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

IN THE U.S. 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 U.S. District Court, Northern District of California

ANSWERING BRIEF FOR THE STATES OF CALIFORNIA, DELAWARE, MARYLAND, NEW YORK, VIRGINIA

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INTRODUCTION

The Patient Protection and Affordable Care Act (ACA) requires that most group health insurance plans provide no-cost contraceptive coverage to women. Congress adopted this requirement to end the discriminatory practice of charging women more than men for preventive healthcare services, and to realize the important benefits to women's health and economic status that accompany greater access to contraceptive care. To date, tens of millions of women have benefited from this provision, including over 14 million women in the plaintiff States.

Defendants—U.S. Departments of Health and Human Services (HHS), Labor, and Treasury—prompted this lawsuit when they issued two interim final rules (IFRs) purporting to implement the contraceptive-coverage requirement. The IFRs went into immediate effect, bypassing standard notice and comment procedures. They permit nearly any employer or health insurance company, claiming any religious or moral objection, to exempt themselves from the coverage requirement. The regulations thus transformed an important legal entitlement to no-cost contraceptive coverage into a conditional benefit subject to an employer's or insurer's veto. This abrupt change to existing policy imperiled the healthcare of millions of

women, and threatened to impose direct financial and public health harms upon the plaintiff States.

Because defendants evaded standard notice and comment procedures, the States were denied their federal procedural right to participate in the rulemaking process. The Administrative Procedure Act's (APA) notice and comment requirement has, for nearly three-quarters of a century, promoted transparency, democratic accountability, and informed decision-making. Defendants' unjustified decision to bypass this process deprived the States of the opportunity to present evidence and legal analysis, and to encourage defendants to adopt a rule that was both legal and in the public interest. This procedural defect renders the IFRs invalid.

Defendants' attempt to rely on the "good cause" exception to the notice and comment requirement was correctly rejected by the district court. This narrow exception has been traditionally invoked to avert calamities such as the likelihood of imminent harm or death, or impending threats to national security. Defendants point to no such exigencies here. And defendants fail to show that Congress has excused the agencies from compliance with the notice and comment requirement altogether.

The district court therefore did not abuse its discretion by entering a preliminary injunction preserving the status quo. It reasonably concluded

that the States were, "at a minimum," likely to succeed on the merits of their notice and comment claim, and observed that the substantial fiscal, economic, and public health harms that the IFRs threatened to visit upon the States tipped the balance of the equities and public interest in their favor. The order below should be affirmed.

JURISDICTIONAL STATEMENT

The States agree with federal defendants that this Court has jurisdiction.

ISSUES PRESENTED FOR REVIEW

1. Whether the States have Article III standing.
2. Whether the United States District Court for the Northern District of California is the proper venue to file this action.
3. Whether the district court abused its discretion by entering a preliminary injunction preserving the status quo.

STATEMENT OF THE CASE

A. Statutory and Regulatory Framework

Among its many reforms to the nation's healthcare system, the ACA requires that certain employer group health insurance plans cover enumerated categories of preventive health services at no cost to the employee or their covered dependents. 124 Stat. 119. One such category is women's "preventive care and screenings." 42 U.S.C. § 300gg-13(a)(4).

Congress added this category of required coverage in the Women's Health Amendment, which sought to redress the "fundamental inequity" that women were systematically charged more for preventive services than men. 155 Cong. Rec. S12027 (Dec. 1, 2009) (statement of Sen. Gillibrand).[1] At the time, "more than half of women delay[ed] or avoid[ed] preventive care because of its cost." *Id.* Eradicating these discriminatory barriers to preventive care—including contraceptive care—would substantially improve health outcomes for women. *See, e.g.*, at S12052 (statement of Sen. Franken); *see also id.* at. S12059 (statement of Sen. Cardin) (noting that amendment will cover "family planning services"); *id.* (statement of Sen. Feinstein) (same). While Congress adopted the Women's Health Amendment, it also considered and rejected a competing amendment to permit a broad moral and religious exemption to the ACA's coverage requirements. *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751, 2775 n.30 (2014); *id.* at 2789-2790 (Ginsburg, J., dissenting); *cf.* 159 Cong. Rec. S2268 (Mar. 22, 2013).

[1] *See id.* at S12051 (statement of Sen. Franken) (similar); *see also id.* at 12027 (statement of Sen. Gillibrand) ("women of child-bearing age spend 68 percent more in out-of-pocket heath care costs than men"); *see id.* at S12051 (statement of Sen. Dodd) (similar).

Rather than set forth a comprehensive definition of women's preventive services that must be covered, Congress opted to rely on the expertise of the Health Resources and Services Administration (HRSA)—an agency housed within HHS—which it charged with this task. 42 U.S.C. § 300gg-13(a)(4). HRSA, in turn, commissioned the Institute of Medicine (IOM) to study the issue and to make evidence-based recommendations.[2] The IOM assembled a panel of independent experts, who surveyed the relevant literature and peer-reviewed research, and produced a report recommending that preventive services for women include all FDA-approved "contraceptive methods, sterilization procedures, and patient education and counseling." IOM, Clinical Prevention Services for Women: Closing the Gaps 109-110 (2011) (IOM Report).[3]

The IOM Report, like the sponsors of the Women's Health Amendment, recognized the importance of contraception to women's health. *Id.* at 102-109. It concluded, for example, that 49% of all pregnancies in the

[2] The IOM, "an arm of the National Academy of Sciences," is an organization comprised of independent medical experts, and was established by Congress "'for the explicit purpose of furnishing advice to the Government.'" *Hobby Lobby*, 134 S. Ct. at 2788 n.3 (Ginsburg, J., dissenting).

[3] *available at* https://www.nap.edu/read/13181/chapter/1 (last visited May 21, 2018).

United States are unintended, and that this phenomenon was most prevalent among low-income women and women of color, who are least likely to have access to contraceptive care. *Id.* at 102-103. The IOM Report relatedly found that the most effective forms of contraceptives (such as an intrauterine device or implant) carry substantial upfront costs, *id.* at 105, 108, and that even modest out-of-pocket fees (such as co-payments and deductibles) can appreciably deter adoption of these methods, *id.* at 109. The report also discussed the important public health benefits and cost-savings associated with increased access to contraception. *Id.* at 102-109.

HRSA adopted the IOM Report's recommendation, and the three federal agencies responsible for implementing the ACA (HHS, Labor, and Treasury) promulgated implementing regulations. *See* 76 Fed. Reg. 46,621 (Aug. 3, 2011); 77 Fed. Reg. 8,725 (Feb. 15, 2012). The regulations, which garnered over 200,000 comments, included a carefully-crafted exemption to the contraceptive-coverage requirement for a defined class of religious employers.[4] The agencies explained that this exemption was meant to apply

[4] Certain plans that were in existence prior to the ACA's enactment, and have not undergone specified changes, are statutorily-exempted from the requirement. These so-called "grandfathered plans" are a "transitional measure," meant to ease regulated entities into compliance with the ACA, and "will be eliminated as employers make changes to their health care

primarily to houses of worship, where it would be reasonable to presume that line-level employees would share their employer's religious objection to contraception. 77 Fed. Reg. 8,728 (Feb. 15, 2012).[5] The agencies declined to implement a broader exemption out of concern that it might sweep in employers "more likely to employ individuals who have no religious objection to the use of contraceptive services," and thereby risk "subject[ing] [such] employees to the religious views of [their] employer." *Id.*

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plans." *Priests For Life v. HHS*, 772 F.3d 229, 266 (D.C. Cir. 2014), *vacated and remanded sub nom. Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (*PFL*); *Hobby Lobby*, 134 S. Ct. at 2801 ("the grandfathering provision is 'temporary, intended to be a means for gradually transitioning employers into mandatory coverage.'") (Ginsburg, J., dissenting); *see also* Kaiser Family Foundation, *Employer Health Benefits 2017 Annual Survey* 207 (Sept. 19, 2017), *available at* https://www.kff.org/health-costs/report/2017-employer-health-benefits-survey/ (last visited May 21, 2018) (showing precipitous decline in percentage of covered workers enrolled in a grandfathered plan); Kaiser Family Foundation, *Preventive Services Covered by Private Health Plans Under the Affordable Care Act* (Aug. 4, 2015) ("[I]t is expected that over time almost all plans will lose their grandfathered status."), *available at* http://www.kff.org/health-reform/fact-sheet/preventive-services-covered-by-private-health-plans/ (last visited May 21, 2018).

[5] The regulation defined "religious employer" as follows: "(1) Has the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a non-profit organization [under the relevant statutes, which] refer[] to churches, their integrated auxiliaries, and conventions or associations of churches, as well as to the exclusively religious activities of any religious order." *Id.* at 8,726.

The agencies later solicited public comment on, and implemented, updated regulations that simplified the criteria for the religious employer exemption and instituted a separate "religious accommodation" process. 78 Fed. Reg. 39,870 (Jul. 2, 2013). The regulations required an employer that wished to avail itself of the religious accommodation to submit a government-issued form to its health insurance provider—or in the case of a self-insured plan, to its third party administrator (TPA)—certifying that: (1) it is a non-profit organization that (2) holds itself out as a religious organization, and (3) opposes providing contraceptive coverage on religious grounds. *Id.* at 39,874; *Wheaton College v. Burwell*, 134 S. Ct. 2806, 2807 (2014).[6] Upon submitting the self-certification form, the employer is absolved of any obligation to "contract, arrange, pay, or refer for contraceptive coverage" to which it objects. 78 Fed. Reg. 39,874. Upon receipt of the form, the insurance provider becomes solely responsible for continuing to provide seamless contraceptive coverage to the insured. *Id.* at 39,876, 39,893.

Subsequent legal developments caused the agencies to further amend the religious accommodation. In *Hobby Lobby*, the Supreme Court held that

[6] For simplicity and clarity, the States will refer to TPAs and health insurers collectively as "insurers" or "health insurers."

the Religious Freedom Restoration Act of 1993 (RFRA) applies to closely-held for-profit corporations with religious objections to contraception, and that the government must therefore provide these companies with a less burdensome means of complying with the contraceptive-coverage requirement. 134 S. Ct. at 2785. The Court suggested that the government might comply by simply extending the existing religious accommodation to these closely-held for-profits. *Id.* at 2782. It emphasized that its holding would have no effect on women's access to contraceptive coverage. *Id.* at 2760. In the wake of the decision, the agencies solicited public comment, and later amended the regulations by making certain closely-held for-profits eligible for the religious accommodation. 80 Fed. Reg. 41,343 (Jul. 14, 2015).

Next in *Wheaton College*, a nonprofit college that qualified for the religious accommodation challenged the requirement that it must file the self-certification form. 134 S. Ct. 2806. It reasoned that doing so made it complicit in providing contraception, and therefore violated its right to free exercise of religion under RFRA. *Id.* at 2808 (Sotomayor, J., dissenting). The Court granted Wheaton's application for an interim injunction pending appeal, while expressing no view on the merits. *Id.* at 2807. Just as it did in *Hobby Lobby*, the Court emphasized that nothing in its order "affects the

ability of [Wheaton's] employees and students to obtain, without cost, the full range of FDA approved contraceptives." *Id.* at 2807. The agencies responded by providing an alternative process to the self-certification form, whereby employers need only notify HHS in writing (without resort to any particular form) "of [their] religious objection to covering all or a subset of contraceptive services." 80 Fed. Reg. 41,323. Upon receipt, the agencies contact the employer's insurance provider to inform it of its obligation to separately provide contraceptive coverage to the insured employees. *Id.*

In *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (per curiam), various nonprofit employers challenged the revised religious accommodation process, arguing that it violated RFRA. After oral argument, the Court did not reach the merits, but instead vacated and remanded the matter to the Courts of Appeal to afford the parties an opportunity to resolve the matter in light of their evolving legal positions. *Id.* at 1560-1561. As it did in *Wheaton College* and *Hobby Lobby*, it again underscored that nothing in its order "is to affect the ability of the Government to ensure that women covered by petitioners' health plans 'obtain, without cost, the full range of FDA approved contraceptives.'" *Id.* at 1560-1561.

In response to *Zubik*, the agencies solicited public comment on proposed modifications to the religious accommodation process that would

lessen any perceived burden on religious expression, "while still ensuring that women enrolled in the organizations' health plans have access to seamless [contraceptive] coverage . . . without cost sharing." 81 Fed. Reg. 47,741 (Jul. 22, 2016). On January 9, 2017, after considering the 54,000 comments received, the agencies determined that no change to the religious accommodation process was warranted. Dep't of Labor, FAQs About Affordable Care Act Implementation Part 36 4-5.[7] Defendants concluded that the existing accommodation complied with RFRA by protecting the interests of religious objectors, while also fulfilling the agencies' statutory duty to ensure women retained access to no-cost contraceptive coverage. *Id.* To date, over 62 million women have benefited from the contraceptive-care requirement, including over 14 million women in the plaintiff States.[8]

[7] *available at* https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-36.pdf (last visited May 21, 2018).
[8] Nat'l Women's Law Center, *New Data Estimates 62.4 Million Women Have Coverage of Birth Control Without Out-of-Pocket Costs* (Sep. 2017), *available at* https://nwlc.org/wp-content/uploads/2017/09/New-Preventive-Services-Estimates-3.pdf (last visited May 21, 2018); *see also* HHS, *The Affordable Care Act is Improving Access to Preventive Services for Millions of Americans* (May 14, 2015), *available at* https://aspe.hhs.gov/pdf-report/affordable-care-act-improving-access-preventive-services-millions-americans (last visited May 21, 2018).

B. The Challenged Religious and Moral Interim Final Rules (IFRs)

On October 6, 2017, unexpectedly and without prior notice to the public, defendants issued two IFRs that created broad exemptions to the contraceptive-coverage requirement: the Religious IFR and the Moral IFR. Both rules were effective immediately. ER 283, 327.

The Religious IFR expanded the exemption, previously reserved for a carefully-defined class of religiously-affiliated nonprofits, to any non-governmental employer—regardless of corporate structure or religious affiliation—or any health insurance company. ER 300-303. The IFR does not require an objecting entity to submit a self-certification form or otherwise notify its insurance provider or the federal government that it is availing itself of the exemption. ER 299. While the IFR nominally preserves the accommodation process, objecting entities are not required to use it and may instead rely on the wholesale exemption. The IFR thus renders the religious accommodation process—which ensured that women received seamless access to contraceptive coverage—entirely voluntary at the employer's or health insurer's sole discretion. ER 303-304.

The Moral IFR created a similarly broad exemption for certain entities that object to contraception on moral grounds. ER 327-351. No

prior regulation or policy had ever recognized non-religious moral objections as a basis for exemption from the contraceptive-coverage requirement. Like the Religious IFR, the Moral IFR contained an entirely voluntary accommodation process. ER 343.

Neither of the IFRs impose any independent obligation upon employers to notify employees of their decision to use the exemptions. Affected women therefore may not realize that they have lost contraceptive coverage until the moment that they try to use it.

C. The Proceedings Below

On November 1, 2017, plaintiffs—the States of California, Delaware, Maryland, New York, and Virginia—filed the operative complaint in this case. ER 250. The complaint alleged causes of action under the APA and the United States Constitution. In particular, the complaint alleged that the IFRs were invalid under the APA (1) because the agencies failed to follow notice and comment procedures, (2) because the IFRs contravene the statutory provisions they purport to implement and are therefore contrary to law and arbitrary and capricious, and (3) because the agencies failed to provide any reasoned explanation for their reversal in policy. ER 278-279. The complaint also alleged causes of action under the Equal Protection

Clause and the Establishment Clause. ER 279-280. On November 9, 2017, plaintiffs moved for a preliminary injunction. ER 11.

On December 21, 2017, the district court granted the motion. ER 29. It held that plaintiffs were, "at a minimum," likely to succeed on the merits of their procedural APA claim, and therefore declined to address the other causes of action. ER 2, 17, 25. In so holding, the district court rejected defendants' assertion that this case presented an emergency situation that necessitated bypassing the APA's notice and comment procedures. ER 17-19, 21-24. The district court also found that absent a preliminary injunction, plaintiffs would face irreparable injuries—both substantive and procedural—and that the equities and public interest tipped decisively in plaintiffs' favor. ER 25-28. In particular, the court found that the IFRs effected irreparable harms against the States' fiscs, the public health of its citizens, and their procedural interest in participating in the public comment process. ER 25-26. The court also rejected defendants' threshold standing and venue arguments. ER 12-14, 16-17.

Intervenors—March for Life Education and Defense Fund (March) and Little Sisters of the Poor, Jeanne Jugan Residence (Sisters)—each appealed. ER 32-35. Defendants later appealed on February 16, 2018. ER

30-31. Neither defendants nor intervenors sought to stay the preliminary injunction, either in this Court or in the district court.

SUMMARY OF ARGUMENT

1. The States have Article III standing. This action is not, as defendants suggest (AOB 24), merely a vehicle to express disagreement with a change in federal policy. Rather, defendants violated the States' procedural right to participate in the required notice and comment process, and the resultant regulations—issued without any public input—threaten to harm the States' concrete interests. This combination of procedural and substantive harm is constitutionally sufficient. *NRDC v. Jewell*, 749 F.3d 776, 782–83 (9th Cir. 2014) (en banc); *California ex rel. Imperial Cty. Air Pollution Control Dist. v. U.S. Dep't of the Interior*, 767 F.3d 781, 789-791 (9th Cir. 2014).

As to the procedural harm, the States were entitled by law to present their legal analysis, policy views, and relevant evidence in hopes of shaping the debate and encouraging the agencies to adopt a rule that was both legal and served the public interest.

As to the substantive harms, the regulations change the status quo and will directly harm the States' fiscs. Some women who lose contraceptive coverage as a result of the regulations will seek contraceptive care through

State-run programs, or programs that the States are legally responsible for reimbursing. Other women who lose coverage will not qualify for these programs, and will be at heightened risk for unintended pregnancies, which may also impose direct financial costs on the States. Finally, reduced access to birth control will have a negative impact on women's educational attainment, ability to participate in the labor force, and earnings potential. These social, economic, and public health outcomes also inflict great harm on the States. Each harm constitutes a cognizable injury directly caused by the challenged regulations, which can only be remedied by a favorable judicial decision.

2. California is entitled to bring this action in any judicial district within its territory. Defendants' contrary reading of the venue statute is premised on its mistaken belief that States are "entities" as defined in the venue statute, who may only bring suit in their "principal place of business." 28 U.S.C. § 1391(c)(2). But the most natural reading of the statute is that residency for a State is not expressly defined, because the statute uses the word "State" separately and distinctly from the word "entity," which suggests that "entity" would not encompass a plaintiff "State." *Compare* 28 U.S.C. § 1391(d) *with* 28 U.S.C. § 1391(c). Moreover, States are deemed to

"reside" in their sovereign borders. *Alabama v. Army Corps of Eng'rs*, 382 F. Supp. 2d 1301, 1327-29 (N.D. Ala. 2005).

3. The most important factor in determining whether a preliminary injunction is warranted is the plaintiffs' likelihood of success. The district court focused on one of plaintiffs' many claims and correctly determined that the IFRs are invalid for failure to observe notice and comment procedures. 5 U.S.C. § 553(b)-(d). No exception to the notice and comment requirement applies. Defendants' asserted desire for expeditiousness, and to reduce litigation risk and regulatory uncertainty, fails to meet the high bar of demonstrating an emergency that necessitates bypassing normal rulemaking procedures. *United States v. Valverde*, 628 F.3d 1159, 1166-1167 (9th Cir. 2010). The agencies also assert that the accommodation process needed to be amended immediately because it conflicts with RFRA. But no decision of the United States Supreme Court supports defendants' reading of RFRA, *see Zubik*, 136 S. Ct. 1557, and the agencies' interpretation of RFRA is entitled to no deference, *see Gonzales v. Oregon*, 546 U.S. 243, 258-259 (2006).

Defendants' failure to observe notice and comment procedures is not harmless because plaintiffs never received actual notice of the proposed rules, nor any opportunity to comment before they became effective.

Paulsen v. Daniels, 413 F.3d 999, 1006 (9th Cir. 2005). And the ACA does not give defendants blanket authority to dispense with notice and comment whenever they deem it "appropriate." AOB 51. The statutes cited by defendants do not "plainly express[] a congressional intent to depart from normal APA procedures." *Asiana Airlines v. FAA*, 134 F.3d 393, 398 (D.C. Cir. 1998); *see also Castillo-Villagra v. INS*, 972 F.2d 1017, 1025-1026 (9th Cir. 1992).

Furthermore, the district court did not abuse its discretion by issuing a preliminary injunction, in light of the harms, equities, and public interest. The financial harms sustained by the States are irreparable because they cannot be recovered once dispensed. *See Cal. Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 851-852 (9th Cir. 2009), *vacated and remanded on other grounds sub nom. Douglas v. Indep. Living Ctr. of S. California, Inc.*, 565 U.S. 606 (2012). The uptick in unintended pregnancy will also inflict irreparable harm to the States' economic and public health interests. The States' procedural injury is equally irreparable because post-promulgation comment is an inadequate remedy. *See Paulsen*, 413 F.3d at 1006-1008; *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 214-215 (5th Cir. 1979).

In contrast, the government has pointed to no irreparable harm that would flow from the delay necessary to follow proper APA procedures. *See*

League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton, 752 F.3d 755, 765 (9th Cir. 2014). And defendants' claimed harms are undercut by their own statements that several employers will be unaffected in light of other litigation. AOB 31; Sisters Br. 31; March Br. 55. Moreover, the public interest is served when "agencies comply with their obligations under the APA," *N. Mariana Islands v. United States*, 686 F. Supp.2d 7, 21 (D.D.C. 2009), resulting in transparent, informed, and accountable agency decision-making.

The district court did not abuse its discretion by preliminarily enjoining the IFRs nationwide. Defendants' contrary arguments conflate principles of Article III standing with a district court's discretion, deriving from its equitable powers, to fashion the appropriate scope of relief. *See Melendres v. Arpaio*, 784 F.3d 1254, 1265 (9th Cir. 2015). The Supreme Court has in fact admonished that "the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class," *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979), and has recognized that a suit by a single plaintiff can alter an entire federal program, *see, e.g.*, *Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 890 n.2 (1990). Defendants also raise a number of policy concerns about the wisdom of issuing nationwide

injunctions. But they fail to explain how these generalized concerns amount to an abuse of discretion in this case.

STANDARDS OF REVIEW

A district court's order entering a preliminary injunction is reviewed for abuse of discretion. *Network Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d 1137, 1144 (9th Cir. 2011). The district court must be affirmed so long as it "'identified the correct legal rule'"—even if this Court "would have arrived at a different result"—and did not make any clearly erroneous findings of fact. *Disney Enterprises, Inc. v. VidAngel, Inc.*, 869 F.3d 848, 856 (9th Cir. 2017). Standing and venue are reviewed de novo. *Cal. Sea Urchin Comm'n v. Bean*, 883 F.3d 1173, 1180 (9th Cir. 2018); *Decker Coal v. Commonwealth Edison*, 805 F.2d 834, 841 (9th Cir. 1986). Findings of fact supporting the district court's standing analysis are reviewed for clear error. *In re ATM Fee Antitrust Litig.*, 686 F.3d 741, 747 (9th Cir. 2012).

ARGUMENT

I. THE STATES HAVE ARTICLE III STANDING

To demonstrate standing, a plaintiff must show that (1) it is under threat of a concrete and particularized injury, (2) that is "fairly traceable to the challenged action," and (3) it is likely that a favorable decision will "prevent

or redress the injury." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). Where, as here, a plaintiff alleges a procedural injury, it need not meet "'all the normal standards' for traceability and redressability." *Jewell*, 749 F.3d at 782.[9] It need only show that it "has 'a procedural right that, if exercised, *could* protect [its] concrete interests,'" *id.* at 783 (emphasis original), and that the statute conferring the procedural right was "designed to protect [its] concrete interests," *Imperial Cty.*, 767 F.3d at 789, 790; *see also W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 485 (9th Cir. 2011).[10] It is under no obligation to show that following proper procedures would have changed the substance of the policy being challenged. *Imperial Cty.*, 767 F.3d at 790 n.4; *Massachusetts*, 549 U.S. at 518; *Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1082-1083 (9th Cir.

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[9] While under some circumstances a bare procedural violation will confer standing, *Spokeo v. Robins*, 136 S. Ct. 1540, 1549 (2016), a plaintiff must generally demonstrate that the procedural fault threatens a concrete interest, *Summers*, 555 U.S. at 496.

[10] *See also Friends of Santa Clara River v. U.S. Army Corps of Eng'rs*, 887 F.3d 906, 918 (9th Cir. 2018); *Imperial Cty.*, 767 F.3d at 790 (for "procedural rights, 'our inquiry into the imminence of the threatened harm is less demanding'"); *Massachusetts v. EPA*, 549 U.S. 497, 517-518 (2007); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 572 n.7 (1992); *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1197 (9th Cir. 2004); *cf. Lujan*, 504 U.S. at 578; *id.* at 580 (Kennedy, J., concurring) ("Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before").

2015); AOB 42 (accord). Finally, where a State exercises a federal procedural right, its standing to summon the jurisdiction of the federal courts is afforded "special solicitude." *Massachusetts*, 549 U.S. at 520; *Texas v. United States*, 809 F.3d 134, 162 (5th Cir. 2015), *aff'd by an equally divided court in United States v. Texas*, 136 S. Ct. 2271 (2016).

Plaintiffs have established Article III standing here. The States were deprived of the procedural right to receive advance notice and submit comments before the challenged regulations became effective. *Infra* Section III.A. Defendants do not dispute that the APA's procedural rights are designed to protect States, who routinely challenge unlawful agency action. *See, e.g.*, *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1178-1179 (9th Cir. 2011) (per curiam) (California suffered procedural injury sufficient to confer standing); *Texas*, 809 F.3d at 152; *cf. Sausalito*, 386 F.3d at 1200. If employers are permitted to avail themselves of the new exemptions created by the IFRs, it will result in increased state responsibilities and thereby inflict concrete financial harm on the States in at least three distinct ways:[11]

- Some women who lose contraceptive coverage as a result of the IFRs will seek contraceptive care through state-funded programs, or through third party providers that the States are legally responsible for

[11] These harms are addressed in greater detail *infra* Section III.B.

reimbursing. The increased demand for these programs will therefore result in direct financial costs to the States. *See infra* pp. 55-57.[12]

- A subset of women who lose contraceptive coverage as a result of the IFRs may not qualify for these programs, or may opt not to use them because they cannot afford the cost-sharing requirements that they impose. These women will have lost access to contraceptive care altogether, and will be at increased risk for an unintended pregnancy. The States are burdened with funding a significant portion of the medical procedures associated with unintended pregnancies and their aftermath. *See infra* pp. 57-59.[13]

- In addition to these direct financial outlays, numerous studies have shown that reduced access to birth control also has a negative impact on women's educational attainment, ability to participate in the labor force, and earnings potential. These pernicious social, economic, and public health outcomes also inflict great harm on the States. *See infra* pp. 58-59.[14]

Defendants contend that these harms are premised upon a speculative chain of future events, and fault the States for failing to identify specific employers who will use the new exemptions, or specific women who will lose contraceptive coverage as a result. AOB 28-40. But a causal chain

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[12] *See also* ER 233, 236 (Tosh Decl. ¶¶ 22, 33-34); ER 122 (Cantwell Decl. ¶¶ 16-17); ER 199-200 (Jones Decl. ¶ 19); ER 136, 140 (Lytle-Barnaby Decl. ¶¶ 4, 21-22); ER 115-117 (Rattay Decl. ¶¶ 3, 7-8); ER 205-206, 209-211, 213 (Nelson Decl. ¶¶ 5, 8, 20-28, 34); ER 243 (Whorely Decl. ¶¶ 10-11).

[13] *See also* ER 141 (Lytle-Barnaby Decl. ¶ 24); ER 115-116 (Rattay Decl. ¶ 5); ER 97 (Grossman Decl. ¶ 6).

[14] *See also* ER 162-163, 169, 171, 175, 177 (Finer Decl. ¶¶ 45, 61, 69, 85, 93); ER 130 (Ikemoto Decl. ¶ 7); ER 234-235 (Tosh Decl. ¶ 28); ER 115-117 (Rattay Decl. ¶¶ 5, 7-9); ER 213 (Nelson Decl. ¶ 34).

"does not fail simply because it has several 'links.'" *Maya v. Centex Corp.*, 658 F.3d 1060, 1070 (9th Cir. 2011). What "matters is not the 'length of the chain of causation,' but rather the 'plausibility of the links that comprise the chain.'" *Nat'l Audobon Soc'y v. Davis,* 307 F.3d 835, 849 (9th Cir. 2002). There is nothing speculative about the States' harms. It 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. *See infra* pp. 55-59.

And defendants cite no authority supporting the proposition that the States are under any obligation to identify specific women or employers affected by the IFRs.[15] This Court in fact disapproved of this precise argument. In *Sherman*, the State of California challenged as procedurally defective a land resource and management plan (Plan) that liberalized standards governing logging and grazing activity on a 10-million-acre parcel of land. 646 F.3d 1161. The U.S. Forest Service argued that California

[15] Sisters itself moved to intervene on the grounds that it intended to use the IFRs in California. ECF No. 38 at 1 (moving to intervene explaining that it plans to use the expanded religious exemption); *Massachusetts v. U.S. Dep't of Health and Human Services*, No. 17-11930-NMG, —F. Supp. 3d—, 2018 WL 1257762, at *11 (D. Mass. March 12, 2018) ("There is no doubt that employers in [] California intend to use the IFR's expanded exemptions, a prerequisite to a state incurring an injury to its state fisc or to the health and well-being of its residents.").

lacked standing because it had not identified a specific logging project that had been approved as a result of the Plan. *Id.* at 1178-1179. The Court rejected that argument, noting that the injury was complete the moment that the Plan was approved, because the procedural harm was "fairly traceable to some action that will affect [California's] interests." *Id.* at 1179. The Court further remarked that California was under no obligation to identify a specific logging project, because it is entirely unrealistic to assume that the Forest Service would not undertake *any* projects pursuant to the Plan. *Id.*; *cf. Cent. Delta Water Agency v. United States*, 306 F.3d 938, 948-950 (9th Cir. 2002).

The same is true here. It strains credulity to assume, as defendants suggest, that the States will suffer no cognizable harm—that no women will lose ACA contraceptive coverage as a result of an employer taking advantage of the greatly expanded exemptions. *See Council of Ins. Agents & Brokers v. Molasky-Arman*, 522 F.3d 925, 932 (9th Cir. 2008) (noting that Supreme Court has found injury-in-fact even where magnitude of financial harm was only a few dollars).[16] Defendants themselves recognize that the

[16] Sisters goes a step further, arguing that no employer will avail themselves of the broad exemptions created by the IFRs. Sisters Br. 31 ("all known religious objectors are already protected by the existing injunctions"); *see*

IFRs will affect the States' concrete fiscal and public health interests: Even by the agencies' conservative estimates, hundreds of thousands of women will be affected by the IFRs. ER 314. And they further acknowledge that state programs will bear a resultant financial burden. ER 294. Contrary to defendants' suggestion, this injury is no less concrete simply because the names and precise locations of those thousands of women are presently unknown. Courts have found Article III standing in cases even where the alleged harm was remote—a situation not presented here. *See Massachusetts*, 549 U.S. at 526 (States established standing where risk of harm was "remote" but "nevertheless real"); *id.* at 523 n.21.[17]

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also AOB 31 ("[m]any" employers are "currently protected by injunctions"). This is a curious assertion given that defendants' primary justification for bypassing notice and comment was to provide immediate relief for the many employers they claimed were forced to make the untenable choice between violating their moral and religious tenants or paying a financial penalty.

[17] *See also Hawaii v. Trump*, 859 F.3d 741, 767-768 (9th Cir. 2017), *vacated on other grounds*, 138 S. Ct. 377 (2017) (harm not too speculative where plaintiff had yet to request a waiver that would have granted him relief); *Texas*, 809 F.3d at 155-161; *NRDC v. EPA*, 464 F.3d 1, 7 (D.C. Cir. 2006) (lifetime risk of 1 in 200,000 of developing non-fatal skin cancer as a result of agency action is a cognizable injury-in-fact); *cf. Lujan*, 504 U.S. at 572 n.7; *Sausalito*, 386 F.3d at 1197-199 (government interests may be "congruent with" those of its citizens and "are as varied as a municipality's responsibilities, powers, and assets," including interest in city's aesthetic, tourism, and preventing lost tax revenue caused by "congested streets, parks, parking lots, and sidewalks," and increase in "noise" and "trash").

The declarations filed in support of the motion for a preliminary injunction—from respected researchers and public servants—show that the IFRs will block women from receiving contraceptive care, which will impose direct responsibilities and associated financial burdens upon the States. *See infra* pp. 55-59; *Imperial Cty.*, 767 F.3d at 791 (citing *City of Davis v. Coleman*, 521 F.2d 661, 671 (9th Cir. 1975)) (finding injury in fact where declarations disclose that procedural violation will harm City's interest in land management and "controlled growth"). The new burdens that will be assumed by the States constitute an "injury in fact" that is directly traceable to the IFRs and redressible by a favorable judicial decision.

Defendants also argue that the States will not suffer harm because California, Delaware, Maryland, and New York have enacted state laws that independently require certain group health plans to cover contraception. AOB 30; Sisters Br. 33; March Br. 57-59. But these laws will still leave many women unprotected from the effects of the IFRs. None of these state laws, for example, apply to self-funded plans, which provide coverage to several million residents of the plaintiff States. *See infra* pp. 56-57; *see also*

March Br. 36.[18] In addition, Delaware's laws permit cost-sharing in some circumstances, which could make contraception unaffordable for some women, or lead them to use less effective forms of birth control. ER 133 (Navarro Decl. ¶ 11); *see also* IOM Report at 109. And Virginia has no independent state contraceptive-coverage requirement. ER 242 (Whorley Decl. ¶ 8). State law therefore cannot fully abate the harms imposed by the IFRs. Only a judicial remedy will suffice.[19]

II. VENUE IS PROPER IN THE NORTHERN DISTRICT OF CALIFORNIA

The district court correctly determined that venue in the Northern District of California is proper. ER 16-17. A civil action against an officer of a United States agency in his official capacity may be brought where "the plaintiff resides." 28 U.S.C. § 1391(e)(1)(C). This statute was enacted to

[18] The States are preempted from enforcing state contraceptive equity laws against self-funded plans. 29 U.S.C. § 1144(a).

[19] In a single sentence, Sisters asserts that the States lack statutory standing. Sisters Br. 38. Such perfunctory assertions are insufficient to raise a claim on appeal. *Recycle for Change v. City of Oakland*, 856 F.3d 666, 673 (9th Cir. 2017); *see also Bilyeu v. Morgan Stanley Long Term Disability Plan*, 683 F.3d 1083, 1090 (9th Cir. 2012) ("statutory standing may be waived"). And in any event, it cannot be said that the States' "'interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'" *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012).

establish "nationwide venue for the convenience of individual plaintiffs in actions which are nominally against an individual officer but are in reality against the [federal] Government." *Stafford v. Briggs*, 444 U.S. 527, 542 (1980).

Venue is proper in the Northern District of California because California "resides" in the Northern District of California. 28 U.S.C. § 1391(e)(1)(C). When a plaintiff is the State, it "is held to reside in any district within it." 14D Wright & Miller, *Fed. Prac. & Proc.* § 3815 (4th ed. 2017) (citing *Alabama*, 382 F. Supp. 2d at 1327-1328). While only two district courts, including the court below, have confronted the issue of where a State "resides" for venue purposes, both reasonably concluded that when a State with multiple federal judicial districts, such as California (28 U.S.C. § 84), brings suit against federal defendants, it is deemed to "reside" in any of its own districts. *Alabama*, 382 F. Supp. 2d at 1329 (noting that federal government has provided "no just or logical reason" for its contrary interpretation); ER 16 ("common sense dictates that for venue purposes, a state plaintiff with multiple federal judicial districts resides in any of those

districts"); *see id*. at 17.[20] And States have routinely sued the federal government in districts other than where their capital is located. *See, e.g.*, *Texas v. United States*, 86 F. Supp. 3d 591, 604 (S.D. Tex. 2015); *Oklahoma ex rel. Pruitt v. Burwell*, 51 F. Supp. 3d 1080 (E.D. Okl. 2014).

Defendants argue that for residency purposes, California must either be a "natural person" or an "entity." AOB 43 (citing 28 U.S.C. § 1391(c)(2)). Defendants then argue that because California is not a "natural person," it must be an "entity" and, as a result, it is limited to bringing suit in the "judicial district in which it maintains its principal place of business." 28 U.S.C. § 1391(c)(1), (2). However, a more logical, plain reading of the venue statute is that residency for a "State" is not expressly defined, like it is for "natural person[s]," "entit[ies]," and "corporations," because States are deemed to "reside" in their sovereign borders. Indeed, that 28 U.S.C. § 1391 uses the word "State" separately and distinctly from the word "entity," suggests that "entity" would not encompass a plaintiff "State." *Compare* 28

[20] Federal defendants seek to distinguish *Alabama* on the ground that the applicable venue statute was subsequently amended. AOB 45. The 2011 amendments merely clarified that incorporated and non-incorporated plaintiff entities are "residents" of the district in which they maintain their principle place of business. A State in contrast "resides" throughout its own sovereign borders. 382 F. Supp. 2d at 1329 ("[c]ommon sense suggests" that the State, as a sovereign, "is ubiquitous within its borders").

U.S.C. § 1391(d) *with* 28 U.S.C. § 1391(c); *see Spencer Enterprises, Inc. v. U.S.*, 345 F.3d 683, 689 (9th Cir. 2003) (it is a "well-established canon of statutory interpretation that the use of different words or terms within a statute demonstrates that Congress intended to convey a different meaning for those words").

Moreover, defendants' argument would produce an absurd result. Corporations in States with multiple districts, like California, would be deemed to reside "in any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State." 28 U.S.C. § 1391(d). But, the State itself, which certainly has "sufficient" contacts in the Northern District of California, would be precluded from claiming residency as to that District. *Chubb Custom Ins. Co. v. Space Systems/Loral, Inc.*, 710 F.3d 946, 958 (9th Cir. 2013) (cautioning against an interpretation of a statute that would "lead to an absurd result"). And even if the Court concludes that "entity" encompasses a "State," as a State, California's "principal place of business" is its entire sovereign. 28 U.S.C. § 1391(c)(2); *See, e.g.*, Cal. Code Civ. Proc. § 401.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY ENTERING A PRELIMINARY INJUNCTION PRESERVING THE STATUS QUO

A. The States Are Likely to Succeed on the Merits

Likelihood of success on the merits is the most important factor in determining whether to issue a preliminary injunction. *Disney*, 869 F.3d at 856. The district court did not abuse its discretion in holding that the States were "at a minimum" likely to succeed on the merits of their notice and comment claim. ER 17, 25.

1. The IFRs Are Procedurally Defective for Failure to Observe Notice & Comment Procedures

The APA strives to ensure that federal agencies remain accountable to the people that they govern. *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1483-1484 (9th Cir. 1992). Hence before an agency may promulgate a rule carrying the force of law, it must first give notice to the public by publishing its proposed rule in the Federal Register, invite any interested persons to submit comments, and finally, publish its final rule in the Federal Register—typically accompanied by responses to concerns raised by commenters—at least 30 days before the rule becomes effective. 5 U.S.C. § 553(b)-(d); *United States v. Valverde*, 628 F.3d 1159, 1162 (9th Cir. 2010). This notice and comment process is premised upon notions of basic

"fairness and informed administrative decisionmaking." *Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979). It "reintroduces a representative public voice" to counterbalance the substantial authority "'delegated to unrepresentative agencies,'" and allows agencies to "educate [themselves] on the full range of interests [a proposed] rule affects." *Alcaraz v. Block*, 746 F.2d 593, 611 (9th Cir. 1984).[21] Failure to follow notice and comment is a procedural defect that renders a regulation legally invalid. *Cal. Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1095 (9th Cir. 2011).

[21] *See also FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 537 (2009) (Kennedy, J., concurring) (quoting Stewart & Sunstein, *Public Programs and Private Rights*, 95 Harv. L.Rev. 1193, 1248 (1982)) ("the APA was a 'working compromise, in which broad delegations of discretion were tolerated as long as they were checked by extensive procedural safeguards.'"); *Buschmann v. Schweiker*, 676 F.2d 352, 357 (9th Cir. 1982) ("The interchange of ideas between the government and its citizenry provides a broader base for intelligent decision-making and promotes greater responsiveness to the needs of the people.") (citations and quotations omitted); *Western Oil & Gas Ass'n v. EPA*, 633 F.2d 803, 813 (9th Cir. 1980) ("When substantive judgments are committed to the very broad discretion of an administrative agency, procedural safeguards that assure the public access to the decisionmaker should be vigorously enforced."); *cf.* S.Doc. No. 248, 79th Cong., 2d Sess. iii (1946) (The APA "brings into relief the ever essential declaration that this is a government of law rather than of men.").

Defendants argue that the IFRs are nevertheless valid under the "good cause" exception, 5 U.S.C. § 553(b)(B). AOB 53-62. This "emergency procedure" permits an agency to forego notice and comment in "'calamitous circumstances'" when "'delay would do real harm.'" *Buschmann,* 676 F.2d at 357. Because "[i]t is antithetical to the structure and purpose of the APA for an agency to implement a rule first, and then seek comment later," *Paulsen*, 413 F.3d at 1005, the good cause exception must be "'narrowly construed and only reluctantly countenanced,'" *Alcaraz,* 746 F.2d at 612. *See also Buschmann,* 676 F.2d at 357 (observance of notice and comment procedures "'should be closely guarded and the 'good cause' exception sparingly used'").

To avail itself of the good cause exception, the agency must articulate a reasoned basis for why notice and comment procedures "are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B); *see* S.Doc. No. 248, 79th Cong., 2d Sess. 200, 258 (1946) ("A true and supported or supportable finding of necessity or emergency must be made and published."). This requirement is a not a mere "procedural formality." *North Carolina Growers' Ass'n v. United Farm Workers*, 702 F.3d 755, 766 (4th Cir. 2012). It serves "the crucial purpose of ensuring that the exceptions do not 'swallow the rule.'" *Id.* Courts owe no deference to an

agency's conclusion that it has good cause to bypass required procedures. *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 706 (D.C. Cir. 2014).

Defendants criticize the district court's phrasing of the appropriate legal standard. AOB 59-62. But the district court did not hold that good cause can *only* be shown where notice and comment would prevent an agency from executing its statutory duties, nor did it suggest that "the good-cause exception [is] exclusively an 'emergency procedure.'" AOB 60. Rather, the district court set forth the legal standard as this Court has characterized it in cases like *Valverde* and *Paulsen*. *See, e.g.*, ER 18 (good cause only where "delay would do real harm") (quoting *Valverde*, 628 F.3d at 1164-1165). And the district court correctly referred to the good cause exception as an "emergency procedure," ER 22, as this Court has traditionally described it. *See, e.g.*, *Valverde*, 628 F.3d at 1165; *Buschmann*, 676 F.2d at 357.

The IFRs raised the "impracticable" and "contrary to the public interest" exceptions. ER 304, 344. In particular, the IFRs stated that immediate promulgation was necessary primarily (1) to reduce litigation risk and general uncertainty in the wake of *Zubik*, and (2) to more quickly achieve the agencies' policy objectives, such as alleviating the burdens endured by individuals and corporations with moral or religious objections to contraception. ER 303-305, 344-345; AOB 58-59. These justifications,

which point to ubiquitous and unremarkable circumstances that attend numerous regulations, fail to demonstrate an impending emergency, or that providing the usual notice and comment would imperil "the agency's ability to carry out its mission." *Riverbend Farms*, 958 F.2d at 1485.

This Court has previously rejected arguments nearly identical to those raised by defendants here. In *Valverde*, the agency argued that providing notice and comment would be "contrary to the public interest" because of a need to resolve uncertainty as to the application of a federal sex offender registration statute, and to protect the public from the impending danger of convicted sex offenders living at large. 628 F.3d at 1165. The Court observed that if a desire for speediness, coupled with a need to reduce uncertainty were enough to avoid normal procedures, an "'exception to the notice requirement would be created that would swallow the rule.'" *Id.* at 1166. This rationale applies with equal force here.

The "contrary to the public interest" exception applies primarily in the "rare circumstance when ordinary procedures—generally presumed to serve the public interest—would in fact harm that interest," *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 95 (D.C. Cir. 2012), such as when "the announcement of future [government price] controls could cause [the very] market distortions" they were meant to avoid, *Buschmann*, 676 F.2d at 357. The federal

agencies do not explain why notice and comment would not have served its intended purpose here. To the contrary, the agencies acknowledge that previous invitations for public comment on decidedly less significant changes to the contraceptive-coverage requirement garnered hundreds of thousands of comments. *E.g.*, AOB 12, 16; ER 22 n.13. Public comment could have also identified that some of the agencies' conclusions are premised upon mischaracterization of data and simple mathematical errors, which may have caused defendants to revisit the wisdom of their chosen course of action. *See, e.g.*, ER 147, 150 **(**Finer Decl. ¶¶ 13, 20 n.24); *cf. Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1403 (9th Cir. 1995) ("Opportunity for public comment is particularly crucial when the accuracy of important material in the record is in question.").

Defendants' reliance on the "impracticable" exception fares no better. Defendants never raised this argument in opposition to plaintiffs' motion for a preliminary injunction, and it is therefore forfeited on appeal. *See Man-Seok Choe v. Torres*, 525 F.3d 733, 740 n.9 (9th Cir. 2008). To the extent that the Court is inclined to consider defendants' impracticability argument for the first time on appeal, it fails on the merits.

Notice and comment is impracticable in emergency situations requiring immediate action to avoid imminent harm or death. *See Hawaii Helicopter*

Operators Ass'n v. FAA, 51 F.3d 212, 214 (9th Cir. 1995) (spate of recent helicopter crashes and related fatalities).[22] Nothing of the sort has been alleged here. Defendants' claims that there was an immediate need for the IFRs are undermined by their own argument—made in service of the position that the States have not suffered an injury-in-fact—that few employers will avail themselves of the IFRs' new exemptions. AOB 31; Sisters Br. 31 ("all known religious objectors are already protected by the existing injunctions").

Citing a footnote in *Serv. Emp. Int'l Union, Local 102 v. Cnty. of San Diego*, 60 F.3d 1346, 1352 n.3 (9th Cir. 1994) (*SEIU*), defendants argue that resolving uncertainty caused by "conflicting judicial decisions" is a satisfactory justification to forego notice and comment. AOB 56-57. But *SEIU* only found good cause because the divergent legal authority on the

[22] *See also Jifry v. FAA*, 370 F.3d 1174, 1179-1180 (D.C. Cir. 2004) (rule necessary to combat the "threat of further terrorist acts involving aircraft in the aftermath of September 11, 2001"); *Sorenson*, 755 F.3d at 706 (notice and comment impracticable where "delay would imminently threaten life or physical property"); *cf. Mack Trucks*, 682 F.3d at 93 (rescuing major regulated entity from imminent insolvency not good cause); *NRDC v. Evans*, 316 F.3d 904, 912 (9th Cir. 2003) (time constraints and complexities associated with data collection and utilization not good cause); *Western Oil*, 633 F.2d at 810-812 (compliance with statutory deadlines not good cause).

issue of the Fair Labor Standards Act's applicability to government employees was poised to cause "enormous" and "unforeseen" financial liability that could "threaten the fiscal integrity" of States and local governments. 56 Fed. Reg. 45,825 (Sept. 6, 1991); *SEIU*, 60 F.3d at 1352 n.3. No similar impending threat to the public fisc was cited here.[23]

Defendants also appear to suggest that because they used an IFR to amend the religious accommodation in the wake of *Wheaton* (*supra* pp. 9-10), they are also entitled to do so here. *See* ER 305; AOB 57-58. Sisters goes even further, arguing that if the Court invalidates the challenged IFRs it must also invalidate every other IFR amending the contraceptive-coverage requirement. Sisters Br. 66. But as defendants acknowledge (AOB 54), each invocation of good cause must be independently justified. *See Valverde*, 628 F.3d at 1164 (whether good cause was properly invoked is a "'case-by-case'" inquiry). Good cause therefore cannot be established by merely gesturing at the existence of prior invocations of good cause to

[23] Also, unlike the present case, the IFRs in *SEIU* did not involve the wholesale exclusion of the public from the rulemaking process prior to the IFR becoming effective. *SEIU*, 60 F.3d at 1352 n.3 ("The public was not deprived of its input."); *see also* 56 Fed. Reg. 45,825; 50 Fed. Reg. 47,696 (Nov. 19, 1985).

justify different IFRs on related subject matter. And in any event, the legality of these prior IFRs are not properly before this Court.[24]

Federal agencies will presumably always argue, as defendants do here, that their proposed regulations will advance the public interest. And bypassing notice and comment procedures will always be one avenue to avoid delay in implementing new regulations. But for over 70 years, the APA has stood as a bulwark against such administrative haste. The Act embodies Congress' considered judgement that an agency's desire to act with dispatch must yield to the virtues of transparency, democratic accountability, and informed agency decision-making. The district court therefore correctly concluded that the "good cause" exception does not apply here.

2. The Religious IFR Is Not Compelled by RFRA

The agencies attempt to bolster their contention that litigation risk supports their finding of good cause by suggesting that the prior regulatory

[24] The *Wheaton* IFRs are also distinguishable from the present circumstances. Defendants relied on the "unnecessary" exception to notice and comment—not implicated here—to make a very minor change to the accommodation process in light of a recent Supreme Court order. *See PFL*, 772 F.3d at 276 (IFRs effected "minor" changes "meant only to 'augment current regulations in light of'" *Wheaton*); ER 22-23 n.14.

regime violated RFRA. *See* ER 297, 305; *see also* AOB 58; Sisters Br. 47-54.[25] The Religious IFR, they reason, was therefore a necessary remedy that required immediate implementation. *Id.* But the agencies have no interpretive authority over RFRA, and their reading of that statute is therefore entitled to no deference from this Court. *See Gonzales v. Oregon*, 546 U.S. 243, 258-259 (2006) (no deference to agency in the absence of congressional grant of interpretive authority). Their proffered interpretation is also legally unsupported.

RFRA does not give employers license to deprive women of their statutorily-entitled benefits. Each time the Supreme Court has been presented with a RFRA challenge to the contraceptive-coverage requirement, it has underscored that there is no inherent conflict between compliance with RFRA and affording women access to seamless contraceptive coverage without cost-sharing. *Hobby Lobby*, 134 S. Ct. at

[25] Sisters' separate contention that the prior regime violated the Free Exercise Clause (Sisters Br. 47-54) was never part of the agencies' good cause finding. Courts may not consider such post-hoc arguments. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) ("an agency's action must be upheld, if at all, on the basis articulated by the agency itself"). The argument was also never raised before the district court, and is therefore forfeited. Moreover, the Supreme Court has never suggested that the contraceptive-coverage requirement implicates the Free Exercise Clause. *See Hobby Lobby*, 134 S. Ct. at 2787, 2790-2791 (Ginsburg, J., dissenting).

2760 (noting that effect of Court's decision on women employed by Hobby Lobby "would be precisely zero"); *Wheaton College*, 134 S. Ct. at 2807; *Zubik*, 136 S. Ct. at 1560-1561. The IFRs, which "transform [women's] contraceptive coverage from a legal entitlement to an essentially gratuitous benefit wholly subject to [an] employer's discretion," ER 25-26, therefore are not compelled by RFRA. And in *Hobby Lobby*—the only Supreme Court opinion to reach the merits of a RFRA challenge to the contraceptive-coverage requirement—the Court only considered RFRA's application to closely-held for-profit corporations. *Hobby Lobby*, 134 S. Ct. at 2774-2775. No Supreme Court authority requires the broad exemptions created by the IFRs—which apply to nearly any employer or insurance provider, regardless of corporate structure.[26]

The federal agencies argued, not long ago, that the prior regulatory regime furthered the government's "compelling interest" in ensuring that women had access to contraceptive coverage, while "go[ing] to great lengths" to accommodate the religious objections of employers. HHS Supp. Br. at 1 *Zubik*, 136 S. Ct. 1557 (No. 14-1418) (Apr. 21, 2016); *see also supra* p. 11. Defendants point to no intervening authority that casts doubt on

[26] And of course, RFRA cannot justify the Moral IFR at all because RFRA does not extend to moral beliefs.

this assertion. *See* ER 291. RFRA therefore cannot excuse defendants' failure to follow notice and comment.

3. Violation of Notice-and-Comment Requirements Was Prejudicial

Courts "must exercise great caution in applying the harmless error rule in the administrative rulemaking context." *Riverbend Farms* 958 F.2d at 1487. Failure to provide notice and comment is only harmless where the error "clearly had no bearing on the procedure used or the substance of decision reached." *Buschmann*, 676 F.2d at 358. An error "clearly ha[s] no bearing on the procedure used," *id.*, where interested persons receive actual notice of the proposed rule, and are permitted to provide comments before the rule becomes effective, *Cal. Communities Against Toxics v. EPA*, 688 F.3d 989, 993 (9th Cir. 2012).[27]

Rather than attempt to satisfy this exacting standard, defendants argue that their error in forgoing normal procedures was harmless because of (1)

[27] *Compare Paulsen*, 413 F.3d at 1006 (error prejudicial where public not afforded opportunity to provide pre-promulgation comments) *with Idaho Farm Bureau*, 58 F.3d at 1405 (9th Cir. 1995) (error harmless where individuals were aware of comment period and actually participated); *Sagebrush Rebellion, Inc. v. Hodel*, 790 F.2d 760, 765-766 (9th Cir. 1986) (similar); *Riverbend Farms*, 958 F.2d at 1488 (error harmless where parties were aware of and used same technically non-compliant notice and comment procedure for thirty-five years).

the availability of post-promulgation comment, (2) the interim nature of the rules, and (3) prior public comment on previous rules touching on the same general subject matter. AOB 62-63.[28] Yet no case supports the conclusion that these factors render procedural error harmless, and for good reason. These factors are common to innumerable interim final rules. If they could serve as a predicate for a finding of harmless error, the APA's notice and comment requirement would be rendered toothless and the "good cause" exception superfluous.

Defendants' first two arguments for why their error was harmless—opportunity for post-promulgation comment and the interim nature of the rules—are insufficient as a matter of law. *See Paulsen*, 413 F.3d at 1006-

[28] Defendants also cite *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) for the proposition that plaintiffs bear the burden of demonstrating that the error was not harmless. AOB 62. But *Sanders* held no such thing. *Sanders* interpreted a harmless error statute specific to agency adjudication of veteran disability claims. *Id.* at 406. Its analysis did not extend to the agency rulemaking context. Moreover, the Court held that harmless error should generally be determined based on a "case-specific application of judgment" and "examination of the record," not "through the use of mandatory presumptions and rigid rules." *Id.* at 407. It also emphasized that the burden of showing prejudice is not "a particularly onerous requirement." *Id.* at 410; *cf.* 5 U.S.C. § 556(d) ("the proponent of a rule or order has the burden of proof").

1008.[29] The fact that HHS published guidance on how regulated entities should implement the IFRs before the comment period even closed further undermines the agencies' suggestion (AOB 63) that they remained receptive to changes proposed by commenters. ER 23; *see also U.S. Steel Corp. v. EPA*, 595 F.2d 207, 214-215 (5th Cir. 1979) (explaining why post-promulgation comment is an inadequate substitute).

The agencies' final argument is equally inapt. While it is undisputed that neither plaintiffs, nor any member of the public, received notice of the challenged IFRs, defendants argue that their solicitation of public comments on prior rules relating to the same general subject matter was an adequate substitute for providing notice here. But none of these prior comment periods could have fairly apprised the public of the policies established by these IFRs, which sharply depart from the agencies' prior positions and regulations.

[29] Defendants cite no case in support of their argument (AOB 62) that the error was harmless because the States have not identified any specific comments they would have submitted. The States are under no obligation to make such a showing. The APA requires notice to "all members of the public," not just those with a "particularized interest" in the subject matter. *Riverbend Farms*, 958 F.2d at 1486. And in any event, the States would have submitted comments highlighting the IFRs' legal infirmities, which are now the subject of this litigation.

In order for notice to be meaningful, it "must be sufficient to fairly apprise interested parties of the issues involved" and the policy proposals that the agency is contemplating. S.Doc. No. 248, 79th Cong., 2d Sess. 200 (1946).[30] A notice of a proposed rulemaking only provides adequate notice where it makes "clear that the agency was contemplating a particular change." *CSX Transp. v. Surface Transp. Bd.*, 584 F.3d 1076, 1081 (D.C. Cir. 2009). The "'essential inquiry focuses on whether interested parties reasonably could have anticipated the final rulemaking from the [proposed rule].'" *NRDC v. EPA*, 279 F.3d 1180, 1186 (9th Cir. 2002). A critical question in this analysis, is "'whether a new round of notice and comment would provide the first opportunity for interested parties to offer comments that could persuade the agency to modify its rule.'" *Id.* In answering this question, courts owe no deference to an agency's assertion that its notice was adequate. *Id.*

[30] *See also id.* at 18 ("[P]ublic rule making procedures 'are likely to be diffused and of little real value either to the participating parties or to the agency, unless their subject matter is indicated in advance. * * * In principle, therefore, each agency should be obliged to announce with the greatest possible definiteness the matters to be discussed in rule making proceedings.'"); *Riverbend Farms*, 958 F.2d at 1486 ("It is a fundamental tenet of the APA that the public must be given some indication of what the agency proposes to do so that it might offer meaningful comment thereon.").

The prior comment periods relating to the contraceptive-coverage requirement, some of which occurred over six years ago, solicited comments on matters that would effect only incremental changes to the then-extant regime. *See supra* pp. 6-11. No prior notice could have reasonably apprised the public that the agencies were contemplating an overhaul of the contraception regulations that would effect an unprecedented expansion of the exemption to include any religious objection, any *moral* objection (which had never been previously recognized as a basis for exemption), and abandon procedures—once considered a core component of the agencies' statutory duty—to ensure that women continue to receive seamless contraceptive coverage. *See Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1107-1108 (D.C. Cir. 2014) (HHS rule invalid for failure to provide adequate notice where agency proposed to "clarify" a practice and final rule sharply diverged from that practice); *see also CSX*, 584 F.3d at 1082. The last request for public comment before the IFRs were issued, for example, only gave the public notice that the agencies were contemplating changes to the accommodation process that would continue to "ensur[e] that women . . . have access to seamless [contraceptive] coverage . . . without cost sharing." 81 Fed. Reg. 47,741. Neither this, nor any prior notice, provided the public

with a meaningful chance to comment on the policies ultimately adopted in the IFRs.[31]

Finally, the statutory provisions that the IFRs purport to implement were enacted to ensure that women have access to preventive care—including birth control—without cost-sharing. *See supra* pp. 3-4. The IFRs directly subvert this statutory requirement by creating exemptions that are available to nearly any employer or insurance company, while no longer requiring use of the accommodation process to ensure that women receive seamless contraceptive coverage.[32] Congress in fact considered and rejected a similar proposal that would have permitted a broad exemption on religious or moral grounds. *Supra* p. 4. None of the previous requests for public comment could have conceivably put the public on notice that the agencies

[31] The substantial gap in time between the challenged IFRs and some of the previous comment periods is an independent ground that renders them categorically deficient as a substitute for providing a new round of notice and comment here. *See Idaho Farm Bureau*, 58 F.3d at 1404 (gap of "nearly six years" renders opportunity for comment inadequate).

[32] Defendants misleadingly note that the accommodation process was "not materially altered" by the challenged IFRs. AOB 29; *see also* Sisters Br. 32. But the IFRs in fact altered what was once a mandatory process to ensure women continued to receive contraceptive coverage into an option that the employer is free to ignore at its sole discretion.

intended to take such arbitrary, capricious, and *ultra vires* action. *See* 5 U.S.C. § 706(2)(A), (C); *see also infra* Section III.A.5.

4. Congress Has Not Excused the Agencies from Notice-and-Comment Requirements

The federal agencies also urge that Congress has vested them with blanket authority to dispense with notice and comment whenever they deem it to be "appropriate." AOB 47 (citing 42 U.S.C. § 300gg-92).[33] But as every court to consider the issue has concluded, the cited statutes do not stand for such a sweeping proposition.[34]

If Congress wishes to excuse an agency from the APA's notice and comment requirement, it must "do[] so expressly." 5 U.S.C. § 559; *Marcello v. Bonds*, 349 U.S. 302, 310 (1955) ("Exemptions from the terms of the [APA] are not lightly to be presumed in view of the statement in [§ 559] that modifications must be express."); S.Doc. No. 248, 79th Cong.,

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[33] The statutes provide that: "The Secretary, consistent with section 104 of the Health Care Portability and Accountability Act of 1996, may promulgate such regulations as may be necessary or appropriate to carry out the provisions of this chapter. The Secretary may promulgate any interim final rules as the Secretary determines are appropriate to carry out this chapter." 26 U.S.C. § 9833; *see also* 29 U.S.C. § 1191c; 42 U.S.C. § 300gg-92.

[34] *Coal. for Parity, Inc. v. Sebelius*, 709 F. Supp. 2d 10, 17-19 (D.D.C. 2010); *Pennsylvania v. Trump*, 281 F. Supp. 3d 553, 571-572 (E.D. Pa. 2017); ER 19-21.

2d Sess. 231 (1946) (Courts must presume that the APA applies "unless some subsequent act clearly provides to the contrary."). The relevant inquiry is "whether Congress has established procedures so clearly different from those required by the APA that it must have intended to displace the norm." *Asiana Airlines*, 134 F.3d at 397.

In *Castillo-Villagra*, for example, this Court held that the APA's procedures were supplanted where the statute in question stated that the "procedure so prescribed shall be the *sole and exclusive procedure* for determining the deportability of an alien under this section." 972 F.2d at 1025 (emphasis added). Courts have also held that Congress clearly intended to supplant notice and comment procedures when a statute directs that the agency "shall" issue an IFR, identifies with specificity the subject matter of the exempt regulation, and sets deadlines that could not be met were notice and comment procedures followed. *See Asiana Airlines*, 134 F.3d at 396-399; *Methodist Hosp. of Sacramento v. Shalala*, 38 F.3d 1225, 1235-1237 (D.C. Cir. 1994); *see also id.* at 1236 n.18.[35]

[35] *Cf.* 42 U.S.C. § 17013(e) (directing that the Secretary "shall" promulgate "an interim final rule" no later than a specific date and setting forth in detail what the IFR must accomplish); 6 U.S.C. § 944(a)(2) (similar); 21 U.S.C. § 811(j) (similar).

The statutes that defendants cite do none of these things. They fail to supply language that meets the high bar of "plainly express[ing] a congressional intent to depart from normal APA procedures." *Asiana Airlines*, 134 F.3d at 398; *cf. Lake Carriers' Ass'n v. EPA*, 652 F.3d 1, 6 (D.C. Cir. 2011). They instead employ language that grants defendants the substantive power to issue regulations, but are silent as to the procedures that must be followed when so doing. *See, e.g.*, 42 U.S.C. § 300gg-92 (agency "may promulgate such regulations as may be necessary or appropriate" and "may promulgate" IFR as agency determines "appropriate"). In such cases, the APA's default procedural rules apply. *See* 5 U.S.C. § 553.[36]

Other provisions of the ACA, by contrast, express a clear intent to override notice and comment procedures. Section 1104(b)(2) of the ACA, for example, provides that recommendations to amend "adopted standards and operating rules" that were approved by the "review committee and reported to" the agency "*shall* be adopted . . . through promulgation of an [IFR] not later than 90 days after receipt of the committee's report." 42

[36] Indeed, in a matter currently pending before the U.S. Supreme Court, defendant HHS relies on these principles in service of the position that provisions of the Medicare Act do not override the APA. Pet. for Writ of Cert. at 14-19, *Azar v. Allina Health Servs.* (No. 17-1484).

U.S.C. § 1320d-2(i)(3)(A) (emphasis added). That Congress opted not to use similarly unequivocal language in the statutes defendants cite, underscores that it had no intent to disturb established APA procedures. *See Custis v. United States*, 511 U.S. 485, 492, (1994).[37]

Defendants suggest that this conclusion would violate the rule against surplusage. AOB 50, 52. But this canon of construction, used to decipher the meaning of ambiguous statutory language, is of little relevance here. Congress has specifically forbidden courts from interpreting ambiguous language to override the provisions of the APA. 5 U.S.C. § 559. The statutes here neither contain express language exempting defendants from the APA, nor provide for any alternative procedures that could reasonably be understood as departing from APA norms.

Under defendants' reading, the cited statutes permit three of the most important federal agencies to jettison rulemaking procedures, and cabin judicial scrutiny to a generalized and highly deferential review for

[37] The defendant agencies highlight that they have invoked these statutes in the past as a basis for foregoing notice and comment procedures. AOB 48-49. But no court has ever passed upon the issue of whether those prior IFRs—which are entirely unrelated to this case—properly interpreted the cited statutes. And no authority supports defendants' assertion (*id.*) that this Court must interpret defendants' prior invocations as conclusive authority on the question of the statutes' legal meaning.

"appropriate[ness]." AOB 46-53. If Congress had intended this extraordinary and unprecedented result, it would have said so clearly, as the APA itself requires. *See Castillo-Villagra*, 972 F.2d at 1025; 5 U.S.C. § 559. That it opted not to implement such language here confirms that it had no intent to disturb the APA's notice and comment requirement. *Cf. EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1612 (2014) (The Court has "repeatedly said that Congress 'does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.'").

5. The IFRs Are Substantively Invalid and Unconstitutional

In addition to the notice and comment claim, plaintiffs also moved for a preliminary injunction on the basis that the IFRs are substantively invalid under the APA, and violate the Equal Protection and Establishment Clauses.[38] While the district court found it unnecessary to reach these other claims, this Court may uphold the preliminary injunction should it determine that there is a likelihood of success on any of these causes of action. *See Syed v. M-I, LLC*, 853 F.3d 492, 506 (9th Cir. 2017).

[38] Because the IFRs violate the APA, this Court need not reach the constitutional claims. *See In re Ozenne*, 841 F.3d 810, 814-815 (9th Cir. 2016).

The IFRs are contrary to law because they contravene the ACA's goal of ensuring that women have access to contraceptive care. 5 U.S.C. 706(2)(A), (C). While defendants are charged with implementing the ACA, they are not free to do so in a way that squarely contradicts Congress' express directive. *See Ragsdale v. Wolverine World Wide, Inc*., 535 U.S. 81, 91-92, 95-96 (2002); *cf. Michigan v. EPA*, 135 S. Ct. 2699, 2708 (2015) (*Chevron* deference "does not license interpretive gerrymanders under which an agency keeps parts of statutory context it likes while throwing away parts it does not.").

The IFRs are also "arbitrary and capricious" for failure to explain defendants' stark departure from prior policy. 5 U.S.C. 706(2)(A); *Encino Motorcars v. Navarro*, 136 S. Ct. 2117, 2125-2127 (2016). Because defendants' policy reversal implicates "serious reliance interests," it must be justified by a "reasoned explanation." *Id.* at 2125-2126; *see also FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 535-536 (2009) (Kennedy, J., concurring). Yet defendants offer no reason why an opposite result is warranted given that the underlying factual and legal circumstances that supported their prior position have not materially changed. *See Hobby Lobby*, 134 S. Ct. at 2785-2786 (Kennedy, J., concurring) (noting HHS's position that the contraceptive-coverage requirement "serves the

Government's compelling interest in providing insurance coverage that is necessary to protect the health of female employees, coverage that is significantly more costly than for a male employee").

B. The States Will Suffer Immediate, Irreparable Harm Absent a Preliminary Injunction

The district court did not abuse its discretion in determining that the States would suffer irreparable harm in the absence of preliminary relief. *See Winter v. NRDC*, 555 U.S. 7, 20 (2008). The court found, in light of the evidence, that "what is at stake" in this case is the "health of [the States'] citizens and [the States'] fiscal interests." ER 25. Every day that the procedurally invalid IFRs remain in effect is another day that employers can unilaterally eliminate contraceptive coverage for employees and their dependents, resulting in devastating consequences for the State. ER 25-26; *see, e.g.*, ER 248-49 (Werberg Decl. ¶¶ 4-9). As the court noted, the harm manifests in multiple ways. ER 14, 25-26.

First, if the IFRs are not enjoined, the States will incur additional responsibilities, and will pay more to provide contraception to their residents. Take California, where individuals with family income at or below 200 percent of the federal poverty level are eligible to enroll in the state's Family Planning, Access, Care, and Treatment (Family PACT). ER

120 (Cantwell Decl. ¶ 7); ER 235 (Tosh Decl. ¶ 29).[39] Eligible women are likely to seek services from Family PACT when their employers slash coverage for contraception from the benefits of self-funded plans. ER 121-22 (Cantwell Decl. ¶¶ 15, 16); ER 236 (Tosh Decl. ¶ 34). And when they do, the States will be left to pick up the tab. ER 122 (Cantwell Decl. ¶ 17); ER 236 (Tosh Decl. ¶ 34); ER 208 (Nelson Decl. ¶ 15); ER 116 (Rattay Decl. ¶ 7). The same holds for New York, Maryland, and Delaware, which all have state family planning programs. ER 169-175 (Finer Decl. ¶¶ 63-86); *see also* ER 210-211 (Nelson Decl. ¶¶ 22-28) (discussing Maryland programs). While these States have enacted laws that independently require that certain insurers provide contraceptive coverage, none apply to self-funded plans. These plans, which are governed by federal law, insure millions of people in the plaintiff States. ER 196, 201 (Jones Decl. ¶¶ 4, 25) (6.6 million in California); ER 207-208 (Nelson Decl. ¶¶ 12, 14); ER 133 (Navarro Decl. ¶ 11); ER 247-248 (Werberg Decl. ¶¶ 2, 4).

The harms inflicted by the IFRs will be especially acute in Virginia, which does not have a state contraceptive equity law. ER 242 (Whorley

[39] For a family of four, two hundred percent of the federal poverty level is $50,200. HHS, *U.S. Federal Poverty Guidelines Used to Determine Financial Eligibility for Certain Federal Programs* (2018), *available at* https://aspe.hhs.gov/poverty-guidelines (last visited May 21, 2018).

Decl. ¶ 8). Many women who lose contraceptive coverage in Virginia will turn to Plan First, Virginia's limited benefit family planning program, which provides contraceptive coverage for women in families below 200 percent of the federal poverty level. ER 242-43 (¶¶ 3, 4, 10). The increase in Plan First enrollees—and in women seeking services from hospital systems that are Plan First providers—will cause fiscal harm to Virginia. ER 243 (¶¶ 10, 11).

This harm to the States is irreparable because there is no remedy at law to recover the costs of providing these services. *See Maxwell-Jolly*, 563 F.3d at 852.[40] The APA does not provide for money damages, and there is no other means by which the States could recoup the substantial expenditures that the IFRs are likely to impose. *See Patchak*, 567 U.S. at 215; 5 U.S.C. § 702. Even a slight uptick in such costs will cause irreparable harm to the States. *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 725 (9th Cir. 1999) ("magnitude of the injury" is not a determinative factor

[40] *See also Hernandez v. Sessions*, 872 F.3d 976, 995 (9th Cir. 2017) ("economic burdens" constitute irreparable harm); *Leiva-Perez v. Holder*, 640 F.3d 962, 969-970 (9th Cir. 2011) ("'potential economic hardship'" may constitute irreparable harm); *Texas*, 809 F.3d at 186.

in the analysis of irreparable harm); *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014).

Second, the overwhelming weight of authority demonstrates that reduced access to contraception produces a surge in unintended pregnancies, which irreparably harms the States. When contraception is provided at no cost—as is the law under the ACA—women are free to use the most effective methods, resulting in lower rates of unintended pregnancy, abortion, and birth among adolescents. ER 146, 148-49, 149-150, 157 (Finer Decl. ¶¶ 7-9, 14-15, 17-19, 32); ER 103 (Lawrence Decl. ¶ 9); ER 98-99 (Grossman Decl. ¶ 9)); ER 126-128 (Ikemoto Decl. ¶ 5); ER 234 (Tosh Decl. ¶ 26); ER 209-210, 212 (Nelson Decl. ¶¶ 21, 30). It also allows women greater control over the intervals between pregnancies, which is correlated with improved birth outcomes. *See* ER 97-98 (Grossman Decl. ¶ 7). The converse is true under the IFRs. When the cost of contraception increases, women are more likely to use less effective methods of contraception, use them inconsistently or incorrectly, or not use them at

all—and the result is a higher rate of unintended pregnancies. ER 154-55, 159-162 (Finer Decl. ¶¶ 28, 38-43).[41]

Unintended pregnancies cause both immediate and far-reaching impacts on the States. Over half of unintended pregnancies end in miscarriage or abortion. ER 234 (Tosh Decl. ¶ 26); *see also* ER 102-103 (Lawrence Decl. ¶ 8). All of these outcomes—whether miscarriages, abortions, or live births—cost the States in the short-term and long-term. The States are burdened not only with funding a significant portion of the medical procedures associated with unintended pregnancies and their aftermath, ER 167, 169, 171, 173, 175, 177 (Finer Decl. ¶¶ 54, 61 (California), 69 (Delaware), 77 (Maryland), 85 (New York), 93 (Virginia)); ER 234-235 (Tosh Decl. ¶¶ 26-28); ER 115-116 (Rattay Decl. ¶ 5), but also with the social and economic repercussions flowing from lost opportunities for affected women to succeed in the classroom, participate in the workforce, and to contribute as taxpayers. ER 162-163 (Finer Decl. ¶ 45); ER 101-102 (Lawrence Decl. ¶ 5); ER 223-224 (Arensmeyer Decl. ¶ 4); ER 212 (Nelson Decl. ¶ 31); ER 217, 218 (Bates Decl. ¶¶ 3, 6). These lifelong

[41] *See also* ER 103 (Lawrence Decl. ¶ 9); ER 98-99 (Grossman Decl. ¶¶ 8-9)); ER 126-28 (Ikemoto Decl. ¶ 5); ER 198-99 (Jones Decl. ¶ 15); ER 236-37 (Tosh Decl. ¶ 35); ER 212 (Nelson Decl. ¶ 30); ER 116 (Rattay Decl. ¶ 6); ER 141-42 (Lytle-Barnaby Decl. ¶ 28).

consequences for women and their families are severe and effect irreparable harm upon the States. The only way to avoid this disruption is to ensure that the ACA's guarantee of no-cost contraceptive coverage is maintained.

In addition to these fiscal and public health harms, depriving the States of the federal procedural right to participate in notice and comment also harms the States irreparably. Irreparable harm is "determined by reference to the purposes of the statute being enforced." *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 818 (9th Cir. 2018). The purposes of the APA's notice and comment requirement—transparency, democratic accountability, and informed agency decisionmaking—cannot be attained with an *ex post* remedy. The federal defendants' violation of the APA's notice-and-comment requirement therefore supports issuing a preliminary injunction. *See N. Mariana Islands*, 686 F. Supp. 2d at 17 (quoting *Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 94-95 (D.C. Cir. 2002)) (failure to provide notice and comment is irreparable); *cf. In re: Howmedica Osteonics Corp*, 867 F.3d 390, 401 (3d Cir. 2017) (procedural harm "irreparable" under standard for mandamus).

Defendants dispute the factual findings underpinning the district court's finding of irreparable harm, but fail to explain how the district court clearly erred. *Disney*, 869 F.3d at 856 (court clearly errs only where fact findings

are "illogical," "implausible," or "without support" in the record). The district court evaluated the facts before it, including declarations from experts and scholars and statements made within the IFRs themselves, and determined that the States would be injured as a result of the IFRs. Among other things, the court concluded that "for a substantial number of women, the 2017 IFRs transform contraceptive coverage from a legal entitlement to an essentially gratuitous benefit wholly subject to their employer's discretion." ER 25-26. Further, the court found that "[t]he impact of the rules governing the health insurance coverage of [the States'] citizens—and the stability of that coverage—was immediate, which also implicates [the States'] fiscal interests." ER 26. Most importantly, the district court noted that in the event that it found in favor of the States on the merits, "any harm caused in the interim by rescinded contraceptive coverage would not be susceptible to remedy." ER 26.

Defendants have not identified "clear error" in any of these factual findings. They instead echo the same arguments marshalled against Article III standing, namely that the States' harms are insufficiently concrete. AOB 64; *see also* March Br. 55, 61-62. These arguments are no more persuasive in the context of irreparable harm analysis. They also appear to be premised upon the erroneous notion that the States must wait to sustain harm before

seeking an injunction. *Cf. Helling v. McKinney*, 509 U.S. 25, 33 (1993) ("It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them."); *Delta Water*, 306 F.3d at 948. And as this Court recently explained, "[i]rreparable harm may be caused by activities broader than those that plaintiffs seek to enjoin," and thus, a "district court [is] not required to find irreparable harm solely" from a single source in order to conclude irreparable harm exists. *Nat'l Wildlife*, 886 F.3d at 820; *see also M.R. v. Dreyfus*, 697 F.3d 706, 728 (9th Cir. 2012).

Defendants' own statements undermine their suggestion that the States will not be irreparably harmed absent an injunction. The federal agencies acknowledge that, in certain respects, they do not know how many entities will take advantage of the IFRs (ER 308); yet they also assert that hundreds of employers *will* take advantage of the IFRs. *See, e.g.*, ER 309 (109 of the 209 entities making use of the accommodation process will instead "make use of their exempt status"); *id.* (at least 122 nonprofits would use the expanded exemption); ER 314 (120,000 women affected). And the evidence before the district court demonstrated that women in the plaintiff States would be harmed. Given defendants' concessions and the evidence before

the court, maintaining the status quo with a preliminary injunction was well within the court's discretionary authority.

C. By Preserving the Status Quo, the Preliminary Injunction Appropriately Balances the Equities and Serves the Public Interest

The balance of the equities and the public interest analyses support issuing a preliminary injunction as well. *See Winter*, 555 U.S. at 24-26. The district court noted two interests to balance when considering the equities: "'the interest in ensuring coverage for contraceptive and sterilization services' as provided for under the ACA, and the interest in 'provid[ing] conscience protections for individuals and entities with sincerely held religious beliefs [or moral convictions] in certain health care contexts.'" ER 26 (quoting ER 284). In violating the APA's notice-and-comment requirement, the federal defendants failed to properly consider the former interest before issuing the IFRs, causing the States substantial injury.

While the IFRs inflict grave and lasting harm upon the States and their residents, enjoining the IFRs has little impact on the federal defendants. Defendants acknowledge as much. Their main justification for rushing the IFRs into effect without full vetting is to avoid "delay [in] the ability of [] organizations and individuals to avail themselves of the relief afforded by these interim final rules." ER 305. Yet the ACA's accommodations and

exemptions, which eight Circuit Courts of Appeal found did not impose a substantial burden on religious exercise under RFRA, remain available as this matter is litigated to its conclusion.[42] *Connaughton*, 752 F.3d 755, 765 (9th Cir. 2014) (the balance of equities generally tips in favor of plaintiffs when the harms they face if an injunction is denied are permanent, while the harms defendants face if an injunction is granted are temporary).

When weighing these interests, particular attention should be given to preserving the status quo. *Chalk v. U.S. Dist. Court Cent. Dist. Cal.*, 840 F.2d 701, 704 (9th Cir. 1988). Here, the status quo is the ACA's contraceptive-coverage requirement, as well as the carefully and deliberately crafted accommodations and exemptions to that requirement. *Cal. Dep't of Parks & Recreation v. Bazaar Del Mundo Inc.*, 448 F.3d 1118, 1124 (9th Cir. 2006) (status quo is "the last uncontested status that preceded the parties' controversy"). Preserving the status quo prevents irreparable harm to the States and their residents, while still protecting the sincerely held religious beliefs of those who oppose contraception. The balance of the equities and the public interest accordingly tips in the States' favor. *N.*

[42] ER at 27 n.17 (collecting cases).

Mariana Islands, 686 F. Supp.2d at 21 ("[t]he public interest is served when administrative agencies comply with their obligations under the APA").

Defendants contrary arguments are unpersuasive. Defendants' suggestion (AOB 65) that the "institutional" harm suffered by the defendants militates in favor of denying the injunction is unsupported by authority, and would preclude nearly all injunctions against the federal government. And their assertion that the district court failed to account for the potential harm to religious and moral objectors to contraception is incorrect. The district court in fact carefully considered this harm in its analysis. ER 26. Moreover, defendants' argument is undercut by their own statements that several employers will be unaffected in light of other litigation. *See, e.g.* March Br. 55 (referencing the employers who have "favorably settled their cases"); Sisters Br. 31 (asserting all "known religious objectors are already protected by the existing injunctions"). Defendants' assertions of harm are also belied by their failure to act with dispatch in seeking relief from the injunction. *See supra* pp. 14-15; *cf. Garcia v. Google*, 786 F.3d 733, 746 (9th Cir. 2015) (en banc) (delay undercuts claim of harm).

D. The District Court Properly Exercised Its Discretion in Determining the Scope of the Injunction

Defendants argue that the district court erred by failing to limit the scope of the injunction to employers in the plaintiff States. AOB 70. But the "scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class." *Califano*, 442 U.S. at 702. A suit by a single plaintiff can therefore alter an entire federal program, if the program itself contravenes the Constitution or a federal law. *See Lujan*, 497 U.S. at 890 n.2; *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017).[43] Hewing to this precedent, the district court correctly enjoined defendants from implementing the IFRs, promulgated in violation of the APA, without geographic restriction.

[43] Circuit courts have heeded this guidance. *See, e.g.*, *Washington v. Trump*, 847 F.3d 1151, 1166 (9th Cir. 2017); *Bresgal v. Brock*, 843 F.2d 1163, 1171 (9th Cir. 1987); *City of Chicago v. Sessions*, 888 F.3d 272, 288-293 (7th Cir. 2018); *Texas*, 809 F.3d at 187-188. The cases that defendants cite (AOB 68, 70, 72) disapproving of nationwide injunctions are fact-bound, and do not apply to the circumstances of this case. *Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 665 (9th Cir. 2011) (nationwide injunction would "significantly disrupt" the administration of Medicare and result in "great uncertainty and confusion"); *Meinhold v. U.S. Dep't of Def.*, 34 F.3d 1469, 1480 (9th Cir. 1994) (lawsuit to reinstate single officer did not justify nationwide injunction).

Defendants take issue with the "nationwide" scope of the injunction, urging that it violates principles of Article III standing which dictate that at least one litigant must have standing for each form of relief sought. AOB 68. But the scope of an injunction is not a different *form* of relief for standing purposes. Rather, the scope of an injunction derives from the district court's equitable powers, and is left to its sound discretion. *See Melendres*, 784 F.3d at 1265. The breadth of the court's remedial powers is therefore distinct from Article III's case or controversy requirement. And contrary to defendants' suggestion, "[t]here is no general requirement that an injunction affect only the parties in the suit." *Bresgal*, 843 F.2d at 1169.

Defendants also argue that, as a matter of policy, nationwide injunctions are only appropriate in the class action context. AOB 72. But this notion is "inconsistent with *Trump* and the myriad cases preceding it in which courts have imposed nationwide injunctions in individual actions." *Chicago*, 888 F.3d at 290.

Where, as here, a challenged agency action has a nationwide impact, a nationwide injunction advances the public interest by providing "efficiency and certainty in the law." *Id.* at 288. As such, nationwide injunctions are an accepted remedy for violations of the APA, which often implicate matters of national concern. *Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687, 699 (9th

Cir. 2007), *rev'd in part on other grounds by Summers*, 555 U.S. 488; *Nat'l. Mining Ass'n. v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (When regulations are deemed invalid, the "'ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed.'"). Defendants' suggestion that the APA itself bars such relief (AOB 70-71) is refuted by its plain language. 5 U.S.C. § 705 (courts have power to issue "all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings").

Defendants' concern that the provisional relief provided in this case will "disserve[] the deliberative development of the law" by halting the adjudication of similar issues in other courts is unpersuasive. AOB 71-72. It is not at all clear that "requiring simultaneous litigation of [a] narrow question of law in countless jurisdictions" benefits the public interest. *Chicago*, 888 F.3d at 292; *see also Califano*, 442 U.S. at 702. And in any event, other challenges to the IFRs continue to be vigorously litigated in the wake of the provisional relief here. *Pennsylvania*, 281 F. Supp.3d 553, *appeals docketed*, Nos. 17-3752, 17-3679, 18-1253 (3rd Cir. 2017); *Massachusetts*, 2018 WL 1257762 (D. Mass. Mar. 12, 2018); *Campbell v. Trump*, No. 17-cv-2455 (D. Colo.).

Defendants fail to demonstrate how the district court abused its discretion in issuing a nationwide injunction. AOB 68-73. Defendants also do not explain how the nationwide scope of the provisional relief has harmed them. *See Califano*, 442 U.S. at 702. Indeed, the nationwide injunction advances the public interest by preserving the status quo, preventing grave and lasting harm upon the States, and ensuring uniformity in the administration of federal law pending resolution of the merits.

CONCLUSION

The States respectfully request that this Court affirm the district court's preliminary injunction.

Date: May 21, 2018

Respectfully Submitted,

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STATEMENT OF RELATED CASES

The States are not aware of any related cases, as defined by Ninth Circuit Rule 28-2.6, that are currently pending in this Court and are not already consolidated here.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Federal Rules of Appellate Procedure 32(a)(5)-(6), and Ninth Circuit Rules 32-1 and 32-2(b) because it uses a proportionately spaced Times New Roman font, has a typeface of 14 points, and contains 15,314 words.

Date: May 21, 2018 *s/ Max Carter-Oberstone*

CERTIFICATE OF SERVICE

I certify that on May 21, 2018, I electronically filed the foregoing document with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all other participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Date: May 21, 2018 *s/ Max Carter-Oberstone*