

1 XAVIER BECERRA, State Bar No. 118517
2 Attorney General of California
3 KATHLEEN BOERGERS, State Bar No. 213530
4 Supervising Deputy Attorney General
5 KARLI EISENBERG, State Bar No. 281923
6 NELI PALMA, State Bar No. 203374
7 Deputy Attorneys General
1300 I Street, Suite 125
Sacramento, CA 94244-2550
Telephone: (916) 210-7913
Fax: (916) 324-5567
E-mail: Karli.Eisenberg@doj.ca.gov
Attorneys for Plaintiff State of California

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

THE STATE OF CALIFORNIA, THE STATE OF CONNECTICUT; THE STATE OF DELAWARE; THE DISTRICT OF COLUMBIA; THE STATE OF HAWAII; THE STATE OF ILLINOIS; THE STATE OF MARYLAND; THE STATE OF MINNESOTA, BY AND THROUGH ITS DEPARTMENT OF HUMAN SERVICES; THE STATE OF NEW YORK; THE STATE OF NORTH CAROLINA; THE STATE OF OREGON; THE STATE OF RHODE ISLAND; THE STATE OF VERMONT; THE COMMONWEALTH OF VIRGINIA; THE STATE OF WASHINGTON.

Plaintiffs.

V.

ALEX M. AZAR, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES; U.S. DEPARTMENT OF HEALTH HUMAN SERVICES; R. ALEXANDER ACOSTA, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE U.S. DEPARTMENT OF LABOR; STEVEN MNUCHIN, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE U.S. DEPARTMENT OF THE TREASURY; U.S. DEPARTMENT OF THE TREASURY: DOES 1-100.

Defendants.

and

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

DEFENSE FUND, Defendant-Intervenors

4:17-cv-05783-HSG

STATES' BRIEF REGARDING EVIDENCE

Judge: The Honorable Haywood S. Gilliam, Jr.
Trial Date: Not set.
Action Filed: October 6, 2017

1

TABLE OF CONTENTS

	Page
3 INTRODUCTION	1
4 ARGUMENT	1
5 I. There Are Several Instances in Which Extra-Record Evidence Is	
5 Admissible	1
6 A. The States May Need to Submit Extra-Record Evidence to	
6 Demonstrate Standing	2
7 B. The States May Need to Submit Extra-Record Evidence to Support	
7 their Constitutional Claims	3
8 C. The States May Need to Submit Extra-Record Evidence to Support	
8 the Relief Requested	3
9 D. The States May Need to Submit Extra-Record Evidence, Including	
9 Legislative History, to Demonstrate the Intent of Congress	4
10 II. The Court Should Not Make Blanket Evidentiary Rulings Without a Proper	
11 Objection from Defendants	5
12 A. Defendants May Raise Evidentiary Objections as Part of the	
12 Forthcoming Cross Motions.....	5
13 CONCLUSION	6
14	
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	
26	
27	
28	

1 TABLE OF AUTHORITIES
2

	<u>Page</u>
3 CASES	
4 <i>Asarco v. EPA</i>	1
5 616 F.2d 1153 (9th Cir. 1980).....	1
6 <i>Association of Pacific Fisheries v. EPA</i>	2
7 615 F.2d 794 811 (9th Cir. 1980).....	2
8 <i>Bunker Hill Co. v. EPA</i>	2
9 572 F.2d 1286 (9th Cir. 1977).....	2
10 <i>Burwell v. Hobby Lobby Stores, Inc.</i>	
11 134 S. Ct. 2751 (2014)	5
12 <i>California v. Azar</i>	
13 -- F.Supp.3d -- (N.D. Cal. Jan. 13, 2019).....	4
14 <i>California v. Azar</i>	
15 911 F.3d 558 (9th Cir. 2018).....	2, 3, 4
16 <i>Center for Biological Diversity v. U.S. Fish & Wildlife Service</i>	
17 2016 WL 1394355 (N.D. Cal. 2016).....	5
18 <i>Flast v. Cohen</i>	
19 392 U.S. 83, 96 n. 14 (1968)	6
20 <i>Grill v. Quinn</i>	
21 No. CIV S-10-0757 GEB, 2012 WL 174873 (E.D. Cal. Jan. 20, 2012).....	3
22 <i>INS v. Cardoza-Fonseca</i>	
23 480 U.S. 421 (1987)	5
24 <i>Jones v. Rose</i>	
25 No. 00-CV-1795-BR, 2008 WL 552666 (D. Or. Feb. 28, 2008)	3
26 <i>Maldonado v. Lynch</i>	
27 786 F.3d 1155 (9th Cir. 2015) (Gould, C.J., dissenting)	6
28 <i>New York v. Department of Commerce</i>	
29 -- F.Supp.3d -- (Jan. 15, 2019)	2
30 <i>Porter v. Califano</i>	
31 592 F.2d 770, 781 (5th Cir. 1979).....	3
32 <i>San Luis & Delta-Mendota Water Authority v. Locke</i>	
33 776 F.3d 971 (9th Cir. 2014).....	1

TABLE OF AUTHORITIES
(continued)

	<u>Page</u>	
2		
3	<i>Sierra Club v. EPA</i>	
4	292 F.3d 895 (D.C. Cir. 2002)	2
5		
6	<i>Webster v. Doe</i>	
7	486 U.S. 592 (1988).....	3
8		
9	<i>Wilson v. CIR</i>	
10	705 F.3d 980 (9th Cir. 2013).....	1
11		
12	COURT RULES	
13		
14	Federal Rules of Civil Procedure	
15	Rule 56	6
16	Rule 56(c)(2)	6
17		
18	Federal Rules of Evidence	
19	Rule 201	5
20		
21	Northern District of California Civil Local Rules	
22	L.R. 7-3(a).....	6
23		
24	OTHER AUTHORITIES	
25		
26	158 Cong. Rec. S539 (Feb. 9, 2012).....	4
27		
28	159 Cong. Rec. S2268 (Mar. 22, 2013)	5

INTRODUCTION

The Court ordered the parties to submit simultaneous briefs “addressing their positions on whether this proceeding is limited to an assessment of the administrative record.” ECF No. 270. As set forth below, this proceeding is not limited to the administrative record.

The Court has ordered a merits briefing schedule, with plaintiffs' merits brief due on April 30, 2019. The schedule does not allow for discovery and the States have no plans to engage in discovery. The States may, however, offer evidence outside the administrative record to demonstrate standing, to support their Constitutional claims, to support the relief requested, or to demonstrate legislative intent. There are several permissible uses for extra-record evidence in cases that include claims under the Administrative Procedure Act. The Ninth Circuit has expressly held that extra-record evidence can be necessary to determine whether the agency has considered all relevant factors and has sufficiently explained its decision. And in this case, the Ninth Circuit explained that extra-record evidence is permissible for purposes of demonstrating standing and determining the scope of the injunctive relief. Given this authority, the States should not be preemptively precluded from submitting documentary evidence to support their claims. Rather, defendants should properly object to specific evidence when and if that evidence is submitted by the States. To date, defendants have not objected to any evidence submitted by the States.

ARGUMENT

I. THERE ARE SEVERAL INSTANCES IN WHICH EXTRA-RECORD EVIDENCE IS ADMISSIBLE

The Ninth Circuit has recognized that a court may consider extra-record evidence in litigation where plaintiffs bring claims under the Administrative Procedure Act. *See San Luis & Delta-Mendota Water Authority v. Locke*, 776 F.3d 971, 992 (9th Cir. 2014) (outlining four instances in which a court may consider extra-record evidence); *Asarco v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980) (finding that it “will often be impossible . . . for the court to determine whether the agency took into consideration all relevant factors unless it looks outside the record to determine what matters the agency should have considered but did not”); *Wilson v. CIR*, 705

1 F.3d 980, 991 (9th Cir. 2013) (a court may “require supplementation of the administrative record
 2 if it is incomplete,” including to “plug holes”); *Bunker Hill Co. v. EPA*, 572 F.2d 1286, 1292 (9th
 3 Cir. 1977) (courts are “not straightjacketed to the original record”); *Association of Pacific
 4 Fisheries v. EPA*, 615 F.2d 794 811 (9th Cir. 1980). Below, the States highlight reasons why
 5 extra-record evidence may be necessary in this case. As the States are still developing their
 6 motion for summary judgment and cannot anticipate all of the defendants’ and intervenors’
 7 arguments, this list is not meant to be exhaustive. Instead, it is illustrative of some areas in which
 8 extra-record evidence may be necessary.

9 **A. The States May Need to Submit Extra-Record Evidence to Demonstrate
 10 Standing**

11 If defendants or intervenors continue to challenge the States’ standing to maintain this
 12 action, the Ninth Circuit’s decision illustrates that evidence outside of the administrative record is
 13 appropriate to support the States’ standing. On the basis of declarations submitted by the States,
 14 the Ninth Circuit held that the States have standing to sue because the IFRs would “first lead to
 15 women losing employer-sponsored contraceptive coverage, which [would] then result in
 16 economic harm to the states.” *California v. Azar*, 911 F.3d 558, 571 (9th Cir. 2018). The Court
 17 concluded that the “*declarations* submitted by the states further show that women losing coverage
 18 from their employers will turn to state-based programs or programs reimbursed by the state.” *Id.*
 19 (emphasis added); *see also Sierra Club v. EPA*, 292 F.3d 895, 899-900 (D.C. Cir. 2002)
 20 (permitting plaintiffs to submit extra-record evidence to establish standing); *New York v.*
 21 *Department of Commerce*, -- F.Supp.3d --, 2019 WL 190285, at *49 n.30 (Jan. 15, 2019) (noting
 22 that federal defendants’ “conceded” that courts “could consider extra-record evidence in deciding
 23 whether Plaintiffs have Article III standing”).

24 Based on defendants’ and intervenors’ statements in the joint case management statement,
 25 the States anticipate that the defendants and/or the intervenors will raise standing in their motion
 26 to dismiss/motion for summary judgment. *See* ECF No. 251 at 2. In response, the States will
 27 need to demonstrate standing by pointing to the harm documented in the rules and by way of
 28 documentary evidence outside of the administrative record. To date, defendants have not

1 provided any legal authority that would preclude the States from submitting evidence to support
 2 standing. Indeed, the Ninth Circuit's reference to the States' declarations submitted to support
 3 standing demonstrate that it is appropriate for the States to submit declarations to establish
 4 standing if the defendants challenge it again.

5 **B. The States May Need to Submit Extra-Record Evidence to Support their
 6 Constitutional Claims**

7 The States are still developing their arguments and evidence on their Constitutional claims.
 8 Thus, at this juncture, the States have not decided what, if any, evidence they will submit in
 9 support of their Constitutional claims.

10 Regardless, defendants are incorrect that the States are precluded from submitting extra-
 11 record evidence on Constitutional claims. "A direct constitutional challenge is reviewed
 12 independent of the APA," and thus, the "court is entitled to look beyond the administrative record
 13 in regard to this claim." *Grill v. Quinn*, No. CIV S-10-0757 GEB, 2012 WL 174873, at *2 at n.8
 14 (E.D. Cal. Jan. 20, 2012) (citing *Porter v. Califano*, 592 F.2d 770, 781 (5th Cir. 1979)); *see also*
 15 *Webster v. Doe*, 486 U.S. 592, 604 (1988) (a party is entitled to discovery related to a
 16 constitutional claim even in a case in which an APA claim is also alleged); *Jones v. Rose*, No. 00-
 17 CV-1795-BR, 2008 WL 552666, at *12 (D. Or. Feb. 28, 2008), *aff'd*, 495 F. App'x 788 (9th Cir.
 18 2012). Accordingly, there is no blanket prohibition of evidence outside of the administrative
 19 record to prove the States' Constitutional claims. Here, if the States plan to move for summary
 20 judgment on their Constitutional claims and if they submit extra-record evidence on those claims,
 21 then defendants can object at that time. *See infra* at 5-6. The Court should not enter an order
 22 limiting that evidence in advance.

23 **C. The States May Need to Submit Extra-Record Evidence to Support the
 24 Relief Requested**

25 Extra-record evidence may be necessary for this Court to meet the Ninth Circuit's specific
 26 instructions to determine the scope of an injunction. The Ninth Circuit held that, on the prior
 27 record, additional evidence was necessary to demonstrate the appropriateness of nationwide
 28 relief. *California*, 911 F.3d at 583-84. The Ninth Circuit recognized that while "the record

1 before the district court was voluminous on the harm to the plaintiffs,” it was not “developed as to
 2 the economic impact on other states.” *Id.* at 584. And thus, the injunction should have been
 3 “narrowed to redress only the injury shown as to the plaintiff states.” *Id.* But a nationwide
 4 injunction is *not* foreclosed where there is a “*showing* of nationwide impact or sufficient
 5 similarity to the plaintiff states.” *Id.* (emphasis added). The Court instructed that the record be
 6 “*developed* as to the economic impact on other states.” *Id.* (emphasis added). This indicates that
 7 the Ninth Circuit both instructed and expects that evidence will be submitted by the States to
 8 “develop” and “show” the need for a nationwide injunction, if one is requested. If the States
 9 request a nationwide permanent injunction, then the States will need to comply with the Ninth
 10 Circuit’s instruction and submit extra-record evidence to demonstrate the need for the scope of
 11 the requested relief.

12 **D. The States May Need to Submit Extra-Record Evidence, Including
 13 Legislative History, to Demonstrate the Intent of Congress**

14 In determining the legality of the final rules, the Court will necessarily have to look at the
 15 implementing statute, the Women’s Health Amendment, and defendants’ justification for the
 16 rules—the Religious Freedom Restoration Act of 1993 (RFRA). *California v. Azar*, -- F.Supp.3d
 17 --, 2019 WL 178555, at *12-22 (N.D. Cal. Jan. 13, 2019). This Court should not limit its ability
 18 to review evidence in deciding these legal issues, including, for instance, whether the “religious
 19 exemption was mandated by RFRA” (*id.* at *17) or whether RFRA authorizes federal agencies to
 20 promulgate regulations that have “the effect of depriving female employees, students, and other
 21 beneficiaries connected to exempted religious objectors of their statutory right under the ACA”
 22 (*id.* at *20).

23 Nor should the Court limit its ability to review legislative action during and after the
 24 implementation of the ACA wherein Congress considered, but rejected, broader religious and
 25 moral exemptions to the contraceptive mandate. *See, e.g.*, 158 Cong. Rec. S539 (Feb. 9, 2012)
 26 (S. Amdt. 1520, Section (b)(1)), 112th Congress (2011-2012) (proponents argued that a
 27 “conscience amendment” was necessary because the ACA does not allow employers or plan
 28 sponsors “with religious or moral objections to specific items or services to decline providing or

1 obtaining coverage of such items or services"); *see also Burwell v. Hobby Lobby Stores, Inc.*, 134
 2 S. Ct. 2751, 2775 n.30; *id.* at 2789-2790 (Ginsburg, J., dissenting) (recognizing this legislative
 3 history); 159 Cong. Rec. S2268 (Mar. 22, 2013). This Court need not speculate about whether
 4 Congress intended to allow broad religious or moral objections; instead, it may look outside the
 5 record to assist it in making that determination. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 432
 6 & n.12 (1987) (reviewing legislative history to determine whether a federal agency's
 7 interpretation of a statute is correct).

8 Indeed, neither the APA nor the rules of evidence constrain the Court's ability to consider
 9 legislative facts. *See Fed. R. Evid. 201*, Advisory Committee Notes, 1972 Proposed Rules, Note
 10 to Subdivision (a) (noting that Rule 201's provisions on judicial notice of adjudicative facts omit
 11 "any treatment of legislative facts" due to "fundamental differences between adjudicative facts
 12 and legislative facts," differences that "render[] inappropriate any limitation" on consideration
 13 legislative facts of the kind that would ordinarily apply to adjudicative facts).

14 **II. THE COURT SHOULD NOT MAKE BLANKET EVIDENTIARY RULINGS WITHOUT A**
 15 **PROPER OBJECTION FROM DEFENDANTS**

16 **A. Defendants May Raise Evidentiary Objections as Part of the Forthcoming**
 17 **Cross Motions**

18 The primary parties have agreed on a cross-motions briefing schedule, and the Court has
 19 now set a briefing schedule. *See ECF Nos. 273, 275*. If defendants have objections to evidence
 20 the States submit during the summary judgment stage, the proper process for defendants to raise
 21 said objections is in response to the proffered evidence when submitted as part of the moving
 22 papers. *See Center for Biological Diversity v. U.S. Fish & Wildlife Service*, 2016 WL 1394355,
 23 at *3-4 (N.D. Cal. 2016) (denying plaintiffs' request to enter a blanket prohibition on extra-record
 24 evidence as premature where "any party that seeks to introduce evidence outside of the
 25 administrative record must" demonstrate the basis for the admission); *see also, e.g., Hoopa Valley*
 26 *Tribe v. U.S. Bureau of Reclamation*, No. 3:16-cv-04294-WHO, ECF No. 88, 2016 WL 9340435
 27 (N.D. Cal. Dec. 22, 2016) (federal defendants' motion to strike plaintiff's extra-record evidence
 28

1 submitted in support of plaintiff's motion for partial summary judgment).¹ In fact, this Court's
 2 rules expressly provide that "[a]ny evidentiary and procedural objections to [a] motion must be
 3 contained within the brief or memorandum." Civil L.R. 7-3(a); *see also* Fed. R. Civ. P. 56(c)(2)
 4 (providing that a party may object to evidence submitted to support or oppose a motion for
 5 summary judgment as part of the summary judgment procedure); Fed. R. Civ. P. 56 advisory
 6 committee's note (2010) (Subdivision (c)(2) "provides that a party may object" to evidence cited
 7 to support a motion for summary judgment; "[t]he objection functions much as an objection at
 8 trial, adjusted for the pretrial setting.").

9 Outside the context of a specific objection to a specific piece of evidence offered to prove a
 10 material fact, an order that the States cannot later submit hypothetical evidence on a hypothetical
 11 issue would be premature, and would be tantamount to an advisory opinion. *See Maldonado v.*
 12 *Lynch*, 786 F.3d 1155, 1165 (9th Cir. 2015) (Gould, C.J., dissenting) (citing *Flast v. Cohen*, 392
 13 U.S. 83, 96 n. 14 (1968)) ("The rule against advisory opinions was established as early as
 14 1793."). The applicable law clearly does not require the States to limit their evidence in this case
 15 to the administrative record. If defendants wish to object to evidence that the States may or may
 16 not submit, then their proper avenue to do so would be to object at that time.

17 CONCLUSION

18 Under applicable Ninth Circuit precedent, the Court should order that the proceeding is not
 19 limited to an assessment of the administrative record. The States thus respectfully request that
 20 this Court refrain from issuing any blanket evidentiary rulings. If the defendants or intervenors
 21 have an objection to evidence, they can submit said objection at the time the evidence is
 22 submitted by the States.

23 ///

24 ///

25 ///

26 ¹ Notably, to date, defendants have not raised any evidentiary objection to any specific
 27 evidence plaintiffs have submitted, including evidence submitted to demonstrate standing or in
 28 support of the scope of relief. Nor have they identified specific objectionable evidence that they
 anticipate the States may submit in connection with their motion for summary judgment.

1 Dated: February 12, 2019

Respectfully submitted,

2 XAVIER BECERRA
3 Attorney General of California
4 KATHLEEN BOERGERS
Supervising Deputy Attorney General

5 */s/ Neli Palma*
6 KARLI EISENBERG
NELI PALMA
7 Deputy Attorneys General
Attorneys for Plaintiff the State of California

8 WILLIAM TONG
9 Attorney General of Connecticut
MAURA MURPHY OSBORNE
10 Assistant Attorney General
Attorneys for Plaintiff the State of Connecticut

11 KATHLEEN JENNINGS
12 Attorney General of Delaware
ILONA KIRSHON
13 Deputy State Solicitor
JESSICA M. WILLEY
14 DAVID J. LYONS
Deputy Attorneys General
Attorneys for Plaintiff the State of Delaware

15 KARL A. RACINE
16 Attorney General of the District of Columbia
ROBYN R. BENDER
17 Deputy Attorney General
VALERIE M. NANNERY
18 Assistant Attorney General
Attorneys for Plaintiff the District of Columbia

19 CLARE E. CONNORS
20 Attorney General of Hawaii
ERIN N. LAU
21 Deputy Attorney General
Attorneys for Plaintiff the State of Hawaii

22 KWAME RAOUL
23 Attorney General of Illinois
ANNA P. CRANE
24 Public Interest Counsel
HARPREET K. KHERA
25 Deputy Bureau Chief, Special Litigation
Bureau
LEIGH J. RICHIE
26 Assistant Attorney General
Attorneys for Plaintiff the State of Illinois

1 BRIAN E. FROSH
2 Attorney General of Maryland
3 CAROLYN A. QUATTROCKI
4 Deputy Attorney General
5 STEVE M. SULLIVAN
6 Solicitor General
7 KIMBERLY S. CAMMARATA
8 Director, Health Education and Advocacy
9 *Attorneys for Plaintiff the State of Maryland*

10 KEITH ELLISON
11 Attorney General of Minnesota
12 JACOB CAMPION
13 Assistant Attorney General
14 *Attorney for Plaintiff the State of Minnesota,
by and through its Department of Human
Services*

15 LETITIA JAMES
16 Attorney General of New York
17 LISA LANDAU
18 Bureau Chief, Health Care Bureau
19 SARA HAVIVA MARK
20 Special Counsel
21 ELIZABETH CHESLER
22 Assistant Attorney General
23 *Attorneys for Plaintiff the State of New York*

24 JOSHUA H. STEIN
25 Attorney General of North Carolina
26 SRIPRIYA NARASIMHAN
27 Deputy General Counsel
28 *Attorneys for Plaintiff the State of North
Carolina*

19 ELLEN F. ROSENBLUM
20 Attorney General of Oregon
21 J. NICOLE DEFEVER
22 Senior Assistant Attorney General
23 *Attorneys for Plaintiff the State of Oregon*

25 PETER F. NERONHA
26 Attorney General of Rhode Island
27 MICHAEL W. FIELD
28 Assistant Attorney General
29 *Attorneys for Plaintiff the State of Rhode
Island*

25 T.J. DONOVAN
26 Attorney General of Vermont
27 ELEANOR SPOTTSWOOD
28 Assistant Attorney General
29 *Attorneys for Plaintiff the State of Vermont*

1 MARK R. HERRING
2 Attorney General of Virginia
3 SAMUEL T. TOWELL
4 Deputy Attorney General
5 *Attorneys for Plaintiff the Commonwealth of*
6 *Virginia*

7 BOB FERGUSON
8 Attorney General of Washington
9 JEFFREY T. SPRUNG
10 ALICIA O. YOUNG
11 Assistant Attorneys General
12 *Attorneys for Plaintiff the State of Washington*

13 SA2017109209
14 33785803.docx

15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

Case Name: **State of California v. Health
and Human Services, et al.** No. **4:17-cv-05783-HSG**

I hereby certify that on February 12, 2019, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

STATES' BRIEF REGARDING EVIDENCE

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 12, 2019, at Sacramento, California.

Ashley Harrison
Declarant

/s/ Ashley Harrison
Signature

SA2017109209
33785254.docx