Nos. 19-431, 19-454

IN THE
Supreme Court of the United States

LITTLE SISTERS OF THE POOR
SAINTS PETER AND PAUL HOME, *Petitioner*,
v.
THE COMMONWEALTH OF PENNSYLVANIA AND
THE STATE OF NEW JERSEY, ET AL., *Respondents*.

DONALD J. TRUMP, PRESIDENT OF
THE UNITED STATES, ET AL., *Petitioners*,
v.
COMMONWEALTH OF PENNSYLVANIA, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR ADMINISTRATIVE LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICI CURIAE[1]

Amici are professors of administrative law and related public law subjects at institutions across the United States. *Amici* have extensive experience studying and teaching the Administrative Procedure Act and doctrines of administrative law, including the doctrines implicated by this case. They share a scholarly interest in the proper application of procedural and substantive limits on federal agency action. With this brief, they seek to bring to the Court's attention settled principles of administrative law that are central to the resolution of this appeal.

Amici submit this brief solely on their own behalf and not as representatives of their universities. *Amici* are listed below, with institutional affiliations provided for purposes of identification only.

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made any monetary contributions intended to fund the preparation or submission of this brief. The parties filed blanket consents to the filing of *amicus* briefs.

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INTRODUCTION AND SUMMARY OF ARGUMENT

The Patient Protection and Affordable Care Act (ACA), 42 U.S.C. 18001 *et seq*., requires certain health plans and health-insurance issuers that offer group or individual health coverage to provide coverage for preventive services, including women's preventive care. See 42 U.S.C. 300gg-13(a). Various religious entities and private parties have objected to this statutory requirement on the ground that it contravenes their sincerely-held religious beliefs, leading to extensive litigation and several rounds of administrative rulemaking.

In October 2017, without undertaking notice-and-comment, the Health Resources and Services Administration (HRSA), a component of the Department of Health and Human Services (HHS), issued two purported "Interim Final Rules": the Religious IFR and the Moral IFR (the 2017 Rules). These rules expanded existing religious exemptions to the ACA's preventative services mandate beyond churches and their auxiliaries to additional not-for-profit, educational, and for-profit entities that have either sincere religious or moral objections to supporting preventative healthcare services. See Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,792 (Oct. 13, 2017); Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,838 (Oct. 13, 2017).

Various legal challenges ensued, and the 2017 Rules were enjoined by the district court below, see Pet.App. 101a–03a, and separately by the District Court for the Northern District of California, see *California v. HHS*, 281 F. Supp. 3d 806 (N.D. Cal. 2017). Rather than withdraw the 2017 Rules, however, the agencies replaced these rules with virtually identical "Final Rules" in 2018 following a period of notice-and-comment. See 83 Fed. Reg. 57,536; 83 Fed. Reg. 57,592 (Nov. 15, 2018) (the 2018 Rules).

In this case, neither the 2017 Rules nor the 2018 Rules were promulgated in a manner consistent with the Administrative Procedure Act (APA). The APA's notice-and-comment rulemaking requirements operate as the presumptive minimum for an administrative agency tasked by Congress with administering particular regulatory programs. The APA's notice-and-comment requirement facilitates participatory government and rational decisionmaking. While notice-and-comment rulemaking is subject to a "good cause" exception, 5 U.S.C. 553(b)(B), the circumstances here do not qualify. Good cause cannot be shown based merely on the agencies' desire to resolve regulatory uncertainty caused by litigation in lower federal courts, nor did the agencies point to the type of imminent harm needed to satisfy the good cause standard. A policy disagreement with a prior administration, perfectly natural in administrative law, is likewise insufficient to warrant skipping notice and comment.

The other statutory provisions cited by the Government do not support the agencies' claim to

authority to dispense with accepted notice-and-comment procedures in promulgating the 2017 Rules. A subsequent statute can displace the APA's rulemaking requirements only "to the extent that it does so expressly," 5 U.S.C. 559, and here the agencies point only to generic grants of discretionary authority—not to statutory provisions that expressly displace the APA.

Because the agencies did not have good cause or statutory authorization to deviate from the APA's standard notice, then comment, then rule procedure, the 2017 Rules were procedurally invalid. And the 2018 Rules are similarly invalid under 5 U.S.C. 553(c), because the agencies did not provide a meaningful opportunity for the public "to *participate* in the rule making." Rather than seeking public comment on whether the agencies should expand religious exemptions and accommodations in the first place, the agencies sought public comment on whether the expanded exemptions and accommodations should be continued. And the agencies, in simply re-packaging and re-promulgating an essentially identical rule after accepting post-promulgation comments to the 2017 Rules, did not keep an open mind when considering those comments. Because the post-promulgation comment period fell far short of the "participat[ion]" envisioned by the APA, the 2018 Rules were promulgated in violation of section 553(c) and were properly vacated by the Third Circuit below.

ARGUMENT

I. The 2017 Rules Were Procedurally Invalid.

The government maintains that the 2017 Rules "were procedurally valid because they were expressly authorized by statute and supported by good cause." *Brief for Petitioners Donald J. Trump et al.* at 13, No. 19-454 (March 2, 2020) (hereinafter "Gov't Br"). Neither assertion is correct.

The APA requires federal agencies to publish a "[g]eneral notice of proposed rule making" in the Federal Register and, after such notice, to "give interested persons an opportunity to participate in the rule making" through submission of comments, views, or arguments. 5 U.S.C. 553(b), (c). Section 553 reflects Congress's commitment to "public participation and fairness to affected parties." *Dia Nav. Co.* v. *Pomeroy*, 34 F.3d 1255, 1265 (3d Cir. 1994) (quoting *Batterton* v. *Marshall*, 648 F.2d 694, 705 (D.C. Cir. 1980)).

The APA's notice-and-comment procedure plays a vital role both in providing for participatory government and in ensuring rational decisionmaking. The notice-and-comment requirements "ensure fairness to affected parties" by giving them "an opportunity to develop evidence in the record to support their objections to the rule," and further improve governmental decisionmaking by "ensur[ing] that agency regulations are tested via exposure to diverse public comment" and by "enhanc[ing] the quality of judicial review." *Prometheus Radio Project* v. *FCC*, 652 F.3d 431, 449

(3d Cir. 2011) (quoting *Int'l Union, United Mine Workers of Am.* v. *Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005)). By adopting notice-and-comment requirements in the APA, Congress deliberately struck a compromise between expediency on one hand and participation, thorough consideration, and the rule of law on the other. See *Am. Bus. Ass'n* v. *United States*, 627 F.2d 525, 528 (D.C. Cir. 1980) (explaining that the notice-and-comment procedure "was one of Congress's most effective and enduring solutions to the central dilemma it encountered in writing the APA[:] reconciling the agencies' need to perform effectively with the necessity that 'the law must provide that the governors shall be governed and the regulators shall be regulated'" (quoting S. Doc. No. 248, 79th Cong., 2d Sess. 244 (1946))).

Central to this compromise are due process considerations for entities whose conduct may be circumscribed by particular regulations under consideration by the agency; for that reason, the APA requires that "an agency shall afford interested persons general notice of proposed rulemaking and an opportunity to comment before a substantive rule is promulgated." *Chrysler Corp.* v. *Brown*, 441 U.S. 281 (1979); see also *Citizens to Pres. Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1977) (noting that a "court must consider whether the [agency's] decision was based on a consideration of the relevant factors").

The notice-and-comment procedures are mandatory, subject to only a few limited exceptions for statements of general policy; procedural, organizational, and interpretive rules; or when "the

agency for good cause finds * * * that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. 553(b)(B). However, "judicial review of a rule promulgated under an exception to the APA's notice-and-comment requirement must be guided by Congress's expectation that such exceptions will be narrowly construed." *N.J. Dep't of Envtl. Prot.* v. *EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980); see also *Mid Continent Nail Corp.* v. *United States*, 846 F.3d 1364, 1380 & n.12 (Fed. Cir. 2017) ("[E]xceptions to notice-and-comment rulemaking under the APA are narrowly construed and only reluctantly countenanced." (internal quotation marks omitted) (citing cases from twelve circuit courts of appeals)).

Under the APA, an agency may also issue substantive rules without prior notice and comment if Congress has "expressly" authorized it to do so. 5 U.S.C. 559. Though Congress need not use magic words to modify the APA's requirements, "[e]xemptions from the terms of the [APA] are not lightly to be presumed." *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." *Ass'n of Data Processing Serv. Orgs., Inc.* v. *Bd. of Governors*, 745 F. 2d 677, 686 (D.C. Cir. 1984) (Scalia, J.).

A. The agencies did not have good cause to forego notice and comment.

Petitioners invoke the "good cause" exception to notice and comment under 5 U.S.C. 553(b), arguing that "the uncertainty created by conflicting lower-

court decisions and ongoing litigation—as well as the need to protect employers with sincere religious and moral objections from potentially devastating penalties—made a lengthy notice-and-comment period 'impracticable' and 'contrary to the public interest.'" Gov't Br. 42 (citing 82 Fed. Reg. at 47,813, 47,815). These two proffered justifications—efficiency, and a belief that the previous administration's balancing of the competing interests of patients in need of medical treatment and religious objectors was misaligned—plainly do not constitute "good cause" for jettisoning the APA's default procedural requirements. Cf. *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("An agency may not * * * depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.")

That the current administration disagrees with its predecessor over certain matters of policy is not a matter of serious debate, nor is it a matter of debate that agency rulemaking may be subject to legal challenge and may result in competing views in the lower courts as the litigation runs its course. As the Third Circuit has noted, if "good cause" could be invoked any time these conditions were present and any time an agency sought to eliminate legal uncertainty about the scope of particular rules, it "would have the effect of writing the notice and comment requirements out of the statute." *United States* v. *Reynolds*, 710 F.3d 498, 510 (3d Cir. 2013).

In determining whether an agency has properly invoked the APA's good cause exception, the courts of appeals are largely in accord that "the exception is to be narrowly construed." *Mobay Chem. Corp.* v.

Gorsuch, 682 F.2d 419, 426 (3d. Cir. 1982); see also *Mid Continent Nail Corp.* v. *United States*, 846 F.3d 1364, 1380 & n.12 (Fed. Cir. 2017) ("E]xceptions to notice-and-comment rulemaking under the APA are narrowly construed and only reluctantly countenanced."). While legal uncertainty "does count to some extent," it "alone may not * * * establish[] the good cause exception." *United States* v. *Dean*, 604 F.3d 1275, 1280 (11th Cir. 2010). Instead, the agency must demonstrate that promulgating a rule without notice and comment is necessary to avoid "harm caused by delay [that] is unique in a way that warrants dispensing with notice and comment." *Reynolds*, 710 F.3d at 514.

Invocation of the good cause exception is generally appropriate where imminent harm or a genuine emergency might result from the agency's failure to act. See *United States* v. *Gould*, 568 F.3d 459, 470 (4th Cir. 2009) (concluding that agency had good cause where delay "could reasonably be found to put the public safety at greater risk," in addition to "need for legal certainty"); *United States* v. *Valverde*, 628 F.3d 1159, 1161 (9th Cir. 2010) (explaining that agencies must demonstrate that dispensing with notice and comment is necessary to avoid a "real harm," not a merely speculative one); cf. *United States* v. *Johnson*, 632 F.3d 912, 929 (5th Cir. 2011) ("[D]esire to provide immediate guidance, without more, does not suffice for good cause." (quoting *United States* v. *Cain*, 583 F.3d 408, 421 (6th Cir. 2009))).

Here, Petitioners argue that good cause was present because "[t]he agencies * * * sought to protect the liberty of employers threatened with

devastating civil penalties for following their religious and moral precepts. Those interests provide good cause." Gov't Br. 42. This assertion amounts to nothing more than a belief that a previous administration reached an incorrect conclusion on a matter of policy, a belief that could conceivably apply to every rule in the Federal Register after a change in administration; accordingly, such a policy disagreement alone cannot be a valid justification for departing from the plain text of the APA. See *Envtl. Defense Fund* v. *EPA*, 716 F.2d 915, 917, 920–21 (D.C. Cir. 1983) (finding it "not at all reasonable for [the agency] to rely on the good cause exception" simply because of "an alleged pressing need to avoid industry compliance with regulations that were to be eliminated."). Especially when the agency has "long been committed to a position, it should be particularly sure that it has all available information before adopting another, in a setting where nothing stands in the way of a rule-making proceeding except the [agency's] congenital disinclination to follow" the APA's rulemaking requirements. *Bell Aerospace Co. Div. of Textron Inc.* v. *NLRB*, 475 F.2d 485, 497 (2d Cir. 1973) (Friendly, J.), *rev'd in part on other grounds*, 416 U.S. 267 (1974).

The APA already provides a vehicle for enacting regulatory changes when the agency believes them warranted—and one that balances the need for efficiency with the need for careful, rational decisionmaking. The procedure is simple: give the public notice, allow a meaningful opportunity to comment, and then promulgate a rule. The compromises that led to the enactment of the APA

demand compliance with those procedures, as noted by Justice Jackson:

> The [APA] * * * represents a long period of study and strife; it settles long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest * * * * [I]t would be a disservice to our form of government and to the administrative process itself if the courts should fail, so far as the terms of the Act warrant, to give effect to its remedial purposes where the evils it was aimed at appear.

Wong Yang Sung v. *McGrath*, 339 U.S. 33, 40–41 (1950) (Jackson, J.).

B. The agencies did not have statutory authorization to issue the 2017 Rules without notice and comment.

Petitioners also argue that subsequent statutes enacted by Congress provide them with "express[]" authority to supersede the APA's notice and comment requirements. 5 U.S.C. 559. As noted by the district court below, "in order to authorize an agency to bypass notice and comment, a subsequent statute must be clear that it abrogates the APA." Pet.App. 71a.

Specifically, petitioners cite identical provisions of the Public Health Service Act (PHSA), 42 U.S.C. 201 *et seq.*, the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, and the Internal Revenue Code, see 26 U.S.C. 9815(a)(1),

which authorize the agencies to "promulgate such regulations as may be necessary or appropriate to carry out the [specified statutes]," and also to "promulgate any interim final rules as the Secretary determines are appropriate." 42 U.S.C. 300gg-92; 29 U.S.C. 1191c; 26 U.S.C. 9833. These three provisions were enacted as part of the Health Insurance Portability and Accountability Act of 1996 (HIPAA). See Pub. L. No. 104-191, §§ 101, 102, 401, 110 Stat. 1936, 1951, 1976, 2032 (1996).

To argue that a general grant of authority to an agency to "promulgate such regulations as may be necessary" or to "promulgate any interim final rules as the Secretary determines are appropriate" qualifies as an affirmative grant of authority to dispense with APA notice-and-comment rulemaking strains credulity. The APA itself "provides that no subsequent statute shall be deemed to modify it 'except to the extent that it does so expressly.'" *Castillo-Villagra* v. *INS*, 972 F.2d 1017, 1025 (9th Cir. 1992) (quoting 5 U.S.C. 559); see also *Marcello* v. *Bonds,* 349 U.S. 302, 310 (1955) ("Exemptions from the terms of the Administrative Procedure Act are not lightly to be presumed").

The statutory language invoked by Petitioners contains no express grant of authority for the agencies to depart at will from the APA's established rulemaking procedures. Nor can Petitioners show that in these three statutes, "Congress has established procedures so clearly different from those required by the APA that it must have intended to displace the norm." *Asiana Airlines* v. *FAA*, 134 F.3d 393, 397 (D.C. Cir. 1998). Were Petitioners' argument correct here, agencies could bypass notice

and comment rulemaking altogether—a drastic result that does not find purchase in the text of the statutes they cite.

When Congress wishes to dispense with the requirement that a particular agency comply with the strictures of the APA, it knows how to say so expressly. To take one very recent example, the Coronavirus Aid, Relief, and Economic Security Act of 2020 contains a provision, section 505G(b), that grants HHS (one of the agencies whose actions are at issue in this case, no less) the authority to "issue an administrative order determining whether there are conditions under which a specific drug, a class of drugs, or a combination of drugs, is determined to be * * * generally recognized as safe and effective" under other provisions of the statute. *Id.*

The Act further provides, in a subsection titled "INAPPLICABILITY OF NOTICE AND COMMENT RULEMAKING AND OTHER REQUIREMENTS," that "[t]he requirements of [section 505G](b) shall apply with respect to orders issued under this section instead of the requirements of subchapter II of chapter 5 of title 5, United 2 States Code," *id.* subsection (p)—that is, it *expressly* displaces the Administrative Procedure Act. The statutes cited by the agencies here do not.

II. The Procedural Errors Infecting the 2017 Rules Render the Essentially Identical 2018 Rules Similarly Invalid.

A. An agency that deviates from the APA's prescribed procedures by frontloading rulemaking and tacking on comment as an afterthought has not given the public a meaningful "opportunity to participate in the rule making."

The APA "prescribes a three-step procedure for so-called 'notice-and-comment rulemaking.'" *Perez* v. *Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015). First, an agency must issue a "[g]eneral notice of proposed rule making." 5 U.S.C. 553(b). Second, it must "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." *Id.* § 553(c). Finally, "*[a]fter* notice" and "*[a]fter* consideration of the relevant matter presented" in the received comments, the agency may promulgate a rule. *Id.* (emphases added).

Undertaking these procedures—in this sequence—is no mere formality. "Notice and comment gives affected parties fair warning of potential changes in the law and an opportunity to be heard on those changes—and it affords the agency a chance to avoid errors and make a more informed decision." *Azar* v. *Allina Health Servs.*, 139 S. Ct. 1804, 1816 (2019). For precisely those reasons of avoiding error and ensuring rational decisionmaking, "the opportunity to participate in the rule making," 5

U.S.C. 553(c), "must be a *meaningful* opportunity," *Rural Cellular Ass'n* v. *FCC*, 588 F.3d 1095, 1101 (D.C. Cir. 2009) (emphasis added).[2] And an opportunity for comment is not "meaningful" unless the agency "remain[s] sufficiently open-minded" during the comment process. *Rural Cellular*, 588 F.3d at 1101; see also, e.g., Pet.App. 30a (a "meaningful opportunity" means "interested parties [can] share their views, and * * * have the agency consider them with an open mind." (internal quotations and citations omitted)).

To ensure an open-minded agency and preserve the meaningful opportunity for comment, the federal courts "strictly enforce" the APA's imperative "that notice and an opportunity for comment * * * *precede* rule-making." *Air Transp. Ass'n of Am.* v. *Dep't of Transp.*, 900 F.2d 369, 379 (D.C. Cir. 1990) (quoting *N.J. Dep't of Envtl. Prot.*, 626 F.2d at 1050),[3] *vacated as moot* 498 U.S. 1077 (1991).[4]

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[2] Accord *N. Carolina Growers' Ass'n, Inc.* v. *United Farm Workers*, 702 F.3d 755, 763 (4th Cir. 2012); *Prometheus Radio*, 652 F.3d at 450; *Safe Air For Everyone* v. *EPA*, 488 F.3d 1088, 1098 (9th Cir. 2007); *Mission Grp. Kan., Inc.* v. *Riley*, 146 F.3d 775, 781 (10th Cir. 1998); *Nw. Tissue Ctr.* v. *Shalala*, 1 F.3d 522, 531 (7th Cir. 1993).

[3] See, e.g., *NRDC* v. *NHTSA*, 894 F.3d 95, 115 (2d Cir. 2018) ("An agency may not promulgate a rule * * * and then claim that post-promulgation notice and comment procedures cure the failure to follow, in the first instance, the procedures required by the APA."); *Burks* v. *United States*, 633 F.3d 347, 360 n.9 (5th Cir. 2011) ("That the government allowed for notice and comment after the final Regulations were enacted is not an acceptable substitute for pre-promulgation notice and comment."); *Sharon Steel Corp.* v. *EPA*, 597 F.2d 377, 381 (3d

But here, rather than follow the APA's simple prescription, the agencies decided to invent a workaround: promulgate invalid "interim rules," *then* allow comment, *then* promulgate an essentially identical "final" rule. In that scenario, the government maintains, who cares that the agencies initially flouted the law? The "final" rule was still "preceded" by comment and thus, on the government's view, technically satisfied the APA—and any prior contumaciousness can be ignored. *See* Gov't Br. 33.

The government is incorrect. If the 2018 Rules were not preceded by a *meaningful* opportunity for the public to comment, then these Rules are procedurally invalid under the APA. For many reasons, an opportunity to comment that is provided *after* essentially identical "interim rules" have already been promulgated will often not be meaningful. In this scenario, a "final" rule will, outside of the circumstance discussed *infra* Part II.B, remain invalid because the agencies have neglected entirely the public's right to "*participate* in the rule making." 5 U.S.C. 553(c) (emphasis added).

"Participating" in a rulemaking does not mean submitting comments to an agency that has made up its mind and has no interest in what the public has

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Cir. 1979) ("We hold that the period for comments after promulgation cannot substitute for the prior notice and comment required by the APA.").

[4] The challengers in *Air Transportation* dropped their argument after this Court granted *certiorari*.

to say.[5] "It is procedure that marks the difference between rule by law and rule by fiat." *McGarva* v. *United States*, 406 U.S. 953, 954 (1972) (quoting *Wisconsin* v. *Constantineau*, 400 U.S. 433, 436 (1971)). And the agencies' initial-rulemaking-by-fiat mechanism runs against the "psychological and bureaucratic realit[y]" that once "regulations are a fait accompli," the few individuals that will still "bother to submit their views" will confront bureaucrats uninterested in "seriously consider[ing] their suggestions." *N.J. Dep't of Envtl. Prot.*, 626 F.2d at 1048–50 (quoting *U.S. Steel Corp.* v. *EPA*, 595 F.2d 207, 214–15 (5th Cir. 1979)); see also *Sharon Steel Corp.* v. *EPA*, 597 F.2d 377, 380–81 (3d Cir. 1979) ("After the [interim] final rule is issued, the [commenter] must come hat-in-hand and run the risk that the decisionmaker is likely to resist change.").

The panel below recognized and responded to that reality, observing that the 2017 Rules "impaired the rulemaking process by altering the Agencies' starting point in considering the [2018] Final Rules," as "the Agencies changed the question presented concerning the Final Rules from whether they should create the exemptions to whether they should depart from them." Pet.App. 31a.

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[5] Similarly, an agency cannot satisfy the APA by accepting comments and shoving them, unread, into a filing cabinet. See, e.g., *Home Box Office, Inc.* v. *FCC*, 567 F.2d 9, 35–36 (D.C. Cir. 1977) ("[T]he opportunity to comment is meaningless unless the agency responds to significant points raised by the public.").

The logic that "post hoc comment was not contemplated by the APA and is generally not consonant with it," *N.J. Dep't of Envtl. Prot.*, 626 F.2d at 1050, should apply irrespective of whether an invalid prior rule is swiftly repackaged and re-promulgated after a comment period that functions as an afterthought. The meaningful opportunity for comment "require[s] that * * * parties be able to comment on [a] rule while it is still in [a] formative or 'proposed' stage." *Advocates for Highway & Auto Safety* v. *Fed. Highway Admin.*, 28 F.3d 1288, 1291 (D.C. Cir. 1994) (quoting *Nat'l Tour Brokers Ass'n* v. *United States*, 591 F.2d 896, 902 (D.C. Cir. 1978)). Petitioners' interim-then-final rule workaround "ignore[s] the possibility that the policy announced [in the interim rule] might have solidified to the point where any comments offered in response to the late[] invitation would fall on deaf ears." *Id.* at 1291; see also *Air Transp.*, 900 F.2d at 379–80 ("People naturally tend to be more close-minded and defensive once they have made a 'final' determination.").

The federal Circuit Courts have rejected analogous agency attempts to implement such kangaroo procedures—and this Court should do the same here. "An agency that wished to dispense with pre-promulgation notice and comment could simply do so, invite post-promulgation comment, and republish the regulation before a reviewing court could act." *U.S. Steel Corp.* v. *EPA*, 595 F.2d 207, 211–14 (5th Cir. 1979). Federal agencies may not "circumvent * * * the APA" with such ease. *NRDC* v. *EPA*, 683 F.2d 752, 768 (3d Cir. 1982); see also *Reynolds*, 710 F.3d at 523 ("[A]gencies [cannot] avoid

notice and comment by simply issuing an interim rule and subsequently adopting it as the final rule. We cannot countenance a justification which has the potential for such mischief." (internal citations omitted)); *City of Waco* v. *EPA*, 620 F.2d 84, 86 (5th Cir. 1980) ("[A]cceptance of the EPA's position would allow any agency to dispense with pre-promulgation notice and comment whenever it so desired."); *Sharon Steel*, 597 F.2d at 381 ("If a period for comments after issuance of a rule could cure a violation of the APA's requirements, an agency could negate at will the Congressional decision that notice and an opportunity for comment must precede promulgation.").

B. An agency that violates section 553 must establish it maintained an "open mind" when considering post-promulgation comments or have its rule vacated, irrespective of whether the agency swiftly re-promulgates the same rule.

Normally, a rule promulgated in violation of section 553 must be vacated—and an agency may not short-circuit that process by swiftly repackaging and re-promulgating the same invalid rule. See *supra* Part II.A. But some federal courts have recognized a limited exception if an agency can demonstrate that it maintained an "open mind" when considering post-promulgation comments.

For example, in *Levesque* v. *Block*, 723 F.2d 175 (1st Cir. 1983), the First Circuit deemed invalid a prior regulation promulgated without notice and comment, but decided that a similar regulation

promulgated after notice and comment remained "a valid rule." *Id.* at 187. The First Circuit took note that the "general rule * * * frowns upon post-promulgation comment periods." *Id.* But when "the agency has been open-minded, the presumption against a late comment period can be overcome and a rule upheld." *Id.* at 188. In *Levesque*, the agency was able to demonstrate an open mind—and so save its final rules—in part because it had "made a number of changes in the [final] rules and gave reasonable responses when rules were not changed." *Id.*

Other Circuits—most notably the D.C. Circuit and the Third Circuit[6]—have seen fit to adopt a similar "open-mindedness" inquiry when evaluating a post-rulemaking comment period. See, e.g., *Guedes* v. *Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 13 (D.C. Cir. 2019) ("[W]e have repeatedly held that the agency prevails on the merits as long as it can demonstrate that it has kept an 'open mind' throughout the subsequent comment period." (quotation omitted)); *Fed. Express Corp.* v. *Mineta*, 373 F.3d 112, 120 (D.C. Cir. 2004) (upholding final rule notwithstanding intermediate notice and comment violation as the "agency has made a compelling showing that it provided a meaningful opportunity to comment before the [final rule] became effective" (internal citations and quotation marks omitted)); *Reynolds*, 710 F.3d at 519

[6] Pet.App. 30a ("'The opportunity for comment must be a meaningful opportunity,' to have interested parties share their views, and to have the agency consider them with an 'open mind.'" (quoting *Prometheus Radio*, 652 F.3d at 450)).

("The Government * * * [must] show[] that the [agency] 'maintained a flexible and open-minded attitude'" rather than "a single-minded commitment to the substantive result reached" (alteration omitted) (quoting *Prometheus Radio*, 652 F.3d at 449)); see also *United States* v. *Brewer*, 766 F.3d 884, 892 (8th Cir. 2014) (noting that a that a "flexible and open-minded attitude towards [an agency's] own rules * * * is generally required for the notice and comment period" (quoting same)).

The open-mindedness approach advanced by these Circuits makes good sense. In stark contrast to an agency bent on re-promulgating its initial invalid rule, an open-minded agency can still "seriously consider" submitted comments, *N.J. Dep't of Envtl Prot.*, 626 F.2d at 1049 (quoting *U.S. Steel Corp.*, 595 F.2d at 214–15), and thereby benefit from "avoid[ing] errors and mak[ing] a more informed decision," *Allina Health Servs.*, 139 S. Ct. at 1816. Put otherwise, an open-minded agency can give the public the "opportunity to participate in the rule making," 5 U.S.C. 553(c), *i.e.*, to submit their views to an agency that affords them a "meaningful opportunity" to comment, *Rural Cellular Ass'n*, 588 F.3d at 1101.

Evaluating an agency's open-mindedness during a post-promulgation comment period is a case-specific inquiry. It is "the agency's burden to persuade the court that it has accorded the comments a full and fair hearing." *Advocates for*

Highway & Auto Safety, 28 F.3d at 1292.[7] To evince an open mind, an agency might "present evidence of a level of public participation and a degree of agency receptivity that demonstrates that a real public reconsideration of the issued rule has taken place." *Levesque*, 723 F.2d at 188 (internal quotation marks omitted). Affidavits from relevant officials may be submitted and considered, and an examination of why comment was skipped in the first place may be undertaken. See Pet.App. 30a (analyzing "the Agencies' justifications for avoiding notice and comment" when promulgating the 2017 Rules). Of course, an agency's subsequent "[c]onsideration of comments as a matter of grace is not enough." *McLouth Steel Prods. Corp.* v. *Thomas*, 838 F.2d 1317, 1323 (D.C. Cir. 1988). A court may "examine whether the 'language of the agency's published

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[7] The "imposition of * * * a burden on the challenger is normally inappropriate where the agency has completely failed to comply with § 553." *McLouth Steel Prod. Corp. v. Thomas*, 838 F.2d 1317, 1324 (D.C. Cir. 1988); see also Kristin E. Hickman & Mark Thomson, *Open Minds and Harmless Errors: Judicial Review of Postpromulgation Notice and Comment*, 101 Cornell L. Rev. 261, 312–13 (2016) ("[F]airness militates in favor of placing the burden of proof on the agency because the consequences of forgoing prepromulgation notice and comment are often potentially severe."). Moreover, the question of open-mindedness concerns evidence and considerations within the agency's control. See Hickman & Thomson, *supra*, at 314 ("[P]lacing the burden of proof on a party challenging a rule * * * asks the challenging party to do the impossible."); cf. *Shinseki* v. *Sanders*, 556 U.S. 396, 399 (2009) (recognizing that a doctrinal framework "imposes an unreasonable evidentiary burden" when it forces a party to establish its opponent's mental state).

replies suggest that the agency had afforded the comments particularly searching consideration.'" *Advocates for Highway & Auto Safety*, 28 F.3d at 1292 (alteration omitted) (quoting *Air Transp.*, 900 F.2d at 380). Finally, "changes and revision [to the final rule] are indicative of an open mind"—although "an agency's failure to make any does not [inevitably] mean its mind is closed." *Id.*; see also *Air Transp.*, 900 F.2d at 380 ("The FAA has not come close to overcoming the presumption of close-mindedness in this case [in part because i]t made no changes in the * * * Rules in response to public comments."); *Levesque*, 723 F.2d at 188–89 (concluding that agency demonstrated an open mind in part because it "made a number of changes in the [final] rules and gave reasonable responses when rules were not changed").

In undertaking the open-mindedness inquiry, due consideration should be given to the concern that if the "government could skip [notice-and-comment] procedures" without adverse consequences in the majority of cases, that would "virtually repeal section 553's requirements." *Sugar Cane Growers Co-op. of Fla.* v. *Veneman*, 289 F.3d 89, 96 (D.C. Cir. 2002); see also Kristin E. Hickman & Mark Thomson, *Open Minds and Harmless Errors: Judicial Review of Postpromulgation Notice and Comment*, 101 Cornell L. Rev. 261, 314 (2016) ("[A]n easy 'out' from prepromulgation notice and comment would dramatically reduce any incentive for agencies to comply with § 553, and the requirements in that section would become afterthoughts."). Accordingly, when an agency already violated section 553(c) in promulgating its rule without proper comment, the

"presumption," in accordance with bureaucratic and psychological reality, must be that the agency has "closed [its] mind" to "subsequent comments" in a later rulemaking that produces the same result—and any doubt should be resolved in favor of demanding compliance with the basic requirements in section 553. *Advocates for Highway & Auto Safety*, 28 F.3d at 1292 (quoting *Air Transp.*, 900 F.3d at 379–80)); see also *Air Transp.*, 900 F.2d at 379 ("[W]e recognize that an agency is not likely to be receptive to suggested changes once the agency 'put[s] its credibility on the line in the form of "final" rules.'" (quoting *Nat'l Tour Brokers*, 591 F.2d at 902)). An agency can "overcome [this] presumption 'only upon a compelling showing that 'the agency's mind remain[ed] open enough at the later stage.'" *Air Transp.*, 900 F.2d at 379 (quoting *McLouth* 838 F.2d at 1323).

Thus framed, the open-mindedness inquiry strikes an important balance. It protects the public's meaningful opportunity to comment, see 5 U.S.C. 553(c), while ensuring that an agency is not foreclosed from "ever purg[ing] the * * * 'taint' from a procedurally defective but substantively reasonable interim rule," Gov't Br. 36. If the agency can demonstrate that it maintained an open mind, the taint may well be purged.

Moreover, contrary to the government's contention, the open-mindedness inquiry does not impose an additional requirement beyond the requirements of the APA. See Gov't Br. 35. The APA requires agencies to afford the public the "opportunity to participate in the rule making," 5 U.S.C. 553(c), and the open-mindedness inquiry

appropriately seeks to determine whether an agency has in fact allowed such "participation."

The open mindedness inquiry also would not, as the government suggests, foreclose a court from taking "due account of the rule of prejudicial error." 5 U.S.C. 706; see Gov't Br. 36. Depending on the circumstances, it "might be obvious from the record in the particular case that the error made no difference." *Shinseki* v. *Sanders*, 556 U.S. 396, 407 (2009). For example, the record may evince that no member of the public wished to avail him or herself of the opportunity to participate in the rulemaking. Alternatively, circumstances may indicate that "the agency's substantive approach was 'the only reasonable one,'" *Sugar Cane Growers*, 289 F.3d at 96 (quoting *Sheppard* v. *Sullivan*, 906 F.2d 756, 761–62 (D.C. Cir. 1990))), such that the court "would reverse * * * if the agency came out the other way," *Reynolds*, 710 F.3d at 518 (alteration omitted) (quoting same). On the other hand, section 706 will not salvage an agency's otherwise invalid rule when a court "cannot say with certainty whether [the] comments would have had some effect if they had been considered when the issue was open." *McLouth*, 838 F.2d at 1324.[8] In that circumstance,

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[8] Accord *Mid Continent Nail Corp.* v. *United States*, 846 F.3d 1364, 1384 (Fed. Cir. 2017); *Reynolds*, 710 F.3d at 518; *Green Island Power Auth.* v. *FERC*, 577 F.3d 148, 165 (2d Cir. 2009); see also *Paulsen* v. *Daniels*, 413 F.3d 999, 1006 (9th Cir. 2005) ("We have held that the failure to provide notice and comment is harmless only where the agency's mistake 'clearly had no bearing on the procedure used or the substance of decision reached.'" (quoting *Riverbend Farms, Inc.* v. *Madigan*, 958 F.2d 1479, 1487 (9th Cir. 1992))); cf. *McGarva*, 406 U.S. at 955

the appropriate course, consonant with the APA, is vacatur and remand—with a directive that the agency give the issue a fresh look with an open mind. See *id.* ("Remand will of course give petitioner one more procedural bite at the apple, but it is the first bite of the quality to which it was entitled from the start.").

C. The agencies did not provide a meaningful opportunity to comment on the 2018 Rules.

The agencies here have not shown that the public comment period held after they already promulgated the 2018 Rules in violation of 5 U.S.C. 553(c) provided a meaningful opportunity to comment on the expanded exemptions and accommodations. Because the agencies failed to show that they maintained an open mind in considering and responding to comments, they failed to afford the public a meaningful opportunity to participate in the rulemaking process. Thus, the essentially identical 2018 Rules were properly vacated by the Third Circuit.

By providing an opportunity for public comment after the 2017 Rules became effective, the agencies fundamentally altered the starting point for considering public comments. Rather than seeking public comment on whether the agencies should expand religious exemptions and accommodations in

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(recognizing that in some circumstances the "nature of [a] procedural error renders impossible the application of a 'harmless error' test").

the first place, the agencies sought public comment on whether the expanded exemptions and accommodations should be continued. See *NRDC*, 683 F.2d at 768.

This change in the agencies' starting point for the comment period presumptively undermined the public's meaningful opportunity to comment. The agencies were "not likely to be receptive to suggested changes" after they put their "credibility on the line in the form of 'final' rules." *Air Transportation*, 900 F.2d at 379–80 (quoting *Nat'l Tour Brokers*, 591 F.3d at 902); see also *supra* Part II.A.–B. Instead, the agencies were "likely to resist change" after they published the 2017 Rules, which forcefully stated the agencies' position—in binding form—that expanded exemptions and accommodations were being implemented. See *NRDC*, 683 F.2d at 768 (quoting *Sharon Steel*, 597 F.2d at 381). The presence of the procedurally invalid 2017 Rules as the agencies' new baseline prejudiced the public's opportunity to have comments considered by an impartial decisionmaker about whether the expanded exemptions and accommodations to the Mandate should be implemented at all.

The agencies have not carried their burden to show that the presumption of close-mindedness is ill-founded here. Indeed, the language of the 2017 Rules themselves evinces that the agencies did not approach the post-promulgation comment period with an open mind. The agencies stated that they had "decided" it was necessary and appropriate to provide the expanded exemptions because they had "concluded" that requiring objecting entities to choose between the Mandate, the accommodation, or

penalties imposed a substantial burden on religious exercise under RFRA and that the government did not have a compelling interest in applying that federal statutory provision. 82 Fed. Reg. at 47,800; see also *id.* at 47,807 ("[W]e have also *concluded* that the Government does not have a compelling interest in requiring individuals to be covered by policies that include contraceptive coverage when the individuals have sincerely held religious objections to that coverage." (emphasis added)), *id.* at 47,809 ("The Departments further *conclude* that it would be inadequate to merely attempt to amend the accommodation process instead of expand the exemption." (emphasis added)), *id.* at 47,849 ("[T]he Departments have *determined* that the Government's interest in applying contraceptive coverage requirements to the plans of certain entities and individuals does not outweigh the sincerely held moral objections of those individuals." (emphasis added)). Whether the regulatory scheme imposed a substantial burden under RFRA was precisely one of the questions for public comment during the post-promulgation period. Yet the agencies evidently had already "*concluded* that * * * requiring certain objecting entities or individuals to choose between the Mandate, the accommodation, or penalties for noncompliance has violated RFRA." *Id.* at 47,814 (emphasis added).

The agencies also repeatedly stated that they were promulgating the 2017 Rules to "bring years of litigation concerning the Mandate to a close." *Id.* at 47,806; see also *id.* at 47,799, 47,800, 47,848. A desire to foreclose claims in litigation is incompatible with the agencies' statutory duty to seriously

consider input from the public on issues as important as whether requiring certain objecting entities or individuals to choose between the Mandate, the accommodation, or penalties for noncompliance violates RFRA. See *Brewer*, 766 F.3d at 892; *Prometheus Radio*, 652 F.3d at 449, 453. Rather than seriously considering input from the public on whether the regulatory scheme imposed a substantial burden on religious exercise, the agencies sought to immediately pick a side in litigation and bring any contrary argument "to a close." 82 Fed. Reg. at 47,806. The agencies' explicit desire to foreclose litigation itself evinces that they did not have a flexible and open-minded attitude at the time that they were obligated to meaningfully consider comments.

The agencies' behavior during the post-promulgation comment period similarly shows that the agencies did not have an open mind during the comment period. Indeed, at the very moment the agencies were supposedly "considering" public comments, they were actively defending the validity of their 2017 Rules in litigation. See Pet.App. 10a (noting that the agencies promulgated the 2018 rules while an appeal of a preliminary injunction against the 2017 Rules was pending). Moreover, even before the comment period closed, the agencies were taking steps to re-implement the 2017 Rules in repackaged form. During the comment period, for example, the agencies were preparing revised forms to be used for the optional accommodation and seeking public comments on these forms. See *Irish 4 Reprod. Health* v. *Dep't of Health & Human Servs.*, 2020 WL 248009, at *13 (N.D. Ind. Jan. 16, 2020). Such

actions are in no way indicative of an agency with the open-minded and flexible attitude required by 5 U.S.C. 553(c).

The agencies' closed-mindedness is reinforced by the fact that the agencies did not make any meaningful changes between the 2017 and 2018 Rules. The only alterations were, by the agencies' own admission, merely "technical changes," 83 Fed. Reg. at 57,537, or changes made "to clarify the intended scope" of the 2017 Rules, *id.* at 57,593. Such changes do not reflect meaningful, substantive changes to the rules made as part of a rational, deliberative response to public input. The absence of meaningful changes, in combination with the agencies' definitive language in the 2017 Rules and public behavior during the comment period, serves to confirm that the post-promulgation opportunity for comment was, under the circumstances of this case, not meaningful.

Because the agencies did not provide the public with a meaningful opportunity to comment on the substance of the exemptions and accommodations, their promulgation of the 2018 Rules violated 5 U.S.C. 553(c).

CONCLUSION

For the foregoing reasons, the judgment of the Third Circuit should be affirmed.

Respectfully submitted,

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