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

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF CALIFORNIA *et al.*,
Plaintiffs-Appellees,
v.
ALEX M. AZAR II, in his official capacity as Secretary of the U.S. Department of Health and Human Services, *et al.*,
Defendants,
and
THE LITTLE SISTERS OF THE POOR, JEANNE JUGAN RESIDENCE,
Intervenor-Defendant-Appellant.

STATE OF CALIFORNIA *et al.*,
Plaintiffs-Appellees,
v.
ALEX M. AZAR II, in his official capacity as Secretary of the U.S. Department of Health and Human Services, *et al.*,
Defendants,
and
MARCH FOR LIFE EDUCATION AND DEFENSE FUND,
Intervenor-Defendant-Appellant.

STATE OF CALIFORNIA *et al.*,
Plaintiffs-Appellees,
v.
ALEX M. AZAR II, in his official capacity as Secretary of the U.S. Department of Health and Human Services, *et al.*,
Defendants-Appellants.

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

BRIEF FOR THE FEDERAL APPELLANTS

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STATE OF CALIFORNIA *et al.*,
Plaintiffs-Appellees,

v.

ALEX M. AZAR II, in his official capacity as Secretary of the U.S. Department of Health and Human Services, *et al.*,
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BRIEF FOR THE FEDERAL APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Regulatory Materials:

Other Authorities:

INTRODUCTION

This action represents the latest chapter in over six years of litigation regarding the so-called contraceptive-coverage mandate. Since the adoption of the mandate pursuant to the Patient Protection and Affordable Care Act, numerous entities have challenged it, as well as the regulatory "accommodation" intended to address the religious objections of certain organizations not eligible for the regulatory exemption for churches. Dozens of lawsuits were left unresolved by the Supreme Court in *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (per curiam). And despite numerous rounds of rulemaking and the solicitation of public comment, the administering agencies—the Departments of Health and Human Services (HHS), Labor, and the Treasury—have been unable to find a way both to satisfy the organizations' conscience objections and to ensure that women otherwise covered by those organizations' health plans receive contraceptive coverage.

In an effort to resolve the ongoing litigation and alleviate the burden on those with religious or moral objections to contraceptive coverage, the agencies issued interim final rules expanding the religious

exemption to the mandate and creating a new exemption for organizations with moral objections.

In this action, five States challenge the interim rules on both procedural and substantive grounds. But the States themselves are not directly subject to the rules, which do not require them to take, or refrain from taking, any action. Nor do the States identify any resident who will be harmed by the rules. Rather, they speculate (1) that employers within their borders are likely to exempt themselves from the mandate; (2) that as a result "millions" of women will lose contraceptive coverage; and (3) that those women will seek and receive state-funded benefits, resulting in a loss of money to the States. This chain of speculative assumptions is insufficient to demonstrate concrete injury for purposes of Article III standing.

We do not argue here that no one has standing to challenge these rules. An individual who loses contraceptive coverage because of the rules may well have standing to challenge them. But having failed to identify even a single such individual, the States cannot submit their disagreement with federal policy for resolution by the courts. The district court's decision to the contrary incorrectly accepted the States'

vague assertions that money will come from State coffers as a result of the interim rules.

The district court further erred by entertaining this suit in the wrong venue. Having based venue on the district in which California "resides," 28 U.S.C. § 1391(e)(1)(C), the States should have filed this suit in the Eastern District of California, because California's "principal place of business" (its capital, Sacramento) is located there, *id.* § 1391(c)(2). The district court was wrong to hold that a State is free to bring suit in any district within its borders when challenging the enactment of a federal regulation.

Even if the States had standing and the district court had venue, the district court erred in issuing a preliminary injunction barring the agencies from implementing the interim rules. The district court was wrong in holding that the agencies improperly bypassed notice-and-comment procedures. Separate statutes give each agency the authority to promulgate not only "such regulations as may be necessary or appropriate to carry out" provisions of the governing statutes, but also "any interim final rules as the Secretary determines are appropriate to carry out [those specified provisions]." 26 U.S.C. § 9833; 29 U.S.C.

§ 1191c; 42 U.S.C. § 300gg-92. This express authorization to issue "interim final rules" would be superfluous if it did not waive the Administrative Procedure Act's (APA's) requirements concerning notice-and-comment rulemaking. Moreover, the agencies had "good cause" under the APA itself to issue interim final rules to alleviate the burden imposed by the contraceptive-coverage mandate on those with sincerely held religious beliefs and moral convictions and to clear up uncertainty caused by lengthy and unresolved litigation.

Finally, the district court exceeded its equitable authority in issuing the preliminary injunction. The balance of equities does not support an injunction. And even if one were warranted, this "nationwide" injunction goes far beyond what is necessary to redress any alleged injuries to the particular plaintiffs in this case.

STATEMENT OF JURISDICTION

The plaintiff States invoked the district court's jurisdiction under 28 U.S.C. § 1331. The district court entered a preliminary injunction on December 21, 2017. ER 29. The government filed a timely notice of appeal on February 16, 2018 (Case No. 18-15255). ER 30-31. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

1. Whether the plaintiff States lack Article III standing to bring this action given that they have not identified any residents who will lose contraceptive coverage and seek state-funded benefits as a result of the interim rules.

2. Whether the district court erred in holding that a State "resides" in every federal district in the State for purposes of the venue statute, 28 U.S.C. § 1391(e)(1)(C), even though the statute expressly provides that an entity plaintiff "shall to be deemed to reside . . . only in the judicial district in which it maintains its principal place of business," *id.* § 1391(c)(2).

3. Whether the agencies properly concluded that they had express statutory authority as well as good cause under the APA to issue these interim final rules without prior notice and comment.

4. Whether the district court erred in holding that the balance of harms supports a preliminary injunction.

5. Whether the district court erred in issuing a "nationwide" injunction that extends beyond the relief necessary to redress any cognizable injuries to the plaintiffs.

STATEMENT OF THE CASE

A. The Affordable Care Act and the Contraceptive-Coverage Mandate

The Patient Protection and Affordable Care Act (ACA) requires most group health plans and health-insurance issuers that offer group or individual health coverage to provide coverage for certain preventive services without "any cost sharing requirements." 42 U.S.C. § 300gg-13(a). The Act does not specify the types of preventive care that must be covered. Instead, as relevant here, the Act requires coverage, "with respect to women," of such "preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health

Resources and Services Administration [HRSA]," a component of HHS. *Id.* § 300gg-13(a)(4).

In August 2011, HRSA adopted the recommendation of the Institute of Medicine, a part of the National Academy of Sciences, to issue guidelines requiring coverage of, among other things, the full range of FDA-approved contraceptive methods, including oral contraceptives, diaphragms, injections and implants, emergency contraceptive drugs, and intrauterine devices. *See* 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012). As a result, coverage for such contraceptive methods was required for plan years beginning on or after August 1, 2012. *See* 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011).

At the same time, the agencies, invoking their statutory authority under 42 U.S.C. § 300gg-13(a)(4), promulgated rules authorizing HRSA to exempt churches and their integrated auxiliaries from the contraceptive-coverage mandate. *See* 76 Fed. Reg. at 46,623. The rules were finalized in February 2012. *See* 77 Fed. Reg. at 8725. While various religious groups urged the agencies to expand the exemption to all religious not-for-profit organizations and other organizations with religious or moral objections to providing contraceptive coverage, *see*

78 Fed. Reg. 8456, 8459 (Feb. 6, 2013), the agencies instead offered only what they termed an "accommodation" for religious not-for-profit organizations with religious objections to providing contraceptive coverage, *see* 78 Fed. Reg. 39,870, 39,874-82 (July 2, 2013). The accommodation allowed a group health plan established or maintained by an eligible objecting employer to opt out of any requirement to directly "contract, arrange, pay, or refer for contraceptive coverage," *id.* at 39,874, by providing notice of its objection to its health insurer or its third-party administrator (in the case of self-insured plans). The regulations then generally required the employer's health insurer or third-party administrator to provide or arrange contraceptive coverage for plan participants. *See id.* at 39,875-80. (The agencies later amended the accommodation to permit an objecting employer to instead provide notice directly to HHS. *See* 80 Fed. Reg. 41,318, 41,322-23 (July 14, 2015).)

In the case of self-insured church plans, however, coverage by the plan's third-party administrator under the accommodation was

voluntary.[1] Church plans are exempt from the Employee Retirement Income Security Act of 1974 (ERISA) under section 4(b)(2) of that Act, and the authority to enforce a third-party administrator's obligation to provide separate contraceptive coverage derives solely from ERISA. The agencies thus could not require the third-party administrators of those plans to provide or arrange for such coverage or impose fines or penalties for failing to provide such coverage. *See* 79 Fed. Reg. 51,092, 51,095 n.8 (Aug. 27, 2014).

Finally, even apart from the religious exemption, the contraceptive-coverage mandate did not apply to many other employers. The ACA itself exempts from the preventive-services requirement, including the contraceptive-coverage mandate, so-called grandfathered health plans (generally, those plans that have not made specified changes since the Act's enactment), *see* 42 U.S.C. § 18011, which cover tens of millions of people, *see* 82 Fed. Reg. 47,792, 47,794 & n.5 (Oct. 13, 2017). And employers with fewer than fifty employees are not subject to

[1] A church plan can include a plan maintained by a "principal purpose" organization regardless of who established it. *See Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1655-63 (2017); *see also* 29 U.S.C. § 1002(33).

the tax imposed on employers that fail to offer health coverage, *see* 26 U.S.C. § 4980H(c)(2), although small employers that *do* provide non-grandfathered coverage must comply with the preventive-services requirement.

B. Challenges to the Contraceptive-Coverage Mandate and Accommodation

Many employers objected to the contraceptive-coverage mandate. In *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), the Supreme Court held that the Religious Freedom Restoration Act (RFRA) prohibited applying the mandate to closely held for-profit corporations with religious objections to providing contraceptive coverage. The Court held that the mandate "impose[d] a substantial burden on the exercise of religion" for employers with religious objections, *id.* at 2779, and that, even assuming a compelling governmental interest, application of the mandate to such employers was not the least restrictive means of furthering that interest, *id.* at 2780. The Court observed that the agencies had already established an accommodation for not-for-profit employers and that this less-restrictive alternative could be extended to closely held for-profit corporations with

religious objections. *Id.* at 2782. The Court did not decide, however, "whether an approach of this type complies with RFRA for purposes of all religious claims." *Id.*

In response to *Hobby Lobby*, the agencies promulgated rules extending the accommodation to closely held for-profit entities with religious objections to providing contraceptive coverage. *See* 80 Fed. Reg. at 41,323-28. Numerous entities, however, continued to challenge the mandate. They argued that the accommodation burdened their exercise of religion because they sincerely believed that the required notice and the provision of contraceptive coverage in connection with their health plans made them complicit in providing such coverage.

A split developed in the circuits,[2] and the Supreme Court granted certiorari in several of the cases. The Court vacated the judgments and remanded the cases to the respective courts of appeals. *See Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (per curiam). The Court "d[id] not decide whether [the plaintiffs'] religious exercise ha[d] been

[2] *Compare, e.g., Priests for Life v. HHS*, 772 F.3d 229 (D.C. Cir. 2014) (accommodation does not substantially burden religious exercise), *with Sharpe Holdings, Inc. v. HHS*, 801 F.3d 927 (8th Cir. 2015) (accommodation violates RFRA).

substantially burdened, whether the Government ha[d] a compelling interest, or whether the current regulations [we]re the least restrictive means of serving that interest." *Id.* at 1560. Instead, the Court directed that on remand the parties "be afforded an opportunity to arrive at an approach going forward that accommodates [the plaintiffs'] religious exercise while at the same time ensuring that women covered by [the plaintiffs'] health plans receive full and equal health coverage, including contraceptive coverage." *Id.* (quotation marks omitted). In the meantime, the Court precluded the government from "impos[ing] taxes or penalties on [the plaintiffs] for failure to provide the [notice required under the accommodation]." *Id.* at 1561. Similar orders were entered in other pending cases.

In response to the Supreme Court's order in *Zubik*, the agencies issued a request for information seeking public comment to determine whether further modifications to the accommodation could resolve the religious objections asserted by various organizations while providing a mechanism for coverage for their employees. *See* 81 Fed. Reg. 47,741 (July 22, 2016). The agencies received over 54,000 comments, but could not find a way to amend the accommodation to both satisfy the

objecting organizations and provide coverage to their employees. *See* FAQs About Affordable Care Act Implementation Part 36, at 4 (Jan. 9, 2017).[3] The pending litigation—more than three dozen cases brought by more than 100 separate plaintiffs—thus remained unresolved.

In addition, some nonreligious organizations with moral objections to providing contraceptive coverage had filed suits challenging the mandate. That litigation also led to conflicting decisions by the courts. *Compare Real Alternatives, Inc. v. Secretary, HHS*, 867 F.3d 338 (3d Cir. 2017) (rejecting challenge), *with March for Life v. Burwell*, 128 F. Supp. 3d 116 (D.D.C. 2015) (issuing permanent injunction against the government), *appeal docketed*, No. 15-5301 (D.C. Cir. Oct. 30, 2015) (stayed).

C. The Interim Final Rules

In an effort "to resolve the pending litigation and prevent future litigation from similar plaintiffs," the agencies concluded that it was "appropriate to reexamine" the mandate's exemption and accommodation. 82 Fed. Reg. at 47,799. Following that reexamination,

[3] Available at https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-36.pdf.

the agencies issued two interim final rules that expanded the exemption while continuing to offer the existing accommodation as an optional alternative. The first rule expanded the religious exemption to all nongovernmental plan sponsors, as well as institutions of higher education in their arrangement of student health plans, to the extent that those entities have sincere religious objections to providing contraceptive coverage. *See id.* at 47,806. The agencies relied in part on their consistent interpretation of the preventive-services provision to convey "broad discretion to decide the extent to which HRSA will provide for and support the coverage of additional women's preventive care and screenings in the Guidelines." *Id.* at 47,794.

The agencies acknowledged that contraceptive coverage is "an important and highly sensitive issue, implicating many different views." 82 Fed. Reg. at 47,799. But "[a]fter reconsidering the interests served by the [m]andate," the "objections raised," and "the applicable Federal law," the agencies "determined that an expanded exemption, rather than the existing accommodation, [wa]s the most appropriate administrative response to the religious objections raised by certain entities and organizations." *Id.* The agencies also explained that the

new approach was necessary because "[d]espite multiple rounds of rulemaking," and even more litigation, they "ha[d] not assuaged the sincere religious objections to contraceptive coverage of numerous organizations" or resolved the pending legal challenges that had divided the courts. *Id.*

The second rule created a similar exemption for entities with sincerely held moral objections to providing contraceptive coverage (but unlike the religious exemption, this rule did not apply to publicly traded companies). *See* 82 Fed. Reg. 47,838 (Oct. 13, 2017). The agencies explained that the prior rules did not extend exemptions or accommodations to nonreligious moral objectors and that the agencies were now exercising their discretion to do so. *Id.* at 47,839. This decision was "in part to bring the [m]andate into conformity with Congress's long history of providing or supporting conscience protections in the regulation of sensitive health-care issues," *id.* at 47,844, as well as similar efforts by the States, *id.* at 47,847. The rule further reflected the agencies' attempts to resolve legal challenges by moral objectors that had given rise to conflicting court decisions. *Id.* at 47,843.

Invoking agency-specific statutory authority to issue interim final rules, 26 U.S.C. § 9833; 29 U.S.C. § 1191c; 42 U.S.C. § 300gg-92, as well as the APA's general "good cause" exception to notice-and-comment requirements, 5 U.S.C. § 553(b), the agencies issued the rules without prior notice and comment. The agencies did, however, solicit comments for 60 days post-promulgation. *See* 82 Fed. Reg. at 47,792; 82 Fed. Reg. at 47,838. The agencies explained that the express statutory authority to issue "interim final regulations" provided them with authority to do so here. The agencies also concluded that good cause existed to dispense with notice-and-comment rulemaking because the public interest favored prompt guidance to objecting employers and resolution of the uncertainty resulting from the years of litigation over the rules. *See* 82 Fed. Reg. at 47,813-15; 82 Fed. Reg. at 47,854-56. The agencies further concluded that delaying an interim resolution pending a notice of proposed rulemaking was unwarranted given that they had received and considered "more than 100,000 public comments on multiple occasions" in response to previous rulemaking on this issue and those comments "included extensive discussion about whether and by what extent to expand the exemption." 82 Fed. Reg. at 47,814.

The comment period for the interim rules expired on December 5, 2017. HHS received more than 200,000 comments and is currently reviewing them.

D. The States' Challenge to the Interim Rules and the District Court's Preliminary Injunction

Plaintiffs, the States of California, Maryland, Delaware, and New York, and the Commonwealth of Virginia, sued in the U.S. District Court for the Northern District of California, challenging the interim rules. The States claimed that the rules (1) failed to comply with the APA's notice-and-comment requirements; (2) are arbitrary and capricious, an abuse of discretion, or otherwise contrary to law; (3) violate the Establishment Clause; and (4) violate the Equal Protection Clause. ER 278-280.

The district court granted the States' motion for preliminary injunctive relief on the first claim, issuing a "nationwide" preliminary injunction invalidating the interim rules. ER 28-29.

As an initial matter, the district court rejected the government's argument that the States had not demonstrated standing. Asserting that the States' claims of standing are entitled to "special solicitude,"

ER 12, the court found that the States had "stated a procedural injury that is sufficient for the purposes of Article III standing." ER 13. The court determined that the States had demonstrated a concrete injury because they would incur "economic obligations, either to cover contraceptive services necessary to fill in the gaps left by the [interim rules] or for expenses associated with unintended pregnancies." ER 14 (quotation marks omitted).

The district court also rejected the government's argument that venue was not proper in the Northern District of California. Relying on 28 U.S.C. § 1391(e)(1)(C), which permits a plaintiff to bring suit against a federal agency in the district where the plaintiff "resides," the court held that "common sense dictates" that a State resides in all federal districts within its borders, without regard to its "principal place of business," *id.* § 1391(c)(2), thereby giving a State a choice of forum. ER 16.

Turning to the States' request for a preliminary injunction, the district court concluded that the States were likely to succeed on their procedural APA claim. The court rejected the agencies' arguments that they had statutory authority to depart from the APA's notice-and-

comment requirements. ER 19-21. The court also dismissed the agencies' determination that the need to resolve protracted litigation, cure RFRA violations, and eliminate uncertainty over this important issue constituted "good cause" for bypassing pre-promulgation notice and comment. ER 21-24.

The court further held that the balance of harms warranted preliminary injunctive relief. The court observed that any harm to the health of the States' residents and to the States' fiscal interests "would not be susceptible to remedy," ER 26, and that "returning to the state of affairs before the enactment of the [interim rules] . . . does not constitute an equivalent harm to the [government] pending resolution of the merits." ER 27.

The district court found it "appropriate" to issue a "nationwide" injunction, reasoning that "*no* member of the public was permitted to participate in the rulemaking process via advance notice and comment." ER 28. The court therefore ordered that the agencies are "(1) preliminarily enjoined from enforcing the [interim rules], and (2) required to continue under the regime in place before October 6, 2017." *Id.*

SUMMARY OF ARGUMENT

The preliminary injunction barring the agencies from implementing the interim final rules should be reversed.

I. The States have not met their burden of demonstrating standing to challenge the new rules. The States assert that they will bear the costs of providing contraceptive (and other) services to eligible residents who lose contraceptive coverage under the interim rules. But this claim of economic injury is too speculative to confer standing, as the States have not identified a single woman who will lose contraceptive coverage because of the interim rules, much less a woman who will then be eligible for and request benefits from a state-funded program.

We do not suggest that no women will be affected by these rules. But the States cannot base their claim of economic injury on the agencies' estimate of the number of women who could be affected nationwide—particularly given that four of these States have laws requiring contraceptive coverage by insurance plans. And even to the extent that women in the plaintiff States lose coverage, none of the States offers any basis for concluding that those women would be eligible for state-funded programs.

II. The Northern District of California is not a proper venue for this case, and the district court was wrong to hold that a State may bring suit in any district within its borders. Suit against a federal agency may be brought where the plaintiff "resides." 28 U.S.C. § 1391(e)(1)(C). An entity such as a State, however, is deemed to reside "*only* in *the* judicial district in which it maintains its *principal* place of business." *Id.* § 1391(c)(2) (emphasis added). For California, that place is Sacramento—the state capital—which is in the Eastern District of California.

III. The agencies had statutory authority to issue the interim rules without prior notice and comment. The ACA's preventive-services provision, pursuant to which the contraceptive-coverage mandate was promulgated, was enacted as an amendment to the Public Health Service Act and (along with other provisions of that Act) was incorporated into ERISA and the Internal Revenue Code. Section 2792 of the Public Health Service Act (42 U.S.C. § 300gg-92), section 734 of ERISA (29 U.S.C. § 1191c), and section 9833 of the Internal Revenue Code (26 U.S.C. § 9833) expressly authorize the Secretaries of the three agencies to promulgate not only "such regulations as may be necessary

or appropriate to carry out [specified provisions of these Acts]," but also "any interim final rules as the Secretary determines are appropriate to carry out [those specified provisions]." This express authorization to issue "interim final rules" would be superfluous if it did not waive the APA's notice-and-comment requirements.

Even if the agencies lacked specific statutory authority to issue interim final rules, they validly invoked the general "good cause" exception to the APA's notice-and-comment requirement, 5 U.S.C. § 553(b). The agencies properly concluded that notice-and-comment rulemaking would be impracticable and contrary to the public interest in light of the uncertainty resulting from years of litigation left unresolved by the Supreme Court in *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (per curiam), and the burden imposed on employers with sincerely held religious or moral objections to providing contraceptive coverage.

IV. Regardless of whether the States are likely to succeed on the merits of their claim, the balance of equities does not support the district court's injunction. The government suffers irreparable institutional injury when its laws and regulations are set aside by a

court. Moreover, the injunction essentially restores rules that burden the religious exercise of employers with religious objections to providing contraceptive coverage. Those injuries outweigh the speculative and undefined economic injury asserted by the States, which is not even sufficient to establish standing, much less the irreparable harm necessary to support a preliminary injunction.

V. Even if a preliminary injunction were warranted, the district court erred in issuing an injunction precluding enforcement of the interim rules *nationwide*. Any injuries suffered by the plaintiff States would be fully redressed by an injunction limited to those States. Enjoining the rules in *other* States violates the fundamental principle that an injunction "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (quotation marks omitted).

STANDARD OF REVIEW

Review of the grant or denial of a preliminary injunction is for abuse of discretion. *See American Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009). "[A] district court necessarily

abuses its discretion when it bases its decision on an erroneous legal standard or on clearly erroneous findings of fact." *Id.* (quotation marks omitted). Review of a district court's construction of a federal statute is de novo. *See id.*

ARGUMENT

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

The States that brought this action undoubtedly disagree with the policy of the federal government here. But the federal courts were not established to adjudicate policy or political disputes, even if those disputes involve matters of public importance. Rather, a federal court may exercise Article III jurisdiction only where there is an actual case or controversy. *See Raines v. Byrd*, 521 U.S. 811, 818 (1997). To establish standing, a plaintiff bears the burden of demonstrating an injury that is "concrete[,] particularized," and "actual or imminent, not conjectural or hypothetical"; "fairly traceable to the challenged action"; and "redress[able] by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (quotation marks and alterations omitted). The States have not met that burden here.

"[A] party who seeks a preliminary injunction must show a substantial likelihood of standing." *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 913 (D.C. Cir. 2015) (quotation marks omitted). "Thus, the plaintiff cannot 'rest on . . . mere allegations, but must set forth by affidavit or other evidence specific facts' that, if 'taken to be true,' demonstrate a substantial likelihood of standing." *Electronic Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, 878 F.3d 371, 377 (D.C. Cir. 2017) (quoting *Lujan*, 504 U.S. at 561).

We do not argue here that no one has standing to challenge the rules. An individual who is denied coverage or faces an imminent denial of coverage because of the rules may well have standing to challenge them. But none of the States has identified such a person, much less one who will seek state-funded benefits as an alternative. Accordingly, as we discuss below, the States have not met their burden of demonstrating an injury sufficient to establish their standing to challenge the interim rules.

A. The States' Allegations of Economic Injury Are Not Sufficient to Demonstrate Standing

The challenged rules do not require the States to take, or refrain from taking, any action. Indeed, the rules apply only to nongovernmental employers, not the States. The States nevertheless insist that they have standing to challenge the rules. Disclaiming any attempt to establish *parens patriae* standing by asserting their quasi-sovereign interests in the health and well-being of their residents, *see* States' Reply at 12 n.14, dkt. no. 78 (Dec. 6, 2017), the States assert that they will suffer economic injuries, either by providing contraceptive coverage themselves or by funding medical treatment and other social services associated with unintended pregnancies.

Where, as here, "the plaintiff is not himself the object of the government action or inaction he challenges," standing "is ordinarily substantially more difficult to establish" because it "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." *Lujan*, 504 U.S. at 562 (quotation marks omitted). The States' claim of economic harm rests upon a "chain of speculative contingencies" that is insufficient to confer

standing. *Lee v. Oregon*, 107 F.3d 1382, 1389 (9th Cir. 1997). Before a State will bear any costs as a result of the interim rules, a number of circumstances must exist:

(1) An employer in that State must avail itself of the expanded exemption, leading to a loss of contraceptive coverage for its employees. For that to occur,

   (a) the employer must have previously provided contraceptive coverage (or used the accommodation, under which coverage is arranged by its insurer or third-party administrator); and

   (b) the employer must invoke the expanded exemption and decline to use the accommodation.[4]

(2) The employer's decision must cause women in that State to lose employer-sponsored contraceptive coverage. That means

   (a) the employer's health plan must no longer cover the specific contraceptive methods that those women would otherwise have chosen (given that employers need not opt out of coverage of all contraceptive methods); and

   (b) women denied coverage must lack the option of receiving the desired coverage under the plan of a family member (such as a spouse).

(3) Even under those circumstances, the State will be required to expend money from its coffers only if the women affected are eligible for, and seek, services from state-funded

[4] While the interim rules apply not just to employers but also to institutions of higher education in their arrangement of student health plans, for ease of reference we refer generally to "employers" unless the context requires otherwise.

programs, rather than simply paying out of pocket for contraception.

The States' showing fails at each step.

1. The States Have Not Shown That Employers Will Deprive Residents of Contraceptive Coverage

None of the States demonstrates facts sufficient to show, beyond speculation, that employers in the States will avail themselves of the interim rules to deprive plan participants of contraceptive coverage.

a. California, Delaware, Maryland, and Virginia. As discussed, the States cannot rely on mere allegations to support standing at the preliminary-injunction stage. It bears noting, however, that even the States' bare allegations are insufficient to show that any employers will deprive plan participants of contraceptive coverage. Delaware makes no allegation that any employer will or is likely to use the expanded exemption under the interim rules. In the complaint, California, Maryland, and Virginia allege only that some unidentified employers "will likely seek an exemption *or accommodation*." ER 276 ¶ 107 (emphasis added); *see also id.* ¶ 108; ER 277 ¶ 113. But the accommodation generally allows plan participants to continue to receive no-cost contraceptive coverage through the employer's insurer or third-

party administrator. *See supra* p. 8. Thus, to the extent an employer uses the accommodation, there will be no effect on its plan participants—or the States in which those participants reside. Indeed, the States are not even challenging the accommodation, which was not materially altered by the interim rules. Nor has the district court enjoined enforcement of that pre-existing provision. Accordingly, the possibility that employers may invoke the accommodation cannot support the States' Article III standing or the preliminary injunction.

Moreover, these four States do not explain how they arrived at their estimates of how many employers are "likely" to use the exemption or accommodation. California cites 25 employers "with 54,879 employees," ER 276 ¶ 107, but provides no basis for those figures. Nor does it offer any basis to believe that any of those employers are likely to decline to use the accommodation. Maryland's and Virginia's allegations suffer the same deficiency. *See id.* ¶ 108 (alleging, without further explanation, that "[t]here are at least 5 Maryland employers, with 6,460 employees who will likely seek an exemption or accommodation"); ER 277 ¶ 113 (alleging, without further explanation, that "[t]here are at least 10 Virginia employers, with 3,853

employees who will likely seek an exemption or accommodation"). The States' vague allegations make it impossible to determine whether the interim rules will have any effect on the employees they attempt to tally.

This is especially true because California, Delaware, and Maryland each have their own laws requiring health-insurance plans to cover FDA-approved contraceptives. *See* ER 262 ¶ 44; ER 265 ¶ 54; ER 266 ¶ 64. Employers in those States that rely on insurers to provide health coverage must continue to provide contraceptive coverage regardless of any exemption or accommodation in the federal contraceptive-coverage mandate, which means that none of their employees will lose coverage.[5] Although these state laws do not apply to self-insured plans (which are generally governed exclusively by ERISA), the States do not allege that any of the employers in their States likely to use the exemption are self-insured. For instance, California alleges that the interim final rules "could impact 6.6 million Californians who

[5] Like the federal contraceptive-coverage mandate, the California and Maryland laws require that such coverage be provided without cost-sharing, *see* ER 262 ¶ 44; ER 266 ¶ 64, although Delaware permits cost-sharing under certain circumstances, *see* ER 265 ¶ 55.

receive their health care through a self-insured employer health plan." ER 276 ¶ 106. But in alleging that "at least 25 California employers . . . will likely seek an exemption or accommodation," *id.* ¶ 107, California does not allege that any of those employers are self-insured.[6]

Moreover, even if any of these employers invoke the exemption, the States have not shown that any alleged injury would be *caused by* the interim rules. The States do not allege that any of the unidentified employers were providing contraceptive coverage (or using the accommodation) before the issuance of the rules. Many employers that challenged the accommodation under the prior rules are currently protected by injunctions precluding the government from enforcing the mandate against them. As a result, participants in the health plans of employers that the States expect to use the expanded exemption may not have been receiving contraceptive coverage even *before* the issuance of the interim rules. Any injury to the States from the absence of

[6] While Virginia does not have a contraceptive-coverage law, and thus its claim of standing does not suffer from this particular flaw, its allegations are still insufficient to demonstrate standing, for the additional reasons discussed below.

employer-sponsored contraceptive coverage would not be traceable to the interim rules, but to the prior injunctions.

Indeed, the States' vague allegations make it impossible to determine whether the employees of the cited employers would otherwise receive contraceptive coverage in the absence of the interim rules. As explained, *supra* pp. 8-9, even under the prior rules the agencies lacked authority to enforce the accommodation against self-insured church plans. To the extent that the accommodation under the prior rules allowed employers with self-insured church plans to relieve themselves, and effectively their third-party administrators as well, of any obligation to provide contraceptive coverage, *see* 82 Fed. Reg. 47,792, 47,801-02, 47,816-17 (Oct. 13, 2017), the interim rules will have no effect on participants in those plans.

b. New York. Although New York identifies three entities that it contends are "likely [to] avail themselves of the [interim rules'] broad exemption criteria," ER 277 ¶ 112, its allegations are insufficient to show that plan participants will lose contraceptive coverage.

New York identifies Hobby Lobby as "likely to use the exemption[]" because of the company's "involvement in previous

litigation" challenging the contraceptive-coverage mandate. ER 248 ¶ 5; *see also* ER 276 ¶ 110. But New York makes no allegation that Hobby Lobby will decline to use the accommodation (which was made available to the company and other closely held corporations under the prior rules as a result of the company's victory in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014)).

New York also identifies two academic institutions that challenged the accommodation, Nyack College and Biola University. *See* ER 277 ¶ 111. As an initial matter, New York has a law requiring health-insurance plans to cover FDA-approved contraceptives without cost-sharing. ER 269-270 ¶¶ 75-77. In litigation challenging the accommodation, Biola alleged that it offered health-insurance coverage to its employees through insurance plans issued by Kaiser Permanente and Blue Cross Blue Shield and to its students through an insurance plan issued by United Health Care. *See* Am. Compl. at 13-14, *Grace Schools v. Sebelius*, No. 3:12-cv-459 (N.D. Ind. Sept. 6, 2013). If Biola continues to offer insured plans, it will be required by state law to provide contraceptive coverage regardless of the interim rules, and New York offers no evidence that Biola is now self-insured. New York

likewise offers no information about whether Nyack College would be subject to state contraceptive-coverage requirements. But even if these institutions are not subject to those state contraceptive-coverage requirements, New York does not allege that they were providing contraceptive coverage (or using the accommodation) before the issuance of the interim rules. *See supra* pp. 31-32. Nor does New York allege that their employees would otherwise receive contraceptive coverage in the absence of the interim rules. *See supra* p. 32; 82 Fed. Reg. at 47,802.

2. The States Do Not Identify Women Who Will Be Adversely Affected

Even assuming that an employer in these States will avail itself of the expanded exemption and cease providing coverage that it provided before the issuance of the interim rules, none of the States identifies any women who will be adversely affected by that employer's decision.

The exemptions created by the interim rules apply only "to the extent" of the objecting entities' sincerely held religious beliefs or moral convictions. 82 Fed. Reg. at 47,809; *see also* 82 Fed. Reg. at 47,850. If an employer objects to covering some, but not all, contraceptives, the employer must still provide coverage for those contraceptives to which it

does not object. *See* 82 Fed. Reg. at 47,809. Indeed, many of the employers that challenged the mandate and the prior accommodation objected only to some contraceptives and covered many others—the plaintiffs in *Hobby Lobby*, for example, were willing to provide coverage for 14 of 18 FDA-approved contraceptive and sterilization methods. *See id*. at 47,801, 47,817 & n.68. It is mere speculation that an employer that avails itself of the exemption will choose not to cover the contraceptive method that a particular plan participant would otherwise choose. Moreover, women covered by plans that cease to provide coverage of all or some contraceptive services may share the entity's religious or moral objections to such coverage.

It is telling that the States do not identify a single woman who will lose coverage she would otherwise want. The best the States could do is assert that women in their States have expressed *concern* about potentially losing coverage. California officials, for instance, state that they received calls from women who "were concerned that changes at the federal level could impact their access to contraceptive coverage." ER 201 ¶ 23; *see also id.* ¶ 24 (referring to "calls asking which health insurance policies will be impacted and when women will lose their

coverage for contraception"). But mere expressions of "concern," which could themselves be based on misunderstanding or speculation, are insufficient to show concrete harm. None of the States reports a call from a woman who actually lost coverage or whose employer had stated its intent to use the exemption.

The only woman the States identify is a Maryland resident who "worried" that the interim rules would "dramatically reduce [her] access to contraceptive coverage." ER 217 ¶¶ 2, 4. Her declaration makes clear, however, that she has contraceptive coverage through her current employer. *Id.* ¶ 3. She states that her unidentified employer "*could* discontinue contraception coverage when renewing health plans for its employees." ER 218 ¶ 5 (emphasis added). But she does not suggest that her employer has religious or moral objections to such coverage and will actually discontinue such coverage. And while she speculates that the supposed increase in the number of employers opting out of contraceptive coverage will "limit[]" her "future job choices," ER 217 ¶ 4, such a claim of future injury is "too speculative to satisfy the well-established requirement that threatened injury must be 'certainly impending.'" *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401 (2013).

3. The Failure to Identify Women Who Will Lose Coverage Renders the States' Assertion of Harm Speculative

a. In failing to identify women who will lose contraceptive coverage they would otherwise have chosen, the States also (necessarily) fail to show economic harm. The States seem to base their claim of economic injury solely on the agencies' estimate that the interim rules could affect as many as 120,000 women of child-bearing age. *See* States' Reply at 13 (asserting that "[t]here is no question" that the alleged economic harm is "real," because the agencies have estimated that as many as 120,000 women could lose coverage). Citing that figure, as well as population statistics, the States assume that "one in five" of those women "are residents of the [plaintiff] States." *Id.*; *see also* ER 277 ¶ 114. This assumption, however, is wholly conjectural and is insufficient to support the States' assertion of economic injury.

As an initial matter, the States' assumption that the interim rules will affect a proportionate number of their residents as could be affected nationwide does not take into account the fact that, unlike many other States, the plaintiff States (except Virginia) have laws requiring contraceptive coverage by insurance plans. Even if an employer with an

insured plan were able to avail itself of the expanded exemption to the extent it operates in other States, that employer could be required to continue to provide coverage in four out of the five plaintiff States.

But even if an employer is self-insured and not subject to such state laws, the States' failure to identify a single woman who will lose coverage of her chosen contraceptive method makes the States' assertion of economic harm speculative. If a woman loses coverage of her chosen contraceptive method through her employer, she may still have access to such contraceptive coverage through a spouse's (or parent's) plan. Or she may otherwise be willing and able to pay for contraceptive services out of pocket and thus may not seek, or be eligible for, services from a state-funded program. Because the States have not identified a particular woman who will lose coverage, it is wholly speculative whether the States' alleged fiscal injury will ever materialize.

The speculative nature of the States' claims is reflected in their declarations. For instance, California's Medicaid Director stated only that she "believe[d] that some California women and covered dependents who *could* lose coverage *could* become eligible for the

Family PACT program, provided they meet other requirements such as [income requirements]." ER 122 ¶ 16 (emphasis added). That sort of conjecture is insufficient to demonstrate the requisite injury to California.

Likewise, a senior policy advisor to Virginia's then Governor declared that "[w]omen impacted by the [interim rules] *who are eligible* for Plan First may be expected to enroll in Plan First, resulting in an increase in enrollees in this state-supported program which would have a corresponding fiscal impact." ER 243 ¶ 10 (emphasis added). But this declarant did not identify any women who are likely to lose coverage, and offered no basis for concluding that any such women would in fact be eligible for state-funded programs. Nor did the Director of Delaware's Division of Public Health offer any basis for "predict[ing] that, if the Interim Final Rules are enforced in Delaware, more women who lose access to contraceptives through their employer-sponsored plans will seek access to those services and products through [the State's] programs." ER 116 ¶ 7.

The States' assertions about unplanned pregnancies are even more speculative. The fact that "California pays for 64 percent of

unplanned births," ER 14 (citing ER 234 ¶ 27), and that "[u]nintended pregnancies cost [California] approximately $689 million . . . in 2010," *id.* (quoting ER 169 ¶ 61), is not sufficient to show that the interim rules will lead to unintended pregnancies, let alone that the State would bear the costs of such pregnancies. It remains wholly conjectural that an employer will avail itself of the interim rules, a woman will lose coverage of the contraceptive method that she would otherwise have chosen, she will thus choose a less-effective method or forgo contraception altogether, she will become pregnant, and she will then be eligible for and seek benefits from a state-funded program, rather than from her employer-sponsored health plan.

b. To the extent the States contend that the interim rules will "burden[]" them "with the costs of lost opportunities for affected women to achieve in education and the workplace and to contribute as taxpayers," States' Mot. for Prelim. Inj. at 30, dkt. no. 28 (Nov. 9, 2017), that sort of generalized harm to the States' economic interests is not sufficient to support standing. *See Wyoming v. U.S. Dep't of Interior*, 674 F.3d 1220, 1234 (10th Cir. 2012); *Pennsylvania v. Kleppe*, 533 F.2d 668, 672 (D.C. Cir. 1976). Because of "the unavoidable economic

repercussions of virtually all federal policies," the "impairment of state tax revenues" generally is not "recognized as sufficient injury in fact to support state standing." *Kleppe*, 533 F.2d at 672. Instead, courts "require some fairly direct link between the state's status as a collector and recipient of revenues and the legislative or administrative action being challenged." *Id.* (concluding that State lacked standing where "diminution of tax receipts [was] largely an incidental result of the challenged action"). In any event, this claim of economic injury fails for the same reasons discussed above: The States do not identify any women who will lose coverage they would otherwise want.

In sum, the States' allegations of economic injury are too speculative to demonstrate standing. The district court erred in disregarding the States' failure to identify a single woman who will lose coverage she would otherwise want under the interim rules. One can speculate that women will lose coverage and then qualify for state-funded benefits (or otherwise burden state public-health or social-services systems). But Article III requires more than speculation. *See Clapper*, 568 U.S. at 401.

B. The States' Procedural Injury Is Not Sufficient to Establish Standing

The district court erred in holding that the States' alleged procedural injury is sufficient to establish standing. This Court has made clear that the "analysis of Article III standing is not fundamentally changed by the fact that a petitioner asserts a 'procedural,' rather than a 'substantive' injury." *Nuclear Info. & Res. Serv. v. Nuclear Regulatory Comm'n,* 457 F.3d 941, 949 (9th Cir. 2006) (quotation marks omitted). Although "the plaintiff in a procedural-injury case is relieved of having to show that proper procedures would have caused the agency to take a different substantive action, the plaintiff must still show that the agency action was the cause of some redressable injury to the plaintiff." *Arpaio v. Obama*, 797 F.3d 11, 21 (D.C. Cir. 2015) (quotation marks omitted). Thus, "deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing." *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009). That means that the States must still show that the interim

rules themselves will cause the States some injury. As discussed above, however, the States have not demonstrated any such injury.[7]

II. The Northern District of California Is Not the Proper Venue for This Action

The States asserted venue on the basis of 28 U.S.C. § 1391(e)(1)(C), which permits official-capacity suits against a federal agency or officer to be brought in a district where "the plaintiff resides." A non-natural plaintiff (such as a State) is "deemed to reside . . . *only* in *the* judicial district in which it maintains its *principal* place of business." *Id.* § 1391(c)(2) (emphasis added). "[R]eference to 'the' and the singular 'its principal place of business' compels the conclusion that an entity plaintiff (unlike an entity defendant) can reside in only one district at a time." Wright & Miller, 14D *Federal Practice and Procedure* § 3805 (4th ed.).

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[7] Quoting *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007), the district court stated that States are "entitled to special solicitude" in the standing analysis. ER 12. But the court recognized, ER 13, and the States did not contest, that any such "special solicitude" does not alter the requirement to demonstrate an injury in fact. As discussed, the States have not demonstrated such an injury here. Thus, even if the States are entitled to "special solicitude" (which we do not concede), it is of no help to them here.

The State of California resides in the Eastern District of California because that is "*the* judicial district" in which its "principal place of business," Sacramento—the state capital—is located. Sacramento is "[t]he permanent seat of government of the state." Cal. Gov't Code § 450. Sacramento is where the California legislature sits and where the Governor's primary office and official residence are located. It is also the official residence of the Governor's close advisors, *id.* § 11151, and the home to numerous government offices. *Cf. Hertz Corp. v. Friend*, 559 U.S. 77, 92-93 (2010) (defining "principal place of business" for diversity-jurisdiction purposes as the place where "officers direct, control, and coordinate the corporation's activities"). Because Sacramento must be the State's "principal place of business," the Eastern District of California is "the" judicial district in which the State "resides" for venue purposes.

The district court nevertheless concluded that a State can choose any judicial district within its borders, regardless of where its principal place of business is located. The court reasoned that "common sense dictates" that "a state plaintiff with multiple federal judicial districts resides in any of those districts." ER 16. But the court's supposed

"common sense" is contrary to the unambiguous text of the statute. As noted, the statute provides that venue is proper "*only* in *the* judicial district in which [the State] maintains its *principal* place of business." 28 U.S.C. § 1391(c)(2) (emphasis added). That is the Eastern District of California. The district court did not acknowledge this statutory provision or explain how its language can be reconciled with the theory that a State can choose any district within its borders.

The district court's reliance on *Alabama v. U.S. Army Corps of Eng'rs*, 382 F. Supp. 2d 1301 (N.D. Ala. 2005), is misplaced. That case relied on the "absence of authority" on the issue to conclude that a State can sue in any judicial district. *Id.* at 1329. But *Alabama* involved an earlier version of the venue statute that provided that a defendant corporation resided "in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced," 28 U.S.C. § 1391(c) (2002), but did not address where a plaintiff such as a State "resides." The current statute now provides the very authority the district court in *Alabama* found lacking, and makes clear that a State resides only in its principal place of business.

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

Section 553 of the APA requires agencies to publish a "[g]eneral notice of proposed rulemaking," and "give interested persons an opportunity to participate in the rule making." 5 U.S.C. § 553(b)-(c). Section 559 of the APA, however, recognizes that Congress may modify that requirement if it does so "expressly." *Id.* § 559. Moreover, § 553 allows an agency to depart from the usual notice-and-comment requirement for "good cause." *Id.* § 553(b). Both of these exceptions apply here.

A. Congress Expressly Authorized the Agencies to Issue the Religious and Moral Exemptions as Interim Final Rules

1. The agencies had statutory authority to issue the interim rules without prior notice and comment under section 2792 of the Public Health Service Act (42 U.S.C. § 300gg-92); section 734 of ERISA (29 U.S.C. § 1191c); and section 9833 of the Internal Revenue Code (26 U.S.C. § 9833). Those statutes expressly permit the Secretaries of these three agencies to promulgate "interim final rules" to carry out the provisions of the statutes that, as is undisputed, govern the scope of the contraceptive-coverage mandate.

The agencies promulgated the contraceptive-coverage mandate, and the interim rules expanding the exemptions from that mandate, pursuant to the ACA's preventive-services provision, 42 U.S.C. § 300gg-13. Congress enacted this provision as an amendment to title XXVII of the Public Health Service Act. *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1001, 124 Stat. 119, 130-32 (2010) (enacting new section 2713). Congress also incorporated this provision into ERISA and the Internal Revenue Code. *See id.* § 1562(e)-(f), 124 Stat. at 270.

Congress placed the preventive-services provision in titles of the Public Health Service Act, ERISA, and the Internal Revenue Code that may be carried out through interim final rules. Section 2792 of the Public Health Service Act authorizes the Secretary of HHS to promulgate "such regulations as may be necessary or appropriate to carry out the provisions of [title XXVII of the Act]," along with "any interim final rules as the Secretary determines are appropriate to carry out [title XXVII]." 42 U.S.C. § 300gg-92. Corresponding provisions in ERISA (section 734) and the Internal Revenue Code (section 9833) likewise authorize the Secretary of Labor and the Secretary of the

Treasury, respectively, to promulgate not only "such regulations as may be necessary or appropriate" but also "any interim final rules as the Secretary determines are appropriate to carry out [part 7 of subtitle B of title I of ERISA (requirements for group health plans) and chapter 100 of subtitle K of the Internal Revenue Code (requirements related to health-insurance coverage)]."[8] Congress placed the ACA's preventive-services provision in title XXVII of the Public Health Service Act, part 7 of subtitle B of title I of ERISA, and chapter 100 of subtitle K of the Internal Revenue Code.

Since the 1996 enactment of these provisions, which are rare in the U.S. Code, the Secretaries of each administration have relied on them as authority to issue interim final rules in a wide variety of contexts related to group health plans.[9] Indeed, the agencies expressly

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[8] These provisions were enacted as part of the Health Insurance Portability and Accountability Act of 1996 (HIPAA). *See* Pub. L. No. 104-191, §§ 101(a) (ERISA); 102(a) (Public Health Service Act); 401(a) (Internal Revenue Code), 110 Stat. 1936, 1939-51, 1955-76, 2073-82.

[9] *See, e.g.*, 62 Fed. Reg. 66,932 (Dec. 22, 1997) (mental-health parity); 62 Fed. Reg. 16,979 (Apr. 8, 1997) (ERISA disclosure requirements for group health plans); 62 Fed. Reg. 16,985 (Apr. 8, 1997) (implementing HIPAA); 63 Fed. Reg. 57,546 (Oct. 27, 1998) (implementing Newborns' and Mothers' Health Protection Act); 65 Fed. Reg. 7152 (Feb. 11, 2000) (multiple employer welfare arrangements);

Continued on next page.

relied on this statutory authority to issue interim final rules relating to the contraceptive-coverage mandate in 2010, 2011, and 2014. *See* 75 Fed. Reg. 41,726, 41,729-30 (July 19, 2010); 76 Fed. Reg. 46,621, 46,624 (Aug. 3, 2011); 79 Fed. Reg. 51,092, 51,095 (Aug. 27, 2014).

These provisions granted the agencies the discretion to depart from normal notice-and-comment requirements in promulgating the rules at issue here. While 5 U.S.C. § 559 states that Congress must act "expressly" to authorize departure from the APA's notice-and-comment requirement, Congress need not "employ magical passwords," *Marcello v. Bonds*, 349 U.S. 302, 310 (1955). "[T]he import of the § 559 instruction is that Congress's intent to make a substantive change be clear." *Asiana Airlines v. FAA*, 134 F.3d 393, 397 (D.C. Cir. 1998) (emphasis and quotation marks omitted). Congressional intent to dispense with notice and comment thus can be gleaned from "the text, context, and relevant historical treatment of the provision at issue." *Musacchio v. United States*, 136 S. Ct. 709, 717 (2016) (quotation marks omitted).

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66 Fed. Reg. 1378 (Jan. 8, 2001) (nondiscrimination in health coverage in group market); 74 Fed. Reg. 51,664 (Oct. 7, 2009) (prohibiting discrimination based on genetic information).

The statutes' reference to "interim final rules" clearly manifests Congress's intent to confer discretion on the agencies to depart from the APA's notice-and-comment requirement. *See Asiana Airlines*, 134 F.3d at 398 (statutory authorization to issue "not a proposed rule, but an 'interim final rule,'" supported finding of express congressional intent to allow departure from the APA's notice-and-comment requirement). Indeed, if the phrase "*interim* final rules" does not waive the APA's notice-and-comment requirement, it would be superfluous, especially since the statutes separately authorize the agencies to promulgate final regulations.

Other language in these three statutes confirms Congress's intent to allow the agencies to choose whether to issue these rules without prior notice and comment. Each statute authorizes the respective Secretary to "promulgate *any* interim final rules *as the Secretary determines are appropriate to carry out [specified provisions]*." This broad language confirms Congress's clear intent to delegate to the agencies the decision whether and when to issue these interim final rules. *Cf. Webster v. Doe*, 486 U.S. 592, 600 (1988) (holding that statute authorizing CIA to terminate employees "whenever the Director 'shall

deem such termination necessary or advisable in the interests of the United States'" "fairly exudes deference to the Director" and "foreclose[s] the application of any meaningful judicial standard of review").

At a minimum, even if the Secretaries do not have unfettered discretion to choose when to issue interim final rules, these statutes should be read to relax the APA's standard for departing from normal notice-and-comment requirements. Under that reading, the district court should have reviewed the validity of the Secretaries' determination of "appropriate[ness]," not of "good cause." And while neither determination was "arbitrary and capricious" under the APA, 5 U.S.C. § 706, that is especially clear if the standard is merely "appropriate" rather than "good cause." *See infra* section III.B.

2. In holding to the contrary, the district court reasoned that the statutory language was insufficiently clear to indicate congressional intent to dispense with notice and comment absent good cause. But that reasoning is contrary to the plain statutory text, which expressly authorizes the agencies to issue interim final rules that their Secretaries "determine[ ] are appropriate," *not* only those that a court

finds are supported by "good cause." The court's reasoning also runs afoul of the "cardinal principle of interpretation requir[ing] [a court] to construe a statute so that no provision is rendered inoperative or superfluous, void, or insignificant." *Asiana Airlines*, 134 F.3d at 398 (quotation marks omitted). Under the district court's reasoning, the express authorization to issue "interim final rules" serves no function because the APA already provides authority for agencies to issue interim final rules when there is "good cause." 5 U.S.C. § 553(b). If statutes specifically authorizing interim final rules require good cause, then this authorization does nothing. Indeed, at no point did the court or the States offer any response to this objection.

The cases on which the district court relied do not support its decision. For instance, the court noted (ER 19-20) that the statute at issue in *Castillo-Villagra v. INS*, 972 F.2d 1017, 1025 (9th Cir. 1992), which this Court construed as expressly authorizing the issuance of an interim final rule, provided that a particular procedural framework was "the sole and exclusive procedure for determining the deportability of an alien under this section." But *Castillo-Villagra* did not hold that a statutory exclusivity provision is necessary to demonstrate Congress's

intent to displace the APA's requirements concerning notice-and-comment rulemaking.

Lake Carriers' Ass'n v. EPA, 652 F.3d 1 (D.C. Cir. 2011), is equally inapposite. There, the D.C. Circuit expressed "doubt" that a provision requiring *States* to engage in notice-and-comment rulemaking was sufficiently clear to dispense with *federal* notice-and-comment requirements. *Id.* at 6. The federal statutes at issue here require no such negative inference; they expressly authorize the Secretaries to issue "interim final rules," plainly obviating any obligation to provide prior notice and comment.

B. Alternatively, the Agencies Had Good Cause to Issue the Rules as Interim Final Rules

1. Even if the statutes administered by the agencies did not authorize them to depart from the APA's notice-and-comment requirements for rulemaking, the agencies had "good cause" to do so under the APA itself. An agency may issue interim final rules without notice and comment when the agency for good cause finds that prior notice-and-comment procedures "are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b).

Section 553(b)'s good-cause inquiry "proceeds case-by-case, sensitive to the totality of the factors at play." *Natural Res. Def. Council, Inc. v. Evans*, 316 F.3d 904, 911 (9th Cir. 2003). Good cause exists, among other circumstances, when waiting for prior notice and comment "would interfere with the agency's ability to carry out its mission." *Id.* As this court observed in *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1484 (9th Cir. 1992), the APA "was intended to impose procedural requirements on the adoption of rules; it is not a device by which an agency may be forced to adopt a less effective regulatory program in order to more effectively comply with notice and comment procedures."

a. The interim rules fall well within these boundaries. As the preamble to the religious exemption explains, notice and comment was both "impracticable" and "contrary to the public interest" because the status quo was untenable. The agencies had "been subject to temporary injunctions protecting many religious nonprofit organizations from being subject to the accommodation process against their wishes, while many other organizations [we]re fully exempt [or] ha[d] permanent court orders blocking the contraceptive coverage requirement." 82 Fed.

Reg. at 47,814. But still "[o]ther objecting entities," including some not-for-profit entities that sued the agencies, did not have "the protection of court injunctions." *Id.*[10]

To add to the uncertainty, the courts of appeals were divided on whether the accommodation imposed a substantial burden on organizations with religious objections. *See* 82 Fed. Reg. at 47,798 (citing cases). The Supreme Court granted certiorari in several of those cases and vacated those decisions to see whether the parties could find an approach that would accommodate the plaintiffs' religious objections and ensure that women covered by the plaintiffs' health plans received contraceptive coverage. *See Zubik*, 136 S. Ct. 1557 (2016) (per curiam). But the Court did not decide "whether [the plaintiffs'] religious exercise ha[d] been substantially burdened," or "whether the current regulations [we]re the least restrictive means of serving [a compelling governmental] interest." *Id.* at 1560. Because the Court did not resolve

[10] As the preamble notes, the latter group of organizations includes "many of the closely held for-profit companies that brought the array of lawsuits challenging the [m]andate leading up to the decision in *Hobby Lobby*." 82 Fed. Reg. at 47,814.

the controversy in the circuits regarding whether the accommodation satisfied RFRA, significant uncertainty remained.

In response to the remand in *Zubik*, the agencies issued a request for information, *see* 81 Fed. Reg. 47,741 (Jul. 22, 2016), but despite receiving over 54,000 comments, the agencies were unable to "find a way" to amend the accommodation to satisfy objecting eligible organizations and provide contraceptive coverage for their employees. 82 Fed. Reg. at 47,814.

Under similar circumstances, this Court found good cause for the issuance of an interim final rule in *Service Employees International Union, Local 102 v. County of San Diego*, 60 F.3d 1346 (9th Cir. 1995). There, the fact that "the federal courts were issuing conflicting decisions" on the applicability of the Fair Labor Standards Act, and that "local governments were therefore unable to predict whether they were complying with [the statute]," constituted good cause to issue an interim rule. *Id.* at 1352 n.3 (noting that "[e]very day that the DOL delayed clarifying its regulation was another day that state and local governments might be exposed to unforeseen liability," which is "just the type of emergency situation in which the 'good cause' exception

should apply"). As in *Service Employees*, here, conflicting judicial decisions created significant uncertainty, leaving religious objectors that were not protected by court injunctions unable to predict whether noncompliance with the contraceptive-coverage mandate might subject them to crippling financial penalties.

The agencies' good cause to issue these rules without notice and comment also is supported by the reasons identified in *Priests for Life v. HHS*, 772 F.3d 229 (D.C. Cir. 2014), which found good cause for interim final rules amending the accommodation following the Supreme Court's order in *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014). The *Wheaton* order permitted an eligible organization to invoke the accommodation by providing notice directly to HHS, rather than to its insurer or third-party administrator, as the regulations had required. In *Priests for Life*, the court noted that the agencies had "made a good cause finding in the rule it issued"; that the regulations the rule modified "were recently enacted pursuant to notice and comment rulemaking, and presented virtually identical issues"; that the agency "will expose its interim rule to notice and comment before its permanent implementation"; and that the government "reasonably interpreted the

Supreme Court's order in *Wheaton College* as obligating it to take action to further alleviate any burden on the religious liberty of objecting religious organizations." 772 F.3d at 276. Those reasons equally support good cause for these interim final rules. *See* 82 Fed. Reg. at 47,814; 82 Fed. Reg. at 47,855.[11]

Here, the agencies determined, after a fresh consideration of the legal issues, that "in many instances, requiring certain objecting entities or individuals to choose between the [m]andate, the accommodation, or penalties for noncompliance has violated RFRA." 82 Fed. Reg. at 47,814. The agencies concluded that good cause existed to issue the expanded religious exemption as an interim final rule "to cure such violations (whether among litigants or among similarly situated parties that have not litigated), to help settle or resolve cases, and to ensure, moving forward, that [their] regulations are consistent with any approach [they] have taken in resolving certain litigation

[11] In addition, as the preamble notes, the clarity provided in the rules serves the public interest by removing barriers to participation in the insurance market and reducing the costs of health insurance. *See* 82 Fed. Reg. at 47,815. The rules also remove any deterrent to objectors considering organizing entities that would be subject to the mandate, or from offering health insurance in the first place. *See id.* at 47,814 (religious objections); 82 Fed. Reg. at 47,855 (moral objections).

matters." *Id.* The agencies' need to halt what they had determined to be their own ongoing violations of their statutory obligations further underscores the existence of good cause.

b. For similar reasons, the agencies also had good cause to issue the moral exemption as an interim final rule. The agencies also faced conflicting decisions by the federal courts, with one court granting a permanent injunction in favor of a not-for-profit organization with moral objections to the mandate, and another rejecting a similar claim. *See* 82 Fed. Reg. at 47,855. The agencies determined that "[f]or entities and individuals facing a burden on their sincerely held moral convictions, providing them relief from Government regulations that impose such a burden is an important and urgent matter, and delay in doing so injures those entities in ways that cannot be repaired retroactively." *Id.*

2. The district court's determination that the agencies lacked good cause was based on an unduly narrow understanding of the good-cause exception.

First, the court applied the wrong standard in holding that good cause exists only when notice and comment would "prevent an agency

from operating." ER 21 (quoting *Riverbend Farms,* 958 F.2d at 1484 n.2). The statutory language is not so limited; it permits an interim final rule when prior notice and comment is "impracticable, unnecessary, *or* contrary to the public interest." 5 U.S.C. § 553(b) (emphasis added). Indeed, this Court has made clear that the good-cause exception is not limited to situations in which notice and comment would prevent an agency from "execut[ing] its statutory duties," ER 21, but also applies when notice and comment would "force[] [the agency] to adopt a less effective regulatory program in order to more effectively comply with notice and comment procedures," *Riverbend Farms,* 958 F.2d at 1484; *see also Evans*, 316 F.3d at 911 (good cause exists "when compliance would *interfere with* the agency's ability to carry out its mission" (emphasis added)). As discussed, the agencies have met that burden here.

The district court similarly erred in describing the good-cause exception as exclusively an "emergency procedure." ER 22 (quoting *United States v. Valverde*, 628 F.3d 1159, 1165 (9th Cir. 2010)). *Valverde* itself noted that emergencies are "*not* the only situations constituting good cause." 628 F.3d at 1165 (emphasis added) (quotation

marks omitted). In any event, whatever *Valverde* envisioned its brief discussion of emergencies to mean, it must include the contexts that provided good cause in *Service Employees* and *Riverbend Farms*, which support the agencies' invocation of the good-cause exception here. Contrary to the district court's suggestion, ER 22, this is not a case in which the agency did nothing more than "provide immediate guidance and information." In issuing the interim rules, the agencies reduced significant uncertainty caused by conflicting decisions that left both employers and employees unsure of their rights and obligations.

The district court also erred in reasoning that the hundreds and thousands of comments the agencies received regarding these interim rules "weakens the suggestion that engaging in advance notice and comment would have been contrary to the public interest, given the public's evident 'real interest' in this matter." ER 22 n.13 (quoting *Levesque v. Block*, 723 F.2d 175, 185 (1st Cir. 1983)). The agencies did not decide to issue interim final rules because of a supposed lack of public interest. They decided to issue interim rules out of necessity to reduce uncertainty and address conflicting legal authority.

Finally, the district court erred in concluding (ER 23) that HHS's issuance of guidance for implementing the rules before expiration of the comment period undercuts the agencies' finding of good cause. The guidance was intended only to clarify the operation of the interim rules. The guidance does not bind the agencies in any way with respect to the substance of the final rule to come.

In sum, the agencies' determination that they had good cause to issue these interim final rules was not arbitrary and capricious and thus cannot be disturbed.

C. The States Cannot Show Any Prejudice Resulting from the Agencies' Issuance of the Religious and Moral Exemptions as Interim Final Rules

The APA provides that "due account shall be taken of the rule of prejudicial error" when courts review agency action, 5 U.S.C. § 706, and the burden falls on the party asserting error to demonstrate prejudice, *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009). The States cannot meet that burden here, as they have not identified any comments that they would have submitted and that were not submitted in previous rounds of rulemaking. The States, like all interested parties, were afforded multiple opportunities to comment on the scope of the exemption and

accommodation during multiple rounds of rulemaking. *See* 75 Fed. Reg. at 41,726; 76 Fed. Reg. at 46,621; 77 Fed. Reg. 16,501 (Mar. 21, 2012); 78 Fed. Reg. 8456 (Feb. 6, 2013); 79 Fed. Reg. 51,118 (Aug. 27, 2014); 81 Fed. Reg. at 47,741. The agencies received "more than 100,000 public comments," and those comments "included extensive discussion about whether and by what extent to expand the exemption." 82 Fed. Reg. at 47,814.

Notably, the States do not allege any specific comments that they would have submitted on the interim rules. Moreover, the States had an opportunity to comment on the expanded exemptions, and the agencies will consider all submitted comments before issuing final rules.

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

In addition to showing a likelihood of success on the merits, a plaintiff seeking a preliminary injunction must demonstrate "that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Here, the "balance of equities" tips in favor of the

government, and requires reversal of the preliminary injunction. *See, e.g.*, *id.* at 23-24 (public interest and harm to the government required reversal of preliminary injunction, even where plaintiffs showed irreparable harm, and independent of likelihood of success on the merits).[12]

As an initial matter, the States' speculative allegations of economic injury are not even sufficient to establish standing, *see supra* section I, let alone the kind of likely, imminent, and irreparable harm necessary to support a preliminary injunction. As the Supreme Court has made clear, "plaintiffs seeking preliminary relief [must] demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter*, 555 U.S. at 22 (rejecting "possibility of irreparable harm" standard). "[S]peculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction." *Boardman v. Pacific Seafood Grp.*, 822 F.3d 1011, 1022 (9th Cir. 2016) (quotation marks omitted).

[12] The interests of the government and the public merge where (as here) the government is a defendant. *See Nken v. Holder*, 556 U.S. 418, 435 (2009); *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014).

The government, on the other hand, suffers irreparable institutional injury whenever its laws and regulations are set aside by a court. *See Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers). Moreover, the government (and the public) has an interest in protecting religious liberty and conscience. In "returning to the state of affairs before the enactment of the [interim rules]," ER 27, the injunction here requires the agencies to maintain rules that they believe, and that some courts have held, substantially burden the exercise of religion for employers with religious objections to contraceptive coverage. These indisputable institutional injuries to the government and conscience injuries to employers far outweigh the speculative economic injury to the States and their residents that may flow from the inability to conscript employers into paying for employees' contraceptive coverage.

The district court acknowledged that the government's interest in protecting religious liberty and conscience is "unquestionably legitimate" but concluded that it did not outweigh any harm to the States, because the court "believe[d] it likely that the prior framing of

the religious exemption and accommodation permissibly ensured such protection." ER 27. This reasoning suffers two flaws.

First, the question whether there are harms to the public for purposes of the balance of equities is not the same as the question whether there are harms cognizable under RFRA. No one disputes that some employers have sincere religious objections to complying with the accommodation. Regardless of whether those objections require (or at least permit) the expanded exemption under RFRA, they are entitled to substantial weight in balancing the relevant equities. The Supreme Court confirmed the relevance and weight of those interests when it four times took the extraordinary step of issuing interim injunctions to ensure that objecting organizations would not be required to violate their sincere religious beliefs during the pendency of their challenges to the accommodation. *See Zubik v. Burwell*, 135 S. Ct. 2924 (2015); *Wheaton*, 134 S. Ct. at 2807; *Little Sisters of the Poor Home for the Aged v. Sebelius*, 134 S. Ct. 1022 (2014); *see also Zubik*, 136 S. Ct. at 1560-61. And the Court did so even though it emphasized that its orders "should not be construed as an expression of the Court's views on the merits"—

that is, even though the Court expressed no view on whether the accommodation actually violated RFRA. *Wheaton*, 134 S. Ct. at 2807.

Second, courts at the preliminary-injunction stage should not presume that a plaintiff will ultimately prevail on all its merits arguments. Although the district court found that the States have a likelihood of success on their procedural claim, it did not find that they were likely to prevail on their substantive challenge. The agencies may ultimately prevail on the question whether the accommodation imposes a substantial burden on the religious exercise of objecting employers, and the district court should have acknowledged that possibility in considering the harms from the injunction to employers with religious objections to contraceptive coverage.[13]

[13] The district court also reasoned that the public interest is served when administrative agencies comply with their obligations under the APA, *see* ER 27, but as explained, *supra* section III, the agencies had statutory authority (and good cause) to issue these rules as interim final rules.

V. The "Nationwide" Injunction Exceeds the District Court's Equitable Power to Redress Plaintiffs' Injuries

A plaintiff must "demonstrate standing . . . for each form of relief that is sought." *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017). "[T]he remedy" sought therefore must "be limited to the inadequacy that produced the injury in fact that the plaintiff has established." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 (2006) (quoting *Lewis v. Casey*, 518 U.S. 343, 357 (1996)). As this Court has recognized, "our legal system does not automatically grant individual plaintiffs standing to act on behalf of all citizens similarly situated." *Zepeda v. INS*, 753 F.2d 719, 730 n.1 (9th Cir. 1983).

Equitable principles independently require that injunctions "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (quotation marks omitted); *accord Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011); *Meinhold v. U.S. Dep't of Def.*, 34 F.3d 1469, 1480 (9th Cir. 1994). The Supreme Court "ha[s] long held that 'the jurisdiction'" conferred by the Judiciary Act of 1789 "over 'all suits . . . in equity'" is "an authority to administer in equity suits the principles of the system of judicial

remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries." *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999) (brackets and quotation marks omitted). Global injunctions that go beyond redressing any harm to named plaintiffs and regulate a defendant's conduct with respect to nonparties did not exist at equity. They are a modern creation, with no direct antecedent in English practice—or apparently in the United States until the mid-twentieth century. *See* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 424-45 (2017).

The decision below contravenes these principles. The district court enjoined enforcement of the interim rules nationwide on the theory that the agencies "did not violate the APA just as to Plaintiffs: *no* member of the public was permitted to participate in the rulemaking process via advance notice and comment." ER 28. But that reasoning conflates the scope of the States' legal theory (*i.e.*, that the denial of public notice and comment renders the rules invalid on their face) with the scope of relief they personally may obtain (*i.e.*, an injunction limited to redressing

their own injuries). The alleged procedural injury to the public, without more, is insufficient even to establish Article III standing as to the nonparty members of the public. *See supra* section I.B. More fundamentally, redressing any injuries to the nonparty public is unnecessary and thus improper to redress the alleged injuries to the plaintiff States themselves, which would be fully redressed by an injunction limited (at the very least) to employers in those States. *Zepeda*, 753 F.2d at 729-30 n.1; *Meinhold*, 34 F.3d at 1480.

The district court further reasoned that a nationwide injunction was "consistent with the general practice of invalidating rules not promulgated in compliance with the APA and reinstating the 'rule previously in force.'" ER 28. This argument is incorrect even as to permanent relief under the APA, *see, e.g.*, *Los Angeles Haven Hospice*, 638 F.3d at 664, but it is especially flawed as to *preliminary* injunctive relief. The APA expressly provides that "to the extent necessary to prevent irreparable injury," a court "may issue all necessary and appropriate process . . . to preserve status or rights pending conclusion of the review proceedings." 5 U.S.C. § 705. In allowing preliminary injunctions only "to the extent necessary to prevent irreparable injury,"

id., the APA thus codifies the principle that preliminary injunctions are not designed to "enjoin all possible breaches of the law," but rather to "remedy the specific harms" allegedly suffered by plaintiffs themselves, *Zepeda*, 753 F.2d at 728 n.1 (quotation marks omitted); *Bresgal v. Brock*, 843 F.2d 1163, 1169 (9th Cir. 1987) (recognizing this "rule" for "preliminary injunction[s]" in the APA context). Even assuming that permanent relief could go beyond plaintiffs, preliminary relief should be limited to plaintiffs properly before the court, given the tentative nature of the ruling. *See Bresgal*, 843 F.2d at 1169.

The district court's nationwide injunction also disserves the deliberative development of the law. An order by a single district court enjoining a federal rule everywhere renders judicial review in all other districts meaningless absent appellate reversal, thereby threatening to bring all other cases to a halt and depriving other courts of differing perspectives on important questions. *See United States v. Mendoza*, 464 U.S. 154, 160, 162 (1984) (rejecting application of nonmutual issue preclusion against the government for similar reasons); *United States v. AMC Entm't, Inc.*, 549 F.3d 760, 770-71 (9th Cir. 2008) (reversing nationwide injunction as abuse of discretion and noting that court

"must be mindful" of other circuits); *Railway Labor Execs.' Ass'n v. ICC*, 784 F.2d 959, 964 (9th Cir. 1986) ("It is standard practice for an agency to litigate the same issue in more than one circuit and to seek to enforce the agency's interpretation selectively on persons subject to the agency's jurisdiction in those circuits where its interpretation has not been judicially repudiated."). Indeed, that is what happened here in at least one case. *See* Order, *Washington v. Trump*, No. 2:17-cv-1510 (W.D. Wash. Jan. 19, 2018) (staying litigation in light of nationwide injunction in this case).

Permitting global injunctions also undercuts the class-action process. It enables all potential claimants to benefit from global injunctive relief if any plaintiff prevails in a single district court, without satisfying the prerequisites of Federal Rule of Civil Procedure 23, but without affording the government the corresponding benefit of a definitive resolution of the underlying legal issue as to all potential claimants if it prevails instead. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974); *Meinhold*, 34 F.3d at 1480 (reversing nationwide injunction because challenge to military policy was "not a class action" and "[e]ffective relief [could] be obtained by directing the [military] not

to apply its regulation to [the individual plaintiff]"). Indeed, another district court rejected Massachusetts's challenge to the rules for lack of standing, *see Massachusetts v. HHS*, No. 17-cv-11930, ___ F. Supp. 3d ___, 2018 WL 1257762 (D. Mass. Mar. 12, 2018), yet the nationwide injunction here grants Massachusetts the relief that the district court in Massachusetts refused to provide. This Court should reject that misguided practice and, at a minimum, tailor the injunction to redress only the States' cognizable, irreparable harms.

CONCLUSION

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

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STATEMENT OF RELATED CASES

This case has been consolidated with Case Nos. 18-15144 and 18-15166. The government certifies that it knows of no other related cases pending in this Court.

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Century Schoolbook, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,805 words, excluding the parts of the brief exempted under Rule 32(f), according to the count of Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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