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August 16, 2018

Molly C. Dwyer
Clerk of the Court
U.S. Court of Appeals for the Ninth Circuit
95 7th Street
San Francisco, CA 94103

Re: *State of California, et al. v. Azar, et al.*
U.S. Court of Appeals for the Ninth Circuit, Case Nos. 18-15144, 18-15166, 18-15255
Oral Argument: October 19, 2018 (San Francisco)
Fed. R. App. P. 28(j)

Dear Madam Clerk:

In *City and County of San Francisco v. Trump*, this Court rejected the Administration's request for "a blanket restriction on all nationwide injunctions" and acknowledged it has "upheld nationwide injunctions when 'necessary to give Plaintiffs a full expression of their rights.'" No. 17-17478 (Aug. 1, 2018), Slip Op. 34-35. This Court explained "'an injunction is not necessarily made overbroad by extending benefit or protection to persons other than prevailing parties in the lawsuit.'" *Id.* at 34. Because plaintiffs in that case tendered evidence only specific to them and California, this Court vacated the nationwide injunction and remanded for a determination on whether a nationwide injunction was justified. *Id.* at 35.

This decision does not call into question the propriety of the district court's nationwide injunction here. First, the nationwide breadth is necessary to give the States a full expression of their rights under the Administrative Procedure Act (APA). Where a federal agency fails to abide by the APA—here, the notice and comment requirement—"the ordinary result is that the rules are vacated—not that their application to the petitioners is proscribed." *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998); *Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687, 699 (9th Cir. 2007), *rev'd in part on other grounds* (nationwide injunction "compelled by" the APA's text). Notice and comment ensures transparency, accountability, and informed agency decisionmaking and cannot be remedied with piecemeal injunctive relief. The district court concluded that defendants violated the APA because "no member of the public was permitted to participate in the rulemaking process via advance notice and comment." ER 28; *Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005). Second, the record in this case establishes that defendants' interim final rules threaten widespread irreparable harm and, absent nationwide relief, the impact of the rules cannot be reversed at the end of the

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lawsuit. *See, e.g.*, Answering Br. 58 (explaining that the consequences of unintended pregnancies cannot be undone). For these reasons and those outlined in the States' brief, this Court should affirm the district court's injunction.

Sincerely,

s/ Karli Eisenberg

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CERTIFICATE OF SERVICE

I certify that on August 16, 2018, I electronically filed the foregoing document with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all other participants in this case are registered CM/ECF users and that services will be accomplished by the appellate EM/EC system.

Date: August 16, 2018

s/Karli Eisenberg

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