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

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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 and Human Services, *et al.*,
Defendants,
and
THE LITTLE SISTERS OF THE POOR, JEANNE JUGAN RESIDENCE,
Intervenor-Defendant-Appellant.

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 and Human Services, *et al.*,
Defendants,
and
MARCH FOR LIFE EDUCATION AND DEFENSE FUND,
Intervenor-Defendant-Appellant.

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 and Human Services, *et al.*,
Defendants-Appellants.

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

REPLY BRIEF FOR THE FEDERAL APPELLANTS

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STATE OF CALIFORNIA *et al.*,
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CHAD A. READLER
Acting Assistant Attorney General
ALEX G. TSE
Acting United States Attorney
HASHIM M. MOOPPAN
Deputy Assistant Attorney General
MATTHEW M. COLLETTE
LOWELL V. STURGILL JR.
CATHERINE H. DORSEY
JAYNIE LILLEY
KAREN SCHOEN
Attorneys, Appellate Staff
Civil Division, Room 7241
U.S. Department of Justice
950 Pennsylvania Avenue N.W.
Washington, D.C. 20530
(202) 514-3427

Counsel for the Federal Defendants

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INTRODUCTION AND SUMMARY

The plaintiff States challenge interim final rules expanding the existing exemption from the contraceptive-coverage mandate. Although the rules have no direct application to them, the States insist that they have standing, on the theory that they have been procedurally injured by the inability to comment on the rules and substantively injured because the rules will cause some of their residents to lose employer-sponsored contraceptive coverage and turn to state-funded programs. But as the States do not and cannot dispute, the mere existence of a procedural injury during the promulgation of a rule does not obviate the need to demonstrate a substantive injury caused by that rule. And yet the States have failed to identify a single woman who will lose contraceptive coverage because of the interim rules, and they have not overcome the multiple layers of speculation on which their claim of economy injury rests.

The States protest that their failure to identify a woman who will likely lose contraceptive coverage is of no moment, asserting that it is reasonable to conclude that at least some employers in their States will use the exemption, that at least some residents will lose coverage as a

result, and that at least some of them will then turn to state-funded programs. But without knowledge of the particular circumstances surrounding both an employer that invokes the exemption and an employee faced with the loss of contraceptive coverage, it is rank speculation whether these particular States will incur any costs as a result of the interim rules.

Most fatally, the States merely speculate that women who lose coverage will not share their particular employer's religious or moral objections to contraception and would otherwise choose a contraceptive method to which the employer objects. The States further speculate that such women will lack access to other private contraceptive coverage through a spouse's plan and otherwise be eligible for and seek state-funded services.

The States likewise fail to rehabilitate the district court's erroneous holding that venue exists in the Northern District of California. The States base venue on the district in which the State of California "resides," 28 U.S.C. § 1391(e)(1)(C), and § 1391(c)(2) makes clear that an entity bringing suit resides only in "the" single judicial district containing "its principal place of business." For California, that

is the Eastern District, where its capital is located. The States ignore the statutory language, relying on a district court case interpreting a prior version of the statute. The States also argue—for the first time—that a State is not an "entity" under § 1391(c)(2). But that argument, which rests on the implausible notion that Congress overlooked States and other governmental plaintiffs when it enacted the current venue statute, is inconsistent with the statute's language and purpose.

On the merits, the States fail to refute our showing that Congress expressly authorized the agencies to issue any "interim final rules" without prior notice and comment as the agencies "determine[] are appropriate." 42 U.S.C. § 300gg-92. Contrary to the States' suggestion, that language deviates from the Administrative Procedure Act's (APA's) default requirement that interim final rules may be promulgated only for "good cause." Indeed, the States concede that their interpretation renders the statutory language meaningless, but suggest that the rule against surplusage does not apply where Congress is required to express its intent clearly. The States offer no support for that proposition, and the Supreme Court has rejected that idea. *See Dorsey v. United States*, 567 U.S. 260, 274-75 (2012).

In any event, the States also fail to refute our showing of "good cause" under the APA to issue interim final rules—namely, that prior notice and comment would have interfered with the agencies' ability to carry out their mission by delaying relief for employers that face severe penalties for violations of the contraceptive-coverage mandate; rendering the agencies subject to adverse judgments regarding policies they could no longer defend; and leaving the agencies' regulations out-of-step with their current legal and policy judgments. The States' dismissal of these extraordinary circumstances as "ubiquitous and unremarkable," Br. 36, lacks merit.

Finally, the States unsuccessfully defend the propriety of the district court's injunctive relief. They fail to demonstrate why the balance of equities and the public interest favor a preliminary injunction, particularly given that the States' alleged economic harm is wholly speculative. And the States' argument that procedural harm is *per se* irreparable is refuted by their own cases.

By contrast, the agencies have substantial interests in issuing these rules without prior notice and comment. Those interests include protecting employers' sincerely held religious and moral beliefs (which,

if ignored, would itself constitute irreparable harm), as well as bringing the agencies' regulations into conformance with their current legal and policy judgments, and resolving protracted litigation the agencies have determined they can no longer defend. These interests far outweigh the speculative and primarily monetary harms on which the States rely.

At a minimum, the States have not justified the nationwide relief granted here. The States make no attempt to show that a more limited injunction would remedy their alleged injuries, which is the critical inquiry under both Article III and equitable principles as to the propriety of the district court's relief. And the States fail to grapple with the fact that nationwide injunctions impede deliberation by multiple courts and expose the government to unfair one-way class actions. Indeed, while the States rely heavily on the affirmance of a nationwide injunction in *City of Chicago v. Sessions*, 888 F.3d 272 (7th Cir. 2018), the Seventh Circuit has since granted en banc rehearing in that case to consider that precise question.

ARGUMENT

I. The States Have Not Demonstrated Standing to Challenge the Interim Final Rules

1. The States contend that they will suffer economic harm because the interim rules will cause some women to seek state-funded contraceptive coverage. But, as our opening brief explained (at 26-41), the risk that the States' alleged fiscal injury will ever materialize is neither certain nor substantial, but entirely speculative.

The States assert that "[i]t is amply reasonable to conclude that employers will use the exemption, that women will lose contraceptive coverage as a result, and that at least some of those women will be forced to resort to State services as a result." Br. 24. But even if an employer uses the exemption and not the accommodation, that decision may not result in a loss of contraceptive coverage. *See* Fed. Br. 27. And even if a woman loses contraceptive coverage from her employer, that loss of coverage may have no effect on the States' coffers. *See id.* at 27-28. Without identifying the circumstances surrounding both the employer that invokes the exemption and the woman who loses coverage, the States cannot show that this loss of employer-sponsored contraceptive coverage will cause the States any harm. The States'

claim of standing is not based on a "chain of causation," States Br. 24, but on "a chain of speculative contingencies" that cannot support standing, *Lee v. Oregon*, 107 F.3d 1382, 1389 (9th Cir. 1997).

The States labor mightily to show that employers will use the exemption. Even assuming, however, that employers will choose the exemption over the accommodation, *but see, e.g.*, ER 276 ¶ 107 (alleging that employers States "will likely seek an exemption *or accommodation*" (emphasis added)),[1] it does not follow that residents will lose coverage in a way that results in fiscal injury to the States. The States ignore the fact that many of the employers that challenged the accommodation under the prior rules—and that may thus be expected to use the exemption under the interim rules—are protected by injunctions precluding the government from enforcing the mandate against them. Additionally, some of the employers invoking the exemption may use self-insured church plans, and even under the prior rules the agencies

[1] New York identified three entities as "likely [to] avail themselves of the [interim rules'] broad exemption criteria." ER 277 ¶ 112. Our opening brief (at 32-34) detailed several reasons why such allegations are insufficient to show that women in that State will lose contraceptive coverage. *See also* March for Life Br. 23-27. The States offer no response.

lacked authority to enforce the accommodation against such plans. *See* Fed. Br. 8-9, 32. Thus, employees of entities that use the exemption already may not be receiving coverage, even in the absence of the interim rules.[2]

Moreover, many employers in the plaintiff States may not be able to use the exemption because four of those States have their own laws requiring health-insurance policies to provide contraceptive coverage. Employers that rely on insurers to provide health coverage must thus continue to provide contraceptive coverage regardless of any federal exemption.

The States emphasize (Br. 27) that those contraceptive-coverage laws do not apply to self-insured plans, but that misses the point. Because the States have not identified self-insured employers that will

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[2] The States note (Br. 24 n.15) that the Little Sisters intend to use the exemption in California. But a district court has granted the Little Sisters a permanent injunction precluding the government from enforcing the contraceptive-coverage mandate against them. *See* Order at 2-3, *Little Sisters of the Poor Home for the Aged v. Sebelius*, No. 1:13-cv-2611 (D. Col. May 29, 2018). And even apart from the injunction, the Little Sisters provide health coverage to their employees through a self-insured church plan. *See Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1167, 1189 (10th Cir. 2015). Thus, the interim rules will have no effect on the Little Sisters' employees.

use the exemption,[3] these laws render the States' assertion of economic injury too speculative to demonstrate standing here, especially when considered in conjunction with the additional layers of speculation raised by the States. It is not enough to speculate that there are some women who would end up receiving state-funded services if their employers did not provide contraceptive coverage, because those particular employers must be self-insured. And conversely, it is not enough to speculate that some self-insured employers would invoke the federal exemption, because their particular employees must be ones who would seek state-funded contraception instead.

Here, the States' vague allegations and conclusory declarations make it impossible to determine whether any women whose employers invoke the exemption will be adversely affected. Because the States have not identified any women who will lose their contraceptive coverage, the States merely speculate that women will not share their

[3] In prior litigation challenging the mandate, Hobby Lobby asserted that it was self-insured. *See Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1124 (10th Cir. 2013). But the States have not alleged that Hobby Lobby will decline to use the accommodation (which was made available to the company and other closely held corporations under the prior rules as a result of the company's victory in that litigation).

particular employer's religious or moral objections to contraception, and that an employer will cease covering the specific contraceptive method a woman covered by the plan would otherwise choose. *See* Fed. Br. 34-35. The States must then further speculate that a woman who does lose coverage of her chosen contraceptive method will be eligible for—and seek—state-funded services because, for example, she lacks access to other private contraceptive coverage through a spouse's plan and is unable to pay out of pocket for contraception. *See id.* at 38-39. Such speculation is insufficient to demonstrate standing.[4]

The States offer no response to these points except to say that in *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161 (9th Cir. 2011), "[t]his Court . . . disapproved" of the argument that they must "identify specific

[4] The States assert that women "may not realize that they have lost contraceptive coverage," because the interim rules do not "impose any independent obligation upon employers to notify employees of their decision to use the exemptions." Br. 13. But, as the agencies explained, if an employer invokes the exemption under the interim rules to cease providing coverage of some or all contraceptive services, existing ERISA rules governing group health plans require that the plan clearly disclose that change to plan participants. *See* 82 Fed. Reg. 47,792, 47,808 & n.54 (Oct. 13, 2017). Likewise, if an employer wishes to revoke its use of the accommodation and use the exemption under the interim rules, its insurer or third-party administrator "must provide participants and beneficiaries written notice of such revocation." *Id.* at 47,813.

women or employers affected by the [interim rules]." Br. 24. That misses the point. As discussed, given the particular chain of contingencies alleged here, without knowledge of the circumstances under which employers invoke the exemption, it is too speculative whether anyone in these States will lose contraceptive coverage. And without knowledge of the circumstances under which a woman loses coverage, it is likewise sheer speculation that the States will be forced to incur any costs.

Thus, the States can draw no support from *Sherman*. There, this Court concluded that California did not need to identify a specific logging project to demonstrate standing to challenge a forest-management plan. *See Sherman*, 646 F.3d at 1179. That was because the State had submitted affidavits addressing the injury it "claim[ed] [would] result from any logging under the [plan]," and it was clear that "logging [would] occur soon somewhere in the State." *Id.* at 1178-79. As the Court explained, "there [was] no real possibility that the Forest Service [would] . . . decline to adopt *any* management projects." *Id.* at 1179.

Here, by contrast, it is speculative not only that women in the plaintiff States will lose contraceptive coverage, but also that this loss of coverage will result in any fiscal injury to the States. We do not suggest that "no women will lose . . . contraceptive coverage as a result of an employer taking advantage of the greatly expanded exemptions." States Br. 25. But particularly in light of the fact that four of the plaintiff States have contraceptive-coverage laws, the States cannot merely rely on the agencies' estimates of the number of women *nationwide* who could lose their employer-sponsored contraceptive coverage to show that women in the plaintiff States will lose such coverage *and then* seek state-funded contraception (or otherwise impose financial costs on the States).

The standing "analysis must be individualized and must consider all the contingencies that may arise in the individual case before the future harm will ensue." *Nelsen v. King County*, 895 F.2d 1248, 1251 (9th Cir. 1990). Here there are several such contingencies, even apart from the States' contraceptive-coverage laws. Employees of entities in the plaintiff States that use the exemption may not have been receiving coverage even before the issuance of the interim rules, because, for

example, the employer was protected by an injunction or the employer uses a self-insured church plan. And an employer that uses the exemption may still cover a particular woman's chosen contraceptive method. Unless the States identify employers that will use the exemption and women covered by those employers' health plans, it is impossible to determine whether women in the plaintiff States are likely to lose employer-sponsored coverage of their chosen contraceptive methods.[5]

[5] Amici Massachusetts and other States assert (Br. 11) that the administrative record itself identifies several employers in the plaintiff States that will use the exemption under the interim rules. But neither the cited record exhibits nor amici provide any basis for concluding that those five employers will decline to use the accommodation, under which employees would continue to receive coverage. While those employers all brought litigation under the prior rules, none of them challenged the accommodation. Indeed, Media Research Center sought a declaration that it was an "eligible organization" permitted to use the accommodation under the prior rules. *See* Compl. ¶¶ 4-7, *Media Research Ctr. v. Sebelius*, No. 1:14-cv-0379 (E.D. Va. Apr. 11, 2014). Further, as we have discussed, even if those employers declined to use the accommodation, it is wholly speculative that women who lose coverage will not share those employers' religious or moral objections and that an employer will cease covering a woman's chosen contraceptive method. Trijicon, for example, objected only to covering certain contraceptive methods. *See* Compl. ¶¶ 3, 70-71, *Bindon v. Sebelius*, No. 1:13-cv-1207 (D.D.C. Aug. 5, 2013).

Moreover, even if one could say with certainty that women in the plaintiff States would lose such coverage under the interim rules, the States' alleged economic injury would still be too speculative to support Article III standing. The loss of contraceptive coverage will not translate into economic injury to the States if women have other access to private coverage, such as through a spouse's plan, or are otherwise willing and able to pay out of pocket for contraception.

The States likewise mistakenly rely (Br. 26) on *Massachusetts v. EPA*, 549 U.S. 497 (2007), in suggesting that their allegations of harm here suffice. In that case, Massachusetts was *already* being injured—"rising seas ha[d] already begun to swallow Massachusetts' coastal land." *Id.* at 522. Here, by contrast, the States do not allege that they have already suffered any economic injury.

2. The States also contend that they will bear costs resulting from "lost opportunities for affected women to succeed in the classroom, participate in the workforce, and to contribute as taxpayers." Br. 59; *see also id.* at 23. This fails for the same reasons discussed above: The States do not identify any women who will lose coverage they would otherwise want. And more fundamentally, as our opening brief

explained (at 40-41), that sort of generalized harm to the States' economic interests is insufficient to support standing.[6]

3. The States emphasize (Br. 21-22) that they also allege a procedural injury, but they fail to refute the showing in our opening brief (at 42-43) that that alleged injury does not change the Article III standing analysis here. While the States are right that they need not show that "following proper procedures would have changed the substance of the policy being challenged," States Br. 21, the States do not and cannot dispute that they must show that the interim rules will cause them a "concrete and particularized injury apart from [the denial of] the congressionally granted procedural process," *Bensman v. U.S. Forest Serv.*, 408 F.3d 945, 955 (7th Cir. 2005). In other words, they

[6] Amici Massachusetts and other States contend (Br. 3-4 & n.1) that the plaintiff States have *parens patriae* standing to assert their quasi-sovereign interests in their residents' health and well-being. The plaintiff States, however, disclaimed *parens patriae* standing in district court. *See* States' Reply at 12 n.14, dkt. no. 78 (Dec. 6, 2017). The plaintiff States also do not rely on a "sovereign interest in ensuring proper enforcement and implementation of the ACA [Affordable Care Act]," or argue that "[f]ederal preemption of State laws may constitute an additional injury sufficient to afford standing." Mass. Amici Br. 6 & n.8. Accordingly, amici's claims are not before this Court. *See Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1177 n.8 (9th Cir. 2009) (explaining that amici cannot raise new arguments on appeal).

need not show that the rule would have been different if they had been given an opportunity to comment, but they still must show that the rule will actually injure them, which they have failed to do.

Further, contrary to the States' contention (Br. 22), their assertion of a procedural injury does not entitle them to the "special solicitude" referred to in *Massachusetts v. EPA*, 549 U.S. at 520. In that case, it was not Massachusetts's assertion of a procedural right alone that entitled the State to "special solicitude," but the procedural right *combined with* the State's assertion of an injury to its sovereign interests—namely, "the loss of [its] sovereign territory." *Id.* at 523 n.21. Massachusetts asserted an injury akin to the injury that would occur if a contiguous State redrew its boundaries to assert dominion over part of Massachusetts's territory. The plaintiff States' alleged pocketbook injuries here are not remotely comparable to that type of sovereign interest.

In any event, "special solicitude" would be of no help to the States here, as it does not alter their burden to demonstrate a concrete injury. Indeed, in *Massachusetts*, there was no dispute that Massachusetts was already losing some of its coastline. *See* 549 U.S. at 522; *see also*

Delaware Dep't of Nat. Res. & Envtl. Control v. FERC, 558 F.3d 575, 579 n.6 (D.C. Cir. 2009) ("This special solicitude does *not* eliminate the state petitioner's obligation to establish a concrete injury, as Justice Stevens' opinion amply indicates."). The States have not demonstrated any such concrete injury here.

II. The District Court Lacked Venue

The venue statute governing suits against the United States is unambiguous: for purposes of determining the plaintiff's residence under 28 U.S.C. § 1391(e)(1)(C), "an entity with the capacity to sue and be sued in its common name under applicable law, whether or not incorporated," is deemed to reside "only in the judicial district in which it maintains its principal place of business." *Id.* § 1391(c)(2). As our opening brief demonstrated (at 43-44), that language plainly means that venue exists in only one judicial district. S*ee* Wright & Miller, 14D *Federal Practice and Procedure* § 3812 (4th ed.) ("The term 'only' and the singular 'its principal place of business' mean that a plaintiff entity cannot reside in more than one district at a time."); *cf. In re BigCommerce, Inc.*, 890 F.3d 978, 982 (Fed. Cir. 2018) ("A plain reading of 'the judicial district' speaks to venue in only one particular judicial

district in the state."). And there is no dispute that the State of California's principal place of business lies within the Eastern District of California.

The States' contention (Br. 29) that a plaintiff State "resides" in all of its districts cannot be reconciled with the statutory language. Nor do the States account for the fact that the primary case they cite, *Alabama v. U.S. Army Corps of Engineers*, 382 F. Supp. 2d 1301 (N.D. Ala. 2005), applied an earlier version of the venue statute, which had substantially different language. *See* Fed. Br. 45. It is no answer to say that "States have routinely sued the federal government in districts other than where their capital is located." States Br. 30. Because objections to venue can be waived, past practice is no substitute for clear statutory language.

Seeking to escape that statutory language, the States assert (Br. 30-31)—for the first time on appeal—that a State is not "an entity" for purposes of 28 U.S.C. § 1391(c)(2), and that the venue statute does not address where a State party "resides." The States forfeited that argument by failing to raise it below. *See, e.g., Clemens v. Centurylink Inc.*, 874 F.3d 1113, 1117 (9th Cir. 2017). In any event, the argument

lacks merit. The residency provision divides parties into three categories: (1) natural persons; (2) entities with the capacity to sue and be sued; and (3) foreign defendants. *See* 28 U.S.C. § 1391(c). California plainly is "an entity with the capacity to sue and be sued," *id.* § 1391(c)(2). *See* Cal. Const. art. III, § 5 ("[s]uits may be brought against the State"); Cal. Gov't Code §§ 945 ("public entity" can sue and be sued), 811.2 ("public entity" includes the State). The only support the States offer for their novel contention that Congress simply left States out of § 1391(c) entirely, is to contrast that section with § 1391(d), which expressly uses the term "State." But § 1391(d) merely refers to a "State" in the geographic sense, not in the party sense, and in no way implies that when a State *is* a party, it is not an "entity."

The States' suggestion that our interpretation of the venue statute "produce[s] an absurd result," Br. 31, is similarly misguided. Section 1391(d) focuses on the residency of one particular class of entity *defendants* under § 1391(c)(2): corporate defendants located in States with more than one judicial district. But corporate *plaintiffs*, just like State *plaintiffs*, reside *only* in "the" judicial district containing their "principal place of business." 28 U.S.C. § 1391(c)(2). The narrower

interpretation of residency for an entity plaintiff, as opposed to that for an entity defendant, "is consistent with a trend to move away from plaintiff-based venue and focus on the convenience of defendants." Wright & Miller, § 3812 (quotation marks omitted).

III. The Agencies Lawfully Issued the Rules Without Prior Notice and Comment

A. Congress Expressly Authorized the Agencies to Issue the Rules as Interim Final Rules

As our opening brief explained (at 46-51), the agencies had authority to issue these rules without prior notice and comment under 42 U.S.C. § 300gg-92, 29 U.S.C. § 1191c, and 26 U.S.C. § 9833, which empower the agencies to issue "any interim final rules as [the agencies] determine[] are appropriate" in this special context. "Interim-final rules are rules adopted by federal agencies that become effective without prior notice and comment and that invite post-effective public comment." Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 Admin. L. Rev. 703, 703 (1999).

By authorizing the issuance of "interim final rules," Congress clearly expressed its intent to allow the agencies to issue rules without prior notice and comment. And Congress further clearly expressed its

intent to permit the agencies to issue "any" interim final rules as they "determine[] are appropriate." *See* Fed. Br. 50-51. Accordingly, contrary to the States' contention (Br. 49-51), this statutory language expressly and unambiguously displaced the APA requirement for "good cause" to proceed with interim final rules here.

The States fail to posit any other possible interpretation of the statutes that gives independent meaning to the grant of authority to issue "interim final rules" that the agencies "determine[] are appropriate." Instead, the States assert (Br. 52) that rendering the language a nullity does not matter because the rule against surplusage is inapplicable here. In the States' view, this interpretive principle is insufficient to satisfy the "express[]" statement required by 5 U.S.C. § 559 for departures from the APA's notice-and-comment requirement. The States offer no authority for that proposition, however, and the law is clear that traditional tools of statutory construction, including the longstanding principle that all of a statute's words should have meaning, apply where a court is asking whether a statute provides a clear expression of Congress's intent. *See*, *e.g.*, *Dorsey v. United States*, 567 U.S. 260, 274-75 (2012) (similar "express statement" requirement in

1 U.S.C. § 109 requires courts to apply "ordinary interpretive considerations" and can be satisfied by a "necessary," "clear," or "fair" implication); *Morrison v. National Austl. Bank, Ltd.*, 561 U.S. 247, 265 (2010) (applying surplusage canon to help resolve whether Congress clearly authorized extraterritorial application of a securities-fraud statute).

The States also suggest (Br. 50-51) that a clear statement of intent to displace normal notice-and-comment procedures exists only where Congress has either *required* agencies to depart from those procedures or *prescribed* alternative notice-and-comment procedures such as those found in *Castillo-Villagra v. INS*, 972 F.2d 1017 (9th Cir. 1992). No case of which we are aware, however, supports the idea that those are the *only* ways to expressly depart from the APA's notice-and-comment requirements and that Congress cannot also simply provide expressly for "interim final rules" that the agencies "determin[e] are appropriate" without regard to the APA's good-cause exception.[7]

[7] Accordingly, the fact that another Affordable Care Act provision specifies that the agency "shall" adopt an interim final rule "not later than 90 days" after receipt of a committee report, 42 U.S.C. § 1320d-2(i)(3)(A), does not mean that Congress's authorization of "interim final

Continued on next page.

Finally, the States do not dispute that their position would contradict the invocation of this statutory authority by every administration since the statutes were enacted in 1996. *See* Fed. Br. 48-49. Conversely, the States wrongly suggest that our express-authority argument would create a massive loophole. They ignore the fact that these statutes authorize departure from notice-and-comment procedures only in a circumscribed context (relating to health insurance and group health plans). *See id.* at 47-48.

B. The Agencies Had Good Cause to Issue the Rules Without Prior Notice and Comment

Even apart from their express statutory authority to issue these rules without prior notice and comment, the agencies had good cause to do so. *See* 5 U.S.C. § 553(b).[8] The agencies issued those rules to address a unique, exigent, and untenable situation. As our opening brief

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rules" pertaining to the contraceptive-coverage mandate does not *also* clearly authorize a departure from the APA's notice-and-comment procedures.

[8] Contrary to the States' suggestion (Br. 37), the agencies properly preserved the argument that subjecting these rules to prior notice and comment would have been impracticable, by identifying reasons that would constitute good cause in the "public interest" and on grounds of "impracticability." *See* Defs. Opp'n to Mot. for Prelim. Inj. at 16-18, dkt. no. 51 (Nov. 29, 2017).

explained (at 54-59), courts had divided on whether not-for-profit entities with religious and moral objections to the contraceptive-coverage mandate have a legal right to an exemption, a question the Supreme Court left unresolved. As a result, while many objectors had obtained preliminary injunctions protecting them from the mandate, others had not and faced the possibility of crippling financial penalties. The agencies' attempts to find a solution that would protect religious and moral interests while still ensuring cost-free contraceptive coverage for employees had fallen short—despite the solicitation of comment—and courts were pressing the agencies for a resolution. These unusual circumstances are hardly "ubiquitous and unremarkable," States Br. 36, and therefore recognizing good cause here would not threaten to "swallow the rule," *id.*, that generally requires agencies to follow notice-and-comment procedures.

For example, this Court has held that conflicting judicial decisions threatening "unforeseen liability" is exactly "the type of emergency situation" in which good cause exists. *Service Emps. Int'l Union, Local 102 v. County of San Diego*, 60 F.3d 1346, 1352 n.3 (9th Cir. 1995). The States' suggestion (Br. 38-39) that the potential financial liability in

Service Employees was more significant than the consequences here denigrates the importance of protecting sincerely held religious beliefs and moral convictions. *See*, *e.g.*, *Kong v. Scully*, 341 F.3d 1132, 1147 (9th Cir. 2003) (Rawlinson, J., concurring) (observing that the government is "entitled to take note of and alleviate the burden that religious entities sustain as a result of the government's exercise of its power"). Unlike in *United States v. Valverde*, 628 F.3d 1159 (9th Cir. 2010), here the agencies did not rely on a generic "desire for speediness" or "need to reduce uncertainty," States Br. 36, but on the need to prevent real and imminent harm.

Finally, the States ignore the fact that good cause exists where prior notice and comment would "interfere with the agency's ability to carry out its mission," *Natural Res. Def. Council, Inc. v. Evans*, 316 F.3d 904, 911 (9th Cir. 2003), or "force[] [the agency] to adopt a less effective regulatory program," *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1484 (9th Cir. 1992). Awaiting notice and comment would have done exactly that here, by delaying relief for employers who may face severe penalties for violating the contraceptive-coverage mandate; rendering the agencies subject to adverse judgments regarding policies they could

no longer defend; and leaving the agencies' regulations out-of-step with the agencies' current legal and policy judgments. *See* Fed. Br. 58-59.

C. The States Can Show No Prejudice from the Issuance of These Rules as Interim Final Rules

As our opening brief explained (at 62-63), the States cannot carry their burden of proving prejudice from the issuance of these rules without prior notice and comment. The agencies solicited comments regarding the proper scope of exceptions to the contraceptive-coverage mandate multiple times in the past, and those solicitations gave the public fair notice of the basic questions the agencies sought to resolve in issuing these interim rules. In addition, the States have not identified any specific comments they would have submitted regarding these rules. The States argue (Br. 44 n.28) that *Shinseki v. Sanders*, 556 U.S. 396 (2009), does not require them to show prejudice because *Shinseki* was not an APA case. But the principles regarding prejudicial error that govern under the APA—including the assignment of the burden of proof—directed the *Shinseki* Court's interpretation of the Veterans Affairs statute at issue in that case. *See id.* at 406-09.[9]

[9] The States also contend (Br. 53-55) that the interim rules are

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IV. The States Do Not Satisfy the Equitable Factors for Preliminary Injunctive Relief

As our opening brief explained (at 63-67), the States cannot meet their burden to show that the "balance of equities" tips in their favor. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). As demonstrated above and in our opening brief (*see supra* pp. 6-15; Fed. Br. 28-40), the States' assertions of fiscal harm do not satisfy Article III standing requirements, given the string of speculative contingencies upon which their alleged harm rests. For the same reasons, the notion that *immediate* injunctive relief is necessary here to protect the States' fiscs is specious.

The States' asserted loss of procedural rights, which does not itself establish Article III standing (*see supra* pp. 15-17; Fed. Br. 42-43), equally fails to show irreparable harm. The States' own citations recognize that while the loss of a procedural right sometimes provides

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substantively invalid under the APA and unconstitutional (although they make no attempt to develop their constitutional arguments, and only make passing reference to their substantive APA arguments). Because the district court did not address the States' substantive challenge, if this Court rejects the States' procedural challenge, the Court should remand to the district court to consider those arguments in the first instance.

"actionable harm," that harm is not necessarily "irreparable." *Northern Mariana Islands v. United States*, 686 F. Supp. 2d 7, 17 (D.D.C. 2009). And contrary to the States' assertion (Br. 60-61), the lack of irreparable injury here does not rest upon a challenge to "factual findings" by the district court, which did not purport to weigh the evidence.

On the other side of the balance, the exemptions protect important religious-liberty and moral-conscience interests that the prior rules left unguarded. The prior rules did not satisfy the religious or moral objections of numerous entities, which led to extensive unresolved litigation, pressure from courts, and—despite the solicitation of comment on that very issue—no solution that would both satisfy those objections and provide employees with cost-free contraceptive coverage. *See* 82 Fed. Reg. at 47,814. That state of affairs was untenable. *Cf. Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) (noting that an allegation of a RFRA violation satisfies the irreparable-harm requirement).

Accordingly, the States' assertion that the prior rules adequately protect religious and moral-conscience interests is incorrect, and in any event, those interests are important parts of the equitable balance here

independent of whether RFRA requires accommodating those concerns. *See* Fed. Br. 66-67. Furthermore, even if the States' allegations could satisfy Article III standing requirements, the financial interest in conscripting employers to pay for contraception rather than having employees or the States pay for it hardly outweighs the conscience interests at stake in this context. For all these reasons, the district court erred in balancing the relevant equities.

V. The District Court Abused Its Discretion in Entering a Nationwide Injunction

In defending the district court's nationwide injunction, the States rely heavily (Br. 66-68) on *City of Chicago v. Sessions*, 888 F.3d 272 (7th Cir. 2018). But the Seventh Circuit has since granted rehearing en banc to consider precisely this question. *See* Order, *City of Chicago v. Sessions*, No. 17-2991 (7th Cir. June 4, 2018). This Court likewise should carefully scrutinize, and then reject, the propriety of injunctions that—as is indisputably the case here—are broader than necessary to redress the plaintiffs' own injuries. And all the more so given the weakness of the States' defense of this improper practice.

Although the States generally agree that they must demonstrate standing for each *form* of relief sought, they argue (Br. 67) that the scope of injunctive relief is not an Article III concern. But "standing is not dispensed in gross," *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017), and thus a plaintiff must show why an injunction of the scope requested is necessary to redress his injury. Anyway, equitable principles independently require relief to be no more burdensome than necessary to remedy the relevant injury. *See* Fed. Br. 67-68.

The States invoke (Br. 67) a statement from *Bresgal v. Brock*, 843 F.2d 1163, 1169 (9th Cir. 1987), that there "is no general requirement that an injunction affect only the parties in the suit." But that statement simply means that nonparties can incidentally benefit from injunctions necessary to redress a plaintiff's injuries. *See id.* at 1170-71 ("[A]n injunction is not necessarily made over-broad by extending benefit or protection to persons other than prevailing parties in the lawsuit—even if it is not a class action—*if such breadth is necessary to give prevailing parties the relief to which they are entitled*."). Indeed, in *Bresgal* this Court made clear that "[w]here relief can be structured on

an individual basis, it must be narrowly tailored to remedy the specific harm shown." *Id*. at 1170. It is only where such relief is unworkable that a court should consider whether broader relief is necessary to provide the parties themselves with adequate relief.

The States try (Br. 66) to distinguish *Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011), and *Meinhold v. U.S. Department of Defense*, 34 F.3d 1469, 1480 (9th Cir. 1994), on the grounds that *Meinhold* involved only a single plaintiff and *Los Angeles Haven Hospice* involved significant disruption to the agency and confusion for the public. The reasoning of those cases, however, did not turn on the number of the plaintiffs, but on whether the injunction went beyond what was necessary for those plaintiffs. In any event, the nationwide injunction here has the same effect as that in *Los Angeles Haven Hospice*, and there is no reason why five State plaintiffs are any more entitled to overbroad nationwide relief than the single plaintiff in *Meinhold*.

The States rely (Br. 66) on *Califano v. Yamasaki*, 442 U.S. 682 (1979), for the proposition that "the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent

of the plaintiff class," *id.* at 702. But the Supreme Court there merely rejected the argument that certifying a nationwide *class action* was improper; it did not suggest that relief to *nonparties* was somehow proper. *Id.* As this Court recognized in *Bresgal*, *Yamasaki*'s "primary concern" was that "the relief granted is not 'more burdensome than necessary to redress the complaining parties.'" *Bresgal*, 843 F.2d at 1170 (quoting *Yamasaki*, 442 U.S. at 702).

Relying on a footnote in *Lujan v. National Wildlife Federation*, 497 U.S. 871, 890 n.2 (1990), the States assert (Br. 66), that a suit by a single plaintiff can invalidate an entire federal program. But that footnote addressed when facial challenges can be brought on the merits, *not* the proper scope of relief to be awarded to a plaintiff if he prevails. *See Lujan*, 497 U.S. at 890 n.2. Moreover, whatever *Lujan*'s implications for the scope of *final* relief in a facial challenge under the APA, *preliminary* injunctive relief under the APA must be limited to the plaintiffs. *See* Fed. Br. 70-71.[10]

[10] The States cite (Br. 66 & n.43) *Trump v. International Refugee Assistance Project*, 137 S. Ct. 2080 (2017), and *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017), but those cases merely denied stays of nationwide injunctions; they did not affirm the injunctions on the

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The States suggest (Br. 67-68) that nationwide injunctions serve the public interest because they are "efficien[t]." But the Supreme Court has repeatedly recognized the benefit of permitting multiple courts to weigh in on difficult issues. *See, e.g., Yamasaki*, 442 U.S. at 702 ("It often will be preferable to allow several courts to pass on a given class claim in order to gain the benefit of adjudication by different courts in different factual contexts."); *United States v. Mendoza*, 464 U.S. 154, 160 (1984).

Finally, the States contend (Br. 69) that nationwide preliminary relief is permissible because the agencies will suffer no harm. That is not true. Nationwide injunctions permit plaintiffs to skirt the class-action process and obtain global injunctive relief if any plaintiff prevails in a single district court. Yet the government, facing challenges in multiple districts, is deprived of any benefit unless it wins every case, since a nationwide injunction in one district effectively nullifies contrary rulings in all other districts (such as the government's victory in the parallel litigation in Massachusetts). *See* Fed. Br. 72-73.

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merits. Moreover, in *Washington*, this Court denied a stay, in part, because the government failed to prove that a narrower injunction was workable. *See* 847 F.3d at 1169.

CONCLUSION

For the foregoing reasons, the preliminary injunction should be reversed.

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

ALEX G. TSE
Acting United States Attorney

HASHIM M. MOOPPAN
Deputy Assistant Attorney General

MATTHEW M. COLLETTE

/s/ Lowell V. Sturgill Jr.
LOWELL V. STURGILL JR.
CATHERINE H. DORSEY
JAYNIE LILLEY
KAREN SCHOEN
Attorneys, Appellate Staff
Civil Division, Room 7241
U.S. Department of Justice
950 Pennsylvania Avenue N.W.
Washington, D.C. 20530
(202) 514-3427

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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 this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,821 words, excluding the parts of the brief exempted under Rule 32(f), according to the count of Microsoft Word.

/s/ Lowell V. Sturgill Jr.
Lowell V. Sturgill Jr.

CERTIFICATE OF SERVICE

I hereby certify that on June 11, 2018, 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/ Lowell V. Sturgill Jr.
Lowell V. Sturgill Jr.