

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

8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA

10 **THE STATE OF CALIFORNIA, THE STATE**
11 **OF CONNECTICUT; THE STATE OF**
12 **DELAWARE; THE DISTRICT OF**
13 **COLUMBIA; THE STATE OF HAWAII;**
14 **THE STATE OF ILLINOIS; THE STATE OF**
15 **MARYLAND; THE STATE OF**
16 **MINNESOTA, BY AND THROUGH ITS**
17 **DEPARTMENT OF HUMAN SERVICES; THE**
18 **STATE OF NEW YORK; THE STATE OF**
19 **NORTH CAROLINA; THE STATE OF**
20 **OREGON; THE STATE OF RHODE**
21 **ISLAND; THE STATE OF VERMONT; THE**
22 **COMMONWEALTH OF VIRGINIA; THE**
23 **STATE OF WASHINGTON,**

Plaintiffs,

v.

19 **ALEX M. AZAR, IN HIS OFFICIAL CAPACITY**
20 **AS SECRETARY OF THE U.S. DEPARTMENT OF**
21 **HEALTH & HUMAN SERVICES; U.S.**
22 **DEPARTMENT OF HEALTH HUMAN**
23 **SERVICES; R. ALEXANDER ACOSTA, IN**
24 **HIS OFFICIAL CAPACITY AS SECRETARY OF THE**
25 **U.S. DEPARTMENT OF LABOR; STEVEN**
26 **MNUCHIN, IN HIS OFFICIAL CAPACITY AS**
27 **SECRETARY OF THE U.S. DEPARTMENT OF**
28 **THE TREASURY; U.S. DEPARTMENT OF**
THE TREASURY; DOES 1-100,

Defendants,

and,

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

4:17-cv-05783-HSG

STATES' BRIEF REGARDING EVIDENCE

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

	Page
INTRODUCTION	1
ARGUMENT	1
I. There Are Several Instances in Which Extra-Record Evidence Is Admissible	1
A. The States May Need to Submit Extra-Record Evidence to Demonstrate Standing	2
B. The States May Need to Submit Extra-Record Evidence to Support their Constitutional Claims	3
C. The States May Need to Submit Extra-Record Evidence to Support the Relief Requested	3
D. The States May Need to Submit Extra-Record Evidence, Including Legislative History, to Demonstrate the Intent of Congress	4
II. The Court Should Not Make Blanket Evidentiary Rulings Without a Proper Objection from Defendants	5
A. Defendants May Raise Evidentiary Objections as Part of the Forthcoming Cross Motions.....	5
CONCLUSION	6

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

CASES

Asarco v. EPA
616 F.2d 1153 (9th Cir. 1980).....1

Association of Pacific Fisheries v. EPA
615 F.2d 794 811 (9th Cir. 1980).....2

Bunker Hill Co. v. EPA
572 F.2d 1286 (9th Cir. 1977).....2

Burwell v. Hobby Lobby Stores, Inc.
134 S. Ct. 2751 (2014)5

California v. Azar
-- F.Supp.3d -- (N.D. Cal. Jan. 13, 2019).....4

California v. Azar
911 F.3d 558 (9th Cir. 2018).....2, 3, 4

Center for Biological Diversity v. U.S. Fish & Wildlife Service
2016 WL 1394355 (N.D. Cal. 2016).....5

Flast v. Cohen
392 U.S. 83, 96 n. 14 (1968).....6

Grill v. Quinn
No. CIV S-10-0757 GEB, 2012 WL 174873 (E.D. Cal. Jan. 20, 2012).....3

INS v. Cardoza-Fonseca
480 U.S. 421 (1987).....5

Jones v. Rose
No. 00-CV-1795-BR, 2008 WL 552666 (D. Or. Feb. 28, 2008).....3

Maldonado v. Lynch
786 F.3d 1155 (9th Cir. 2015) (Gould, C.J., dissenting)6

New York v. Department of Commerce
-- F.Supp.3d -- (Jan. 15, 2019).....2

Porter v. Califano
592 F.2d 770, 781 (5th Cir. 1979).....3

San Luis & Delta-Mendota Water Authority v. Locke
776 F.3d 971 (9th Cir. 2014).....1

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

(continued)

Page

Sierra Club v. EPA
292 F.3d 895 (D.C. Cir. 2002)2

Webster v. Doe
486 U.S. 592 (1988).....3

Wilson v. CIR
705 F.3d 980 (9th Cir. 2013).....1

COURT RULES

Federal Rules of Civil Procedure
Rule 566
Rule 56(c)(2)6

Federal Rules of Evidence
Rule 2015

Northern District of California Civil Local Rules
L.R. 7-3(a).....6

OTHER AUTHORITIES

158 Cong. Rec. S539 (Feb. 9, 2012)4

159 Cong. Rec. S2268 (Mar. 22, 2013)5

INTRODUCTION

1
2 The Court ordered the parties to submit simultaneous briefs “addressing their positions on
3 whether this proceeding is limited to an assessment of the administrative record.” ECF No. 270.
4 As set forth below, this proceeding is not limited to the administrative record.

5 The Court has ordered a merits briefing schedule, with plaintiffs’ merits brief due on April
6 30, 2019. The schedule does not allow for discovery and the States have no plans to engage in
7 discovery. The States may, however, offer evidence outside the administrative record to
8 demonstrate standing, to support their Constitutional claims, to support the relief requested, or to
9 demonstrate legislative intent. There are several permissible uses for extra-record evidence in
10 cases that include claims under the Administrative Procedure Act. The Ninth Circuit has
11 expressly held that extra-record evidence can be necessary to determine whether the agency has
12 considered all relevant factors and has sufficiently explained its decision. And in this case, the
13 Ninth Circuit explained that extra-record evidence is permissible for purposes of demonstrating
14 standing and determining the scope of the injunctive relief. Given this authority, the States
15 should not be preemptively precluded from submitting documentary evidence to support their
16 claims. Rather, defendants should properly object to specific evidence when and if that evidence
17 is submitted by the States. To date, defendants have not objected to any evidence submitted by
18 the States.

ARGUMENT

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

19
20
21
22 The Ninth Circuit has recognized that a court may consider extra-record evidence in
23 litigation where plaintiffs bring claims under the Administrative Procedure Act. *See San Luis &*
24 *Delta-Mendota Water Authority v. Locke*, 776 F.3d 971, 992 (9th Cir. 2014) (outlining four
25 instances in which a court may consider extra-record evidence); *Asarco v. EPA*, 616 F.2d 1153,
26 1160 (9th Cir. 1980) (finding that it “will often be impossible . . . for the court to determine
27 whether the agency took into consideration all relevant factors unless it looks outside the record
28 to determine what matters the agency should have considered but did not”); *Wilson v. CIR*, 705

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17 CONCLUSION

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

23 ///

24 ///

25 ///

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

1 Dated: February 12, 2019

Respectfully submitted,

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

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

11 WILLIAM TONG
12 Attorney General of Connecticut
13 MAURA MURPHY OSBORNE
14 Assistant Attorney General
15 *Attorneys for Plaintiff the State of Connecticut*

16 KATHLEEN JENNINGS
17 Attorney General of Delaware
18 ILONA KIRSHON
19 Deputy State Solicitor
20 JESSICA M. WILLEY
21 DAVID J. LYONS
22 Deputy Attorneys General
23 *Attorneys for Plaintiff the State of Delaware*

24 KARL A. RACINE
25 Attorney General of the District of Columbia
26 ROBYN R. BENDER
27 Deputy Attorney General
28 VALERIE M. NANNERY
Assistant Attorney General
Attorneys for Plaintiff the District of Columbia

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

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

BRIAN E. FROSH
Attorney General of Maryland
CAROLYN A. QUATTROCKI
Deputy Attorney General
STEVE M. SULLIVAN
Solicitor General
KIMBERLY S. CAMMARATA
Director, Health Education and Advocacy
Attorneys for Plaintiff the State of Maryland

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

LETITIA JAMES
Attorney General of New York
LISA LANDAU
Bureau Chief, Health Care Bureau
SARA HAVIVA MARK
Special Counsel
ELIZABETH CHESLER
Assistant Attorney General
Attorneys for Plaintiff the State of New York

JOSHUA H. STEIN
Attorney General of North Carolina
SRIPRIYA NARASIMHAN
Deputy General Counsel
*Attorneys for Plaintiff the State of North
Carolina*

ELLEN F. ROSENBLUM
Attorney General of Oregon
J. NICOLE DEFEVER
Senior Assistant Attorney General
Attorneys for Plaintiff the State of Oregon

PETER F. NERONHA
Attorney General of Rhode Island
MICHAEL W. FIELD
Assistant Attorney General
*Attorneys for Plaintiff the State of Rhode
Island*

T.J. DONOVAN
Attorney General of Vermont
ELEANOR SPOTTSWOOD
Assistant Attorney General
Attorneys for Plaintiff the State of Vermont

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

MARK R. HERRING
Attorney General of Virginia
SAMUEL T. TOWELL
Deputy Attorney General
Attorneys for Plaintiff the Commonwealth of Virginia

BOB FERGUSON
Attorney General of Washington
JEFFREY T. SPRUNG
ALICIA O. YOUNG
Assistant Attorneys General
Attorneys for Plaintiff the State of Washington

SA2017109209
33785803.docx

CERTIFICATE OF SERVICE

Case Name: **State of California v. Health
and Human Services, et al.**

No. **4:17-cv-05783-HSG**

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

STATES' BRIEF REGARDING EVIDENCE

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

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

Ashley Harrison

Declarant

/s/ Ashley Harrison

Signature