the APA regarding notice and comment." *Id.* at 921. The desire to provide relief from regulation was not, without more, good cause.

On appeal, the Departments point to two decisions sustaining good cause claims, but neither justifies the Departments' action here. The first decision is inapposite. In *Service Employees International Union, Local 102 v. County of San Diego*, 60 F.3d 1346 (9th Cir. 1995), this Court discussed good cause in a footnote, citing only the good cause exception in 5 U.S.C. § 553(d)(3), which allows an agency to dispense with the requirement that "publication or service of a substantive rule shall be made not less than 30 days before its effective date." *Id.* at 1352 n.3. To the extent that the *Service Employees* court's holding was limited to Section 553(d)(3), it does not control the question whether good cause is present in this case under Section 553(b)(B). Good cause under Section 553(d)(3) is

"more easily found" than good cause under Section 553(b)(B). *Riverbend Farms*, 958 F.2d at 1485.[4] In any event, *Service Employees* is distinguishable. The agency in that case was concerned about the federalism impacts of "unforeseen liability" on the "fiscal integrity of State and local governmental agencies" and disruption of state and local governmental policies "designed and intended to serve the public trust." 56 Fed. Reg. 45,824, 45,825 (1991). The Departments did not rely on the same sort of impacts in finding "good cause" in this case.

The Departments also mistakenly rely upon a decision of the D.C. Circuit, *Priests for Life v. HHS*, 772 F.3d 229, 276 (D.C. Cir. 2014). There, the D.C. Circuit held that the Department of Health and Human Services ("HHS") had good cause in 2014 to promulgate an interim final rule modifying the process for religious nonprofits to opt out from contraceptive coverage. As the District Court below rightly concluded, the similarity between this case and *Priests for Life* is superficial. While HHS's 2014 interim final rulemaking involved regulations that "were recently enacted pursuant to notice and comment rulemaking, and presented virtually identical issues," *id.* at 276, the Departments' 2017 interim final rulemakings "represent a dramatic about-face in federal policy, and adopt sweeping changes." *California*, 281 F. Supp. 3d at 828 n.14.

[4] *See also* Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 Admin. L. Rev. 703, 718 n.55 (1999) ("The section 553(d)(3) good cause standard is easier to satisfy than the section 553(b)(B) good cause standard.").

A delay in implementation may create costs for regulatory beneficiaries, regulated parties, and the agency itself, but "such occasional impairments are the price we pay to preserve the integrity of the APA." *N.J. Dep't of Envtl. Prot. v. U.S. EPA*, 626 F.2d 1038, 1048 (D.C. Cir. 1980). This Court should reject the Departments' arguments that their desire to resolve uncertainty and to eliminate regulatory burdens provided "good cause" to dispense with the APA's requirements.

C. The Statutory Grant of Authority to Promulgate Interim Final Rules Does Not By Itself Constitute Good Cause

The Departments also point to a statutory grant of authority to promulgate interim final rules as sufficient to justify bypassing notice and comment. They rely on three statutory provisions that were enacted as part of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). *See* Pub. L. No. 104-191, §§ 101, 102, 401, 110 Stat. 1936, 1951, 1976, 2032 (1996). These provisions authorize the promulgation of regulations. *See* 26 U.S.C. § 9833 ("The Secretary . . . may promulgate such regulations as may be necessary or appropriate to carry out the provisions of this chapter"); 29 U.S.C. § 1191c (substituting "part" for "chapter"); 42 U.S.C. § 300gg-92 (substituting "subchapter" for "chapter"). And they specify that the "Secretary may promulgate any interim final rules as the Secretary determines are appropriate" to implement Congress's statutory directives. *See* 26 U.S.C. § 9833; 29 U.S.C. § 1191c; 42 U.S.C. § 300gg-92.

When enacting the ACA, Congress codified the relevant coverage requirement in the same chapters of the U.S. Code as these three provisions. *See Pennsylvania*, 281 F. Supp. 3d at 571. The Departments argue that Congress thus has freed them from any obligation to demonstrate "good cause" under Section 553(b)(B) when promulgating an interim final rule to implement the ACA's coverage requirement. App. Br. 49. The Departments, in other words, offer the breathtaking assertion that Congress, simply by codifying the ACA's coverage requirement in the same titles as HIPAA, carved out a broad exemption authorizing them to bypass the APA's rulemaking procedure simply by labeling a rule "interim."

Federal courts do not, however, lightly conclude that Congress has specifically authorized an agency to ignore the APA's requirements. The APA itself "provides that no subsequent statute shall be deemed to modify it 'except to the extent that it does so expressly.'" *Castillo-Villagra*, 972 F.2d at 1025 (quoting 5 U.S.C. § 559). It follows that "[e]xemptions from the terms of the [APA] are not lightly to be presumed." *Marcello*, 349 U.S. at 310. Where, as here, an agency cannot point to an express exemption from the APA, it must show that "Congress has established procedures so clearly different from those required by the APA that it must have intended to displace the norm." *Asiana Airlines v. FAA*, 134 F.3d 393, 397 (D.C. Cir. 1998).

This is not, however, a case where Congress has required or even clearly authorized an agency to ignore the APA. It is not a case where Congress expressly carved out an exclusive rulemaking procedure in lieu of Section 553. *Compare Castillo-Villagra*, 972 F.2d at 1025 (concluding that Congress had specifically authorized agency to bypass notice and comment when it provided a "sole and exclusive procedure" in place of Section 553's requirement). Nor is it a case where notice and comment would clearly violate Congress's intent in specifically requiring an agency to act quickly by publishing interim final rules before seeking comment. *Compare Asiana Airlines*, 134 F.3d at 398 (construing statute imposing timetable and providing that agency "shall publish . . . interim final rule[s]" prior to seeking comment). Instead, it is a case in which Congress has merely specified that the agency may use interim final rulemaking.

The Departments do not, therefore, argue that Congress expressly authorized them to ignore Section 553. Instead, they argue that Congress carved out a broad exemption by implication, on the theory that any other reading of HIPAA's grant of interim final rulemaking authority would render it a nullity. *See* App. Br. 22.

The District Court's reading of HIPAA's grant does not, however, render it a nullity. By authorizing the Departments to use interim final rulemaking, Congress directed reviewing courts to weigh the statutory authorization as a factor favoring the Departments' "good cause" determination. *See Nat'l Women, Infants &*

Children Grocers Ass'n v. Food & Nutrition Serv., 416 F. Supp. 2d 92, 105 (D.D.C. 2006) ("[I]t is significant that Congress authorized the issuance of an interim rule."). That is how the D.C. Circuit approached Congress's grant of interim final rulemaking in *Methodist Hospital of Sacramento v. Shalala*, 38 F.3d 1225, 1237 (D.C. Cir. 1994), holding that an agency had "good cause" under Section 553(b)(B) to bypass notice and comment when Congress had authorized it to promulgate interim final rules within a strictly defined deadline and thereafter to seek public comment. Importantly, that is where the law stood in 1996, when Congress enacted HIPAA's grant of rulemaking authority. In enacting HIPAA, Congress did not direct the agency to publish an interim final rule on a strict deadline "without the necessity for consideration of comments." *Id.* at 1236 n.18.[5] *Methodist Hospital* does not, therefore, sustain the Departments' "good cause" determination in this case.

Congress's grant of interim final rulemaking authority in HIPAA cannot fairly be read to exempt the Departments from the APA's "good cause"

[5] In *Asiana Airlines*, the D.C. Circuit concluded that its decision in *Methodist Hospital* could have rested on the statutory scheme alone, without reference to the good cause exception of Section 553(b)(B). 134 F.3d at 398. But that is not where the law stood in 1996, when Congress specified that the Departments could use interim final rulemaking. There is no reason to assume, therefore, that Congress enacted HIPAA's grant of interim final rulemaking with the implication that it would exempt the Departments from making a "good cause" determination.

requirement when promulgating interim final rules to implement the ACA.[6] Requiring the Departments to make a reasonable good cause determination when implementing the ACA would not clearly violate the apparent intent of Congress in authorizing interim final rulemaking through HIPAA. The Departments point to the D.C. Circuit's decision in *Asiana Airlines*, 134 F.3d 393, *see* App. Br. 50, but the statutory scheme in that case bears little resemblance to the statutory grants in this case. *See Asiana Airlines*, 134 F.3d at 398 (construing statute that imposed timetable and provided that agency "shall publish . . . interim final rule[s]" prior to seeking comment). Because "[e]xemptions from the terms of the [APA] are not lightly to be presumed," *Marcello*, 349 U.S. at 310, Congress's grant of interim final rulemaking authority is not by itself dispositive but should be construed as simply a factor in this Court's "good cause" analysis.[7] And because none of the

[6] That was the holding of *Coalition for Parity, Inc. v. Sebelius*, 709 F. Supp. 2d 10, 18 (D.D.C. 2010), which the court below considered. *See California*, 281 F. Supp. 3d at 827.

[7] The Departments did not find, and do not argue on appeal, that the Religious Freedom Restoration Act ("RFRA") required them to bypass notice and comment. Nevertheless, two Intervenors press that point, arguing that the Departments *had to* skip notice and comment because doing so was the only way for them to comply with RFRA. *See* Br. of Intervenor Little Sisters 41. This Court should not, however, rely upon the Intervenors' post hoc rationale to sustain the Departments' action. *See SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943) ("[A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its actions can be sustained.").

Departments' other reasons demonstrate "good cause," they have failed to justify their decision to bypass notice-and-comment requirements.

III. THE DEPARTMENTS' ARBITRARY AND CAPRICIOUS DECISION TO SKIP NOTICE AND COMMENT WHILE REVERSING THEIR EXISTING POLICIES UNDERSCORES THE NEED FOR NOTICE AND COMMENT

The APA directs reviewing courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The "basic procedural requirement" of reasoned decisionmaking directs an agency to "'examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted). While political elections have consequences, an agency changing course must always offer a reasoned explanation for the change. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). An agency's failure to do so renders its decision arbitrary and capricious and without the force of law. *See id.* at 2126.

The Supreme Court has recently signaled that a central concern of arbitrary-and-capricious review is an unexplained about-face in agency policymaking. In *FCC v. Fox Television Stations, Inc.*, the Court explained that while the "mere fact of policy change" may not demand greater justification than the adoption of a

policy in the first instance, "a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." 556 U.S. 502, 515-16 (2009). In his concurring opinion, Justice Kennedy elaborated: "Where there is a policy change the record may be much more developed because the agency based its prior policy on factual findings. In that instance, an agency's decision to change course may be arbitrary and capricious if the agency ignores or countermands its earlier factual findings without reasoned explanation for doing so." *Id.* at 537 (Kennedy, J., concurring in part and concurring in the judgment). The Court made clear in *Perez v. Mortgage Bankers Association*, that "the APA requires an agency to provide a more substantial justification when 'its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests . . . .'" 135 S. Ct. 1199, 1209 (2015) (quoting *Fox Television*, 556 U.S. at 515). And in *Encino Motorcars*, Justice Kennedy, now writing for the Court, summarized the standard of review for agency changes in policymaking. The agency must recognize that it is changing course, "'show that there are good reasons for the new policy,'" explain why it is "'disregarding facts and circumstances that underlay or were engendered by the prior policy,'" and address "'serious reliance interests'" that rested on its prior policy. *Encino Motorcars*, 136 S. Ct. at 2126 (quoting *Fox Television*, 556 U.S. at 515-16).

Under this standard of review, the Departments' action is an arbitrary and capricious about-face from their prior positions. They reversed course despite no relevant change in the underlying facts and without a reasoned explanation for countermanding their prior findings and policy determinations.

The prior policy was promulgated based upon findings that contraceptive coverage benefits women's health. The ACA provides that "a group health plan and a health insurance issuer offering group or individual health insurance coverage *shall*, at a minimum provide coverage for and shall not impose any cost sharing requirements for . . . (4) with respect to *women*, such additional preventive care and screenings . . . ." 42 U.S.C. § 300gg-13(a)(4) (emphasis added). Thus, the ACA plainly provides for no-fee preventive services for women.

Pursuant to the statute's delegation of authority, a panel of experts convened by the Institute of Medicine ("IOM") at the request of the Department of Health and Human Services' Health Resources and Services Administration ("HRSA") determined that this category of basic health care encompasses contraceptive services approved by the FDA. *California*, 281 F. Supp. 3d at 814-15. The HRSA then issued guidelines to "ensure that women receive a comprehensive set of preventive services" based upon IOM's study of "what preventive services are necessary for women's health and well-being." HRSA, Women's Preventive Services Guidelines, *available at* https://www.hrsa.gov/womens-guidelines/

index.html. During subsequent rulemakings, the Departments considered and rejected comments that preventive health services are "harmful to women's health." 78 Fed. Reg. 39,870, 39,872 (2013). To the contrary, the Departments found, the "scientific and medical evidence" demonstrates the health benefits of contraceptive services, and concluded it is for a "woman and her health care provider in each particular case" to consider the benefits and any risks when deciding on medical treatment. *Id.* Moreover, the Departments concluded, the IOM's expert findings demonstrated that the contraceptive coverage requirement serves compelling government interests: It "safeguard[s] public health," and it "assur[es] that women have equal access to health care services." *Id.* at 39,887. These conclusions were based upon several findings, including that "lack of access to contraceptive services has proven in many cases to have serious negative health consequences for women and newborn children," and that a "disproportionate burden on women imposed financial barriers that prevented women from achieving health outcomes on an equal basis with men." *Id.* Thus, the prior regulations were based on a compelling government interest in ensuring that women have access to contraceptive coverage, which a majority of the Justices also assumed in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).[8]

[8] Justice Kennedy wrote, "[i]t is important to confirm that a premise of the Court's opinion is its assumption that the [Contraceptive Mandate] furthers a

In an about-face, the Departments have now announced that there is *no* compelling interest in ensuring women's access to contraceptive coverage. *See* Religious Exemption Rule, 82 Fed. Reg. at 47,800. Among their grab-bag of reasons for this change, the Departments cite their view that "Congress did not mandate that contraception be covered at all under the [ACA]." *Id.* at 47,801. But once the ACA became law, the HRSA, acting pursuant to statutory direction, adopted the IOM's recommendations that all FDA-approved contraceptive methods should be provided without cost-sharing as essential health benefits. 45 C.F.R. § 147.130(a)(1)(iv). In reversing course, the Departments now assert that the administrative record, including IOM's expert report, "is insufficient to meet the high threshold" to demonstrate a compelling government interest. 82 Fed. Reg. at 47,803. But the reasons behind this assertion cannot bear even minimal scrutiny. For one, the Departments cite the negative health effects of contraception. *Id.* at 47,804. In a prior rulemaking, the Departments had addressed the health *benefits* of contraceptive services and concluded that it is for a woman and her health care provider to assess benefits and risks on a case-by-case basis. 78 Fed. Reg. at 39,872.

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legitimate and compelling interest in the health of female employees." *Hobby Lobby*, 134 S. Ct. at 2785-86 (Kennedy, J., concurring). *See also id.* at 2799 (Ginsburg, J., dissenting) ("[T]he Government has shown that the contraceptive coverage for which the ACA provides furthers compelling interests in public health and women's well being.").

The Departments' reversal of course is thus based upon a one-sided assessment of the scientific and medical evidence. While the Departments cherry pick particular studies cited by the IOM, concluding, for instance, that some of them demonstrate correlation rather than causation, 82 Fed. Reg. at 47,804, they provide no reason for disregarding the IOM's expert assessment of the body of the "scientific and medical evidence" demonstrating the health benefits of contraceptive services and case-by-case assessment by a woman and her health care provider, *see* 78 Fed. Reg. at 39,872.

The Departments' conclusion that there is no compelling government interest in ensuring contraceptive coverage because contraception may lead to "risky sexual behavior" is no more reasonable. *See* 82 Fed. Reg. at 47,805. This conclusion, which was based entirely upon a single law review article,[9] puts in stark relief the reasons why the Departments should have engaged in notice-and-comment rulemaking before adopting the new rules. Had they done so, commenters might have put before them comprehensive studies finding that the concerns about risky sexual behavior are belied by the evidence.[10]

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[9] *See* 82 Fed. Reg. at 47,805 n.43 (citing Helen M. Alvaré, *No Compelling Interest: The "Birth Control" Mandate and Religious Freedom*, 58 Vill. L. Rev. 379 (2013)).

[10] *See, e.g.*, Gina M. Secura et al., *Change in Sexual Behavior With Provision of No-Cost Contraception*, 123 Obstet. Gynecol. 771 (2014), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4009508/ ("We found little

Numerous courts across the country have concluded that this administration has failed to comply with the well-established requirements of the APA. *See, e.g.*, *Jimenez-Cedillo v. Sessions*, 885 F.3d 292, 299 (4th Cir. 2018) (explaining that "[w]ithout a reasoned explanation from the [agency] for its change in position," the reviewing court must conclude its reversal of course is arbitrary and capricious); *NAACP v. Trump*, 2018 WL 1920079, at *20 (D.D.C. Apr. 24, 2018) (concluding that DHS had failed to discharge its obligation of explaining its change in agency policy, a failure that "was particularly egregious . . . in light of the reliance interests involved"); *State v. U.S. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106, 1123 (N.D. Cal. 2017) ("New presidential administrations are entitled to change policy positions, but to meet the requirements of the APA, they must give reasoned explanations for those changes and address the prior factual findings underpinning a prior regulatory regime." (quotation marks and brackets omitted)). Having failed to comply with those requirements, the Departments arbitrarily and capriciously changed their prior policy without providing a reasoned explanation for the change. The Departments' procedurally defective and substantively arbitrary change in policy is but another example of the type of uninformed policy

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evidence to support concerns of increased sexual risk-taking behavior subsequent to greater access to no-cost contraception.").

formulation that may occur when the executive branch seeks to evade basic requirements for reasoned and responsive decisionmaking.

CONCLUSION

For the foregoing reasons, the Court should affirm the District Court's preliminary injunction.

Date: May 29, 2018

Respectfully Submitted,

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APPENDIX A

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CERTIFICATE OF COMPLIANCE

Counsel for *Amici* Law Professors certifies:

1. This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) and Ninth Circuit Rule 32-1. This brief contains 6,446 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface and typestyle requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify I electronically filed the foregoing with the Clerk for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system on May 29, 2018. All participants in the case are registered CM/ECF users and so will be served by the CM/ECF system, which constitutes service pursuant to Federal Rule of Appellate Procedure 25(c)(2) and Ninth Circuit Rule 25-5.

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