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-Appellants,
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-Appellants,
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

SUPPLEMENTAL BRIEF FOR APPELLANT MARCH FOR LIFE

No. 18-15166

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STATE OF CALIFORNIA *et al.*,
Plaintiffs–Appellees
v.
MARCH FOR LIFE EDUCATION AND DEFENSE FUND,
Intervenor-Defendant–Appellant.

On Appeal from the United States District Court
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SUPPLEMENTAL BRIEF FOR APPELLANT MARCH FOR LIFE

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INTRODUCTION

Having learned during oral argument on October 19, 2018, that the Defendants in this case had sent final versions of the rules challenged in this case to the Office of Management and Budget for final review, this Court ordered the parties on October 25 to submit simultaneous supplemental briefs within 14 days addressing three questions: (1) "What is the status of the rules in question"?; (2) "If they are now being reviewed by the Office of Management and Budget, when are they likely to be published in the Federal Register?"; and (3) "When the rules become final, will the present appeal become moot?". Dkt. No. 117.

On November 7, one day before the deadline for filing the supplemental briefs, the Defendant federal agencies issued final versions of the rules, making them available for public inspection on the Federal Register website (https://www.federalregister.gov). The next day, the parties jointly moved for an extension of time to file their supplemental briefs in order to review the final rules and assess their impact on the pending appeal. Dkt. No. 122. This Court granted that motion on November 9. Dkt. No. 123. The Defendant federal agencies

officially published the final rules in the Federal Register on November 15. *See* 83 Fed. Reg. 57,536 (Nov. 15, 2018) (religious exemption); 83 Fed. Reg. 57,592 (Nov. 15, 2018) (moral exemption). The final rules will go into effect 60 days after their publication in the Federal Register on January 14, 2019.

As a consequence of these developments, only one of this Court's questions remains: "When the rules become final, will the present appeal become moot?"

SUMMARY OF ARGUMENT

The short answer to the Court's question is no. The present appeal will not become moot—at least not in its entirety—when the final rules go into effect.

March for Life agrees with the Departments and the States that the final rules will render moot the States' procedural Administrative Procedure Act claim. But the mootness of a single claim hardly renders the entire appeal moot.

As the Court knows, all the Appellants argued both in the district court and in this Court that the States lacked standing to assert *any* of their four causes of action—not just the procedural Administrative

Procedure Act (APA) claim that was the basis of the district court's preliminary injunction. The Appellants argued that the States lacked standing to pursue their Establishment Clause, Equal Protection Clause, and substantive APA claims. They appealed the district court's erroneous rejection of that argument.

The States will reprise their remaining substantive claims against the final versions of the rules. Perhaps recognizing the weakness of their contention that they have standing to pursue these claims, the States do not want this Court to address that issue, even though it has been fully briefed and argued, and is undeniably critical to the continued litigation of this case.

Precisely because the standing question is so central to the continued litigation of this case, this Court should—indeed, must—determine whether the States had standing to assert their remaining causes of action.

ARGUMENT

The final rules will moot the States' procedural APA claim but not their substantive challenges to the interim final rules (IFRs). As a

consequence, their standing to assert those substantive claims will remain a live issue for this Court to decide.

I. The Final Rules Will Moot the States' Procedural APA Claims.

March for Life agrees with the Departments that the final rules will moot the States' procedural APA claim. Supplemental Brief for the Federal Appellants at 2, 6-7 (hereinafter "DOJ Supp. Br.") (citing *Safari Aviation Inc. v. Garvey*, 300 F.3d 1144, 1150 (9th Cir. 2002)).

When the district court enjoined the IFRs, it did so based on only one of the States' claims: that the States were likely to succeed on the merits of their claim that the Departments violated the APA's procedural requirements when they issued the IFRs. ER at 17-25. Since the district court did not consider the States' other claims in the preliminary injunction ruling, only that procedural claim is on appeal. On January 14, 2019, the IFRs will expire and be replaced by the final rules. 83 Fed. Reg. 57,536 (Nov. 15, 2018) (religious exemption); 83 Fed. Reg. 57,592 (Nov. 15, 2018) (moral exemption).

"[I]f an event occurs while a case is pending on appeal that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party," the claim is moot. *Neighborhood Improvement*

Projects, LLC v. United States, 692 F. App'x 433, 434 (9th Cir. 2017) (quoting *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992)).

After the January deadline, this Court will be unable to afford the States any relief on the claim on appeal: this Court cannot uphold a preliminary injunction against rules that no longer exist. Once the IFRs expire, then, the procedural claim will be moot. *See Associated Fisheries of Maine, Inc. v. Evans*, 350 F. Supp. 2d 247, 254 (D. Me. 2004) (stating that a procedural challenge to an old rule is moot when a new rule supersedes the old one, even if the new rule is exactly like the old one) ("Plaintiff has brought a procedural challenge against the original rule promulgated by the Secretary in April 2004, and that challenge became moot when the new rule took effect.").

However, that the procedural claim will eventually become moot does not mean that the Court cannot rule on the appeal between now and the effective date of the IFRs, as the claim is still currently live. *See Hunt v. Imperial Merch. Servs., Inc.*, 560 F.3d 1137, 1142 (9th Cir. 2009) ("[W]e are not required to dismiss a live controversy as moot merely because it may become moot in the near future.").

II. The Final Rules Will Not Moot the States' Substantive Claims.

The final rules will not moot the States' Establishment Clause, Equal Protection, and substantive APA claims. These claims, of course, challenge the content of the interim final rules rather than the procedures through which they were adopted. The scope of the religious and moral exemptions from the contraceptive coverage mandate in the final rule does not differ in any material way from scope of the same exemptions in the IFRs. *See* 83 Fed. Reg. 57,536 (Nov. 15, 2018) (religious exemption); 83 Fed. Reg. 57,592 (Nov. 15, 2018) (moral exemption); *see also* DOJ Supp. Br. at 1 ("The substance of the rules remains largely unchanged, however, and none of the changes is material to the States' substantive claims in this case . . . .").

When a governmental body replaces a challenged rule with a substantially identical new rule, the case does not become moot. *See, e.g., Tollis, Inc. v. San Bernardino Cty.*, 827 F.2d 1329, 1331–32 (9th Cir. 1987) ("Since the relevant requirements of the temporary ordinance have been manifestly preserved unchanged in [the replacement] ordinance, the controversy before us is not moot.").

III. The States' Standing to Assert Their Substantive Claims Will Remain A Live Issue.

The States' standing to pursue its remaining claims has been and will continue to be a live issue for this Court to decide.

In the district court, the Departments challenged the States' standing to assert not only its procedural APA claims, but also its substantive causes of action. In their opposition to the States' motion for preliminary injunction, the Departments argued the States lacked standing to assert any of their claims. Defs.' Opp. to Mot. for Prelim. Inj. at 8-11, dkt. no. 51 (Nov. 29, 2017). They correctly asserted (1) that the States had failed to show that the IFRs would economically injure them; (2) that the States could not, as a matter of law, assert a right as *parens patriae* to represent the interests of their citizens; and (3) that the States failed to allege that the IFRs somehow threatened their quasi-sovereign interests. *Id.*

In response, the States curiously only defended their standing to assert their APA procedural claim. They argued that they "[h]ave standing to bring APA claims," specifically an APA procedural claim under 5 U.S.C. § 553. Pls.' Reply at 2, dkt. no. 78 (Dec. 6, 2017). They also stated that "[b]ecause enjoining the IFRs would redress the States'

procedural injuries, the States have standing." *Id.* at 4. On appeal, the States once again focused on their alleged procedural injury and the alleged economic harm the IFRs would ostensibly inflict on them. Appellees' Br. at 20-28.

In addition to the highly conjectural and speculative nature of the States' economic harm arguments, it bears noting that the States have no *legal* entitlement to the savings they claim the contraceptive coverage mandate provided them. They thus have no basis for challenging the expanded exemptions in the interim and final rules on the ground that they will lose some of those savings.

In any event, the States' emphasis on their standing to pursue their procedural APA claim does not absolve them of their obligation to establish standing to assert their other claims. "[A] plaintiff must demonstrate standing for each claim he seeks to press." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). Article III standing as to one claim does not "suffice for all claims arising from the 'same nucleus of operative fact.'" *Id.* at 352. Standing requires that "the particular plaintiff [be] entitled to an adjudication of the *particular claims* asserted." *Id.* at 352 (quoting *Allen v. Wright*, 468 U.S. 737, 752

(1984) (emphasis in original)). The States' failure to explicitly defend their standing to assert their substantive claims does not deprive this Court of its authority—indeed, its duty—to address that issue.

But the States' standing to assert *all* of their claims—not just their procedural APA claim—has been and will continue to be before this Court. The Departments, the Little Sisters of the Poor, and March for Life all challenged the States' standing to make *any* claims. *See* Brief for the Federal Appellants, at 24-43; Opening Brief of Intervenor-Defendant-Appellant The Little Sisters of the Poor Jeanne Jugan Residence, at 25-38; Brief for Intervenor-Defendant-Appellant March for Life, at 10-54; Reply Brief for the Federal Appellants, at 6-17; Reply Brief of Intervenor-Defendant-Appellant The Little Sisters of the Poor Jeanne Jugan Residence, at 27-33; Reply Brief of Intervenor-Defendant-Appellant March for Life, at 2-32.

Because the final rules will not moot the States' substantive claims, the States' standing to assert those causes of action will remain a live issue. For the reasons set forth in March for Life's opening and reply briefs, the States lack standing to assert the claims that will remain live after their procedural APA claim becomes moot.

CONCLUSION

For the foregoing reasons, March for Life respectfully requests that this Court vacate the preliminary injunction and remand with instructions to dismiss the States' claims for lack of standing.

Dated: November 16, 2018

Respectfully submitted,

s/ Gregory S. Baylor

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CERTIFICATE OF COMPLIANCE

I hereby certify that 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 font, a proportionally spaced font.

I further certify that this brief complies with the page limitation in this Court's order dated October 25, 2018.

s/ Gregory S. Baylor
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CERTIFICATE OF SERVICE

I hereby certify that on November 16, 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.

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