Nos. 17-3752 and 18-1253

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

COMMONWEALTH OF PENNSYLVANIA,

Plaintiff-Appellee,

v.

PRESIDENT, UNITED STATES OF AMERICA et al.,

Defendants-Appellants,

and

LITTLE SISTERS OF THE POOR SAINTS PETER AND PAUL HOME,

Intervenor-Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

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 (ACA), numerous entities have challenged it, as well as a 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—were unable to find a way to amend the accommodation to both satisfy the organizations' conscience objections and ensure that women 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.

Pennsylvania challenges the interim rules on both procedural and substantive grounds. But Pennsylvania itself is not directly subject to the rules, which do not require States to take, or refrain from taking, any action. Pennsylvania speculates (1) that Pennsylvania employers are likely to exempt themselves from the mandate; (2) that, as a result, 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 Commonwealth. But Pennsylvania has yet to identify a resident who will lose contraceptive coverage, let alone seek state-funded services, and this chain of speculative assumptions is insufficient to demonstrate concrete injury for purposes of Article III standing. Nor can Pennsylvania assert *parens patriae* standing to protect the health and well-being of its residents. Even apart from the speculative injury to Pennsylvania's residents, it is well settled that "[a] State does not have standing as *parens patriae* to bring an action against the Federal Government." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982).

The district court further erred by entertaining this suit in the wrong venue. The applicable venue statute here permits suit only in the Middle District of Pennsylvania, where the Commonwealth "resides" (because its capital and "principal place of business," Harrisburg, is located there), 28 U.S.C. § 1391(c)(2), (e)(1)(C), or in the District for the District of Columbia, where the events "giving rise to the claim occurred," *id.* § 1391(e)(1)(B).

Beyond these justiciability concerns, Pennsylvania has not satisfied the requirements for obtaining a preliminary injunction. The district court was wrong in holding that the agencies improperly bypassed notice-and-comment procedures. The agencies had express statutory authority independent of the Administrative Procedure Act (APA) to issue interim final rules here, 26 U.S.C. § 9833; 29 U.S.C. § 1191c; 42 U.S.C. § 300gg-92, and also had "good cause" under the APA to do so, 5 U.S.C. § 553(b), in order to alleviate the burden imposed by the contraceptive-coverage mandate on those with sincere religious or moral objections to providing such coverage, as well as to clear up uncertainty caused by lengthy and unresolved litigation.

The court was also wrong in finding the rules "arbitrary, capricious, and contrary to established law." JA 43. The same provision of the ACA that authorized the agencies to issue the original exemption for churches equally authorizes the expanded exemptions. *See* 42 U.S.C. § 300gg-13(a)(4); 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011). Moreover, the Religious Freedom Restoration Act (RFRA) independently authorized, and indeed required, issuance of the religious exemption as a means of eliminating the substantial burden on religious exercise that the Supreme Court held in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), was imposed by the contraceptive-coverage mandate.

Both RFRA and the ACA authorize the government to satisfy its obligation under RFRA to eliminate the substantial burden imposed by the mandate by using the straightforward exemption provided by the current administration rather than attempting to use the novel accommodation created by the prior administration. And that is especially true because the accommodation itself violates RFRA and is, at a minimum, subject to significant legal doubt: as the agencies concluded and some courts have held, there are employers for whom the accommodation imposes a substantial burden by using the plans they

themselves sponsor to provide contraceptive coverage that they object to on religious grounds, which some employers sincerely believe makes them complicit in the provision of such coverage.

Finally, apart from the merits, the balance of equities does not support a preliminary injunction. And at a minimum, even if the injunction were warranted, this Court should clarify that the injunction goes no further than what is necessary to redress any cognizable injuries to the Commonwealth.

STATEMENT OF JURISDICTION

The Commonwealth of Pennsylvania invoked the district court's jurisdiction under 28 U.S.C. § 1331. The district court entered a preliminary injunction on December 15, 2017. JA 51. The government filed a timely notice of appeal on February 6, 2018. JA 1. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

1. Whether Pennsylvania lacks Article III standing to bring this action. (Ruled on at JA 14)

2. Whether the district court lacked venue. (Raised in dkt. no. 15, at 18-19, and dkt. no. 16-1, at 9-11)

3. Whether the agencies had express statutory authority as well as good cause under the APA to issue the interim final rules without prior notice and comment. (Ruled on at JA 25-35)

4. Whether the agencies had statutory authority under the ACA and RFRA to expand the conscience exemption to the contraceptive-coverage mandate. (Ruled on at JA 35-43)

5. Whether the district court erred in holding that the balance of harms supports a preliminary injunction. (Ruled on at JA 43-49)

6. Whether the injunction should be construed as applying no further than necessary to redress any injuries suffered by the Commonwealth. (Raised in dkt. no. 15, at 4 n.1)

STATEMENT OF RELATED CASES

This Court previously reversed an order of the district court denying a motion to intervene in this case by the Little Sisters of the Poor. *See Pennsylvania v. President United States*, 888 F.3d 52 (3d Cir. 2018). Similar challenges to the interim rules are pending in other courts: *California v. Azar*, Nos. 18-15144, 18-15166, 18-15255 (9th Cir.); *Massachusetts v. HHS*, No. 18-1514 (1st Cir.); *ACLU v. Azar*, No. 4:17-cv-5772 (N.D. Cal.) (stayed); *Campbell v. Trump*, No. 1:17-cv-2455 (D. Col.) (dismissed Sept. 11, 2018); *Irish 4 Reproductive Health v. HHS*, No. 3:18-cv-0491 (N.D. Ind.); *Washington v. Trump*, No. 2:17-cv-1510 (W.D. Wash.) (stayed).

STATEMENT OF THE CASE

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

The 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 to issue guidelines requiring coverage of, among other things, the full range of FDA-approved contraceptive methods. *See* 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012). Coverage for such contraceptive methods was thus 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 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 organizations with religious or moral objections to providing contraceptive coverage, *see* 78 Fed. Reg. 8456, 8459-60 (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. The regulations then generally required the employer's health insurer or third-party administrator (in the case of self-insured plans) to provide or arrange contraceptive coverage for plan participants. *See id.* at 39,875-80.

In the case of self-insured church plans, however, coverage by the plan's third-party administrator under the accommodation was voluntary. Church plans are exempt from the Employee Retirement

Income Security Act of 1974 (ERISA), 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, nor impose fines or penalties for failing to provide such coverage. *See* 79 Fed. Reg. 51,092, 51,095 n.8 (Aug. 27, 2014).

Other employers were also exempt from the contraceptive-coverage mandate. 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 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 nongrandfathered 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 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. 41,318, 41,323-28 (July 14, 2015). 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, *see* 82 Fed. Reg. at 47,798, 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 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.* (cleaned up). 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 *Zubik*, the agencies sought 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 objecting organizations and provide coverage to their employees. *See* FAQs About Affordable Care Act Implementation Part 36, at 4 (Jan. 9, 2017).[1] 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

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

mandate. That litigation also led to conflicting decisions by the courts. *See* 82 Fed. Reg. 47,838, 47,843 (Oct. 13, 2017).

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, 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 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 did not apply to publicly traded companies). *See* 82 Fed. Reg. 47,838. The rule was intended "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, and to resolve legal challenges by moral objectors that had given rise to conflicting court decisions, *id.* at 47,843.

The agencies concluded that their express statutory authority to issue "interim final regulations," 26 U.S.C. § 9833, 29 U.S.C. § 1191c;

42 U.S.C. § 300gg-92, provided them with authority to issue the rules without prior notice and comment. The agencies also concluded that they had "good cause" to do so under the APA, 5 U.S.C. § 553(b), in order to protect religious liberty and end the unresolved and unresolvable litigation that had beset the prior rules. *See* 82 Fed. Reg. at 47,813-15; 82 Fed. Reg. at 47,854-56.

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 comment period expired on December 5, 2017. HHS received over 200,000 comments and is currently reviewing them.

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

Pennsylvania brought suit in the Eastern District of Pennsylvania, challenging the interim rules. As relevant here, Pennsylvania claimed that the rules (1) failed to comply with the APA's notice-and-comment requirements; and (2) are arbitrary and capricious, an abuse of discretion, or otherwise contrary to law because they violate the ACA and cannot be justified by RFRA. JA 110-13. Pennsylvania sought a preliminary injunction.

The government moved to dismiss Pennsylvania's suit, arguing, among other things, that Pennsylvania lacked standing to challenge the interim rules and that Pennsylvania had sued in the wrong venue. The government also separately opposed Pennsylvania's motion for injunctive relief, arguing that the interim rules were both procedurally and substantively valid and that equitable relief was unwarranted regardless. Without ruling on the government's motion to dismiss, the district court granted a preliminary injunction. As to justiciability, although the court ignored the government's venue objection, it rejected the objection to Pennsylvania's standing. *See* JA 19-23. On the merits, the court held that the agencies had neither statutory authority nor

good cause to issue the rules without following notice-and-comment procedures, *see* JA 25-35, and further held that the rules were substantively unlawful because neither the ACA nor RFRA justified the expanded exemptions from the contraceptive-coverage mandate in light of the accommodation's availability, *see* JA 35-43. Finding that the equities warranted a preliminary injunction, *see* JA 43-50, the court issued an order prohibiting the agencies from "enforcing" the interim rules, JA 52.

SUMMARY OF ARGUMENT

I. Pennsylvania's arguments for standing are fatally speculative. Pennsylvania has failed to identify even 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. And Pennsylvania's alternative attempt to assert *parens patriae* standing to protect the well-being of its residents is squarely foreclosed by Supreme Court precedent.

II. The Eastern District of Pennsylvania is not a proper venue. Venue based on the district in which Pennsylvania "resides," 28 U.S.C. § 1391(e)(1)(C), would be in the Middle District of Pennsylvania, where Pennsylvania's "principal place of business" (its capital, Harrisburg) is located, *id.* § 1391(c)(2). And venue based on the district in which "a substantial part of the events or omissions giving rise to the claim occurred," *id.* § 1391(e)(1)(B), would be in the District for the District of Columbia, where the interim rules were promulgated.

III. The agencies had statutory authority to issue the interim rules without prior notice and comment. The ACA's preventive-services provision was enacted as an amendment to the Public Health Service

Act and incorporated into ERISA and the Internal Revenue Code, each of which expressly authorizes 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]." *E.g.*, 42 U.S.C. § 300gg-92. This express authorization to issue "interim final rules" would be superfluous if it did not waive the APA's notice-and-comment requirements. The agencies also validly invoked the "good cause" exception to the APA's notice-and-comment requirements, 5 U.S.C. § 553(b), to resolve years of litigation left pending by the Supreme Court, and to protect sincerely held religious or moral objections to providing contraceptive coverage that the prior rules had left unguarded.

IV. The interim rules are also substantively lawful. The ACA authorized HRSA to decide what "additional preventive care and screenings" for women should be required, 42 U.S.C. § 300gg-13(a)(4), and since the agencies' first rulemaking on that subject in 2011—when they created the church exemption—the agencies have reasonably

interpreted § 300gg-13(a)(4) as authorizing exemptions to the contraceptive-coverage mandate for sincerely held conscience-based objections. RFRA also independently authorized the religious exemption. The Supreme Court held in *Hobby Lobby* that the contraceptive-coverage mandate, standing alone, substantially burdens the exercise of religion by employers that sincerely object to providing such coverage. Nothing in RFRA or the ACA prevents the agencies from eliminating that burden through a straightforward exemption rather than the novel accommodation the agencies previously attempted to use. On the contrary, RFRA gives the agencies discretion to determine how best to alleviate the burden flowing from the ACA's regulatory regime. And the agencies' decision here to expand the preexisting religious exemption was particularly reasonable given the sincere religious objections to the accommodation itself, which violates RFRA as applied to some entities and at a minimum is subject to significant legal doubt.

V. The balance of equities does not support the preliminary injunction. In addition to the irreparable institutional injury the government suffers when its laws and regulations are set aside by a

court, 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 Pennsylvania.

VI. At a minimum, any injunction should be no broader than necessary to provide full relief to the allegedly aggrieved plaintiff, Pennsylvania. This Court has repeatedly clarified and narrowed injunctions based on that rule, which reflects principles of equity and Article III.

STANDARD OF REVIEW

This Court employs a "tripartite standard of review" in reviewing the grant of a preliminary injunction: "findings of fact are reviewed for clear error, legal conclusions are reviewed de novo, and the decision to grant or deny an injunction is reviewed for abuse of discretion." *Delaware Strong Families v. Attorney General*, 793 F.3d 304, 308 (3d Cir. 2015).

ARGUMENT

I. Pennsylvania Has Not Demonstrated Standing to Challenge the Interim Final Rules

To establish standing, a plaintiff must demonstrate 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) (cleaned up). Because these requirements "are necessary elements of a plaintiff's case, mere allegations will not support standing at the preliminary injunction stage." *Doe v. National Bd. of Med. Exam'rs*, 199 F.3d 146, 152 (3d Cir. 1999). Rather, a plaintiff "'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). Pennsylvania fails to carry its burden for either of its two theories of standing: direct economic injury, and *parens patriae* interest in its residents' well-being.

A. Pennsylvania's Allegations of Economic Injury Are Not Sufficient to Demonstrate Standing

Pennsylvania contends that it will be injured because it will purportedly suffer economic loss due to the interim rules, as it will have to either provide contraceptive coverage itself or fund 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 (cleaned up). And Pennsylvania's claim of economic harm rests on precisely the type of speculative "chain of contingencies" that is insufficient to confer standing. *Finkelman v. NFL*, 810 F.3d 187, 193 (3d Cir. 2016).

Before Pennsylvania will bear any costs as a result of the interim rules, a number of circumstances must exist:

1. A Pennsylvania employer must use the expanded exemption and thereby deprive employees of contraceptive coverage they previously had. That means

    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.[2]

2. The employer's decision must cause women in Pennsylvania to lose employer-sponsored coverage of their chosen contraceptive method. That means

    a. the employer's health plan must no longer cover the specific contraceptive methods that those women would otherwise choose (since 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. The women who lose such coverage must be eligible for, and seek, services from state-funded programs, rather than simply paying out of pocket for contraception.

Pennsylvania's showing fails at each step.

[2] The interim rules also apply to institutions of higher education in their arrangement of student health plans, but for ease of reference we refer generally to "employers" unless the context requires otherwise.

1. Pennsylvania has not alleged—let alone demonstrated—facts sufficient to show, beyond speculation, that Pennsylvania employers will use the interim rules to deprive employees of contraceptive coverage they previously had.

Pennsylvania "estimate[s] that many employers will claim newly expanded exemptions" under the interim rules, JA 106 ¶ 129, and alleges that "many of [those] employers are expected to be Pennsylvania companies," *id.* JA 106 ¶ 130. But Pennsylvania provides no basis—either in its complaint or in the declarations supporting its motion for a preliminary injunction—for any such prediction.

Moreover, even if an employer invokes the exemption, Pennsylvania has not shown that any alleged injury would be *caused by* the interim rules. Pennsylvania does not allege that any of the employers expected to invoke the exemption were providing contraceptive coverage (or using the accommodation) before the issuance of the interim 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. *See* 82 Fed. Reg. 47,792, 47,814 (Oct. 13, 2017).

And even in the absence of these injunctions, the agencies lacked authority under the prior rules to enforce the accommodation against self-insured church plans. *See supra* pp. 9-10. To the extent that the accommodation under the prior rules allowed employers with self-insured church plans, and effectively also their third-party administrators, to avoid any obligation to provide contraceptive coverage, *see* 82 Fed. Reg. at 47,801-02, 47,816-17, the interim rules will have no effect on participants in those plans.

In short, employees of entities that use the expanded exemption already may not be receiving coverage, even in the absence of the interim rules. Indeed, Pennsylvania's own witnesses underscored the Commonwealth's inability to prove injury.

For example, one of Pennsylvania's witnesses testified that some of her patients receive their health insurance through Catholic schools and similar institutions and "may already have not had [contraceptive] coverage." JA 357:18-358:14 (Chuang). She knew of no patients whose employers were planning to deny them coverage because of the interim rules. *See* JA 358:14-20; *see also* JA 358:21-360:14. Nor could the Commonwealth's other witnesses identify any women who had lost

coverage because of the interim rules. *See* JA 257:3-258:10 (Weisman); JA 304:7-15 (Butts).

2. Even assuming that a Pennsylvania employer will use the expanded exemption and cease providing coverage that it previously provided, Pennsylvania does not identify 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 an entity's sincerely held religious or moral objections. 82 Fed. Reg. at 47,809; *see also* 82 Fed. Reg. at 47,850. That means that an employer must still provide coverage for those contraceptives to which it does not object. *See* 82 Fed. Reg. at 47,809. Many of the employers that challenged the mandate (and 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. Pennsylvania merely speculates that an employer that uses the exemption will choose not to cover the contraceptive method that a particular employee would otherwise choose. Moreover, women covered by plans that cease providing coverage of all or some contraceptive

services may share the entity's religious or moral objections to such coverage.

3. Even assuming that Pennsylvania women will lose coverage of their chosen contraceptive method, Pennsylvania fails to demonstrate economic injury as a result. A woman who loses coverage of her chosen contraceptive method through her employer may still have access to such coverage through a spouse's (or parent's) plan. Or she may otherwise be able to pay out of pocket for contraceptive services and thus may not seek, or be eligible for, services from a state-funded program. Because Pennsylvania has not identified a particular woman who will lose coverage, it is wholly speculative that Pennsylvania's alleged fiscal injury will ever materialize.

Contrary to the district court's suggestion (JA 21), the speculative nature of Pennsylvania's claims is reflected in its own declarations. For instance, Pennsylvania's Executive Deputy Insurance Commissioner stated only that "[t]he Department [of Insurance] *anticipates* that women who lose contraceptive coverage through their employer's plan may seek contraceptive coverage from other sources, including state-funded programs, *or face the financial burden of paying for the full cost*

of contraceptives themselves." JA 144 ¶ 15 (emphases added). Likewise, the Acting Executive Secretary for the Pennsylvania Department of Human Services declared that "[i]t is *not unreasonable to expect* that women who do not receive contraceptive care from their employers or private insurance will turn to government-funded programs . . . *to the extent they are eligible for these programs*." JA 150-151 ¶ 23 (emphases added). But neither declarant identified any women who are likely to lose coverage, or offered a basis for concluding that any such women would in fact be eligible for state-funded programs.

4. Relying almost entirely on the agencies' estimate that approximately 31,700 women nationwide could lose contraceptive coverage and the agencies' observation that state programs provide free or subsidized contraceptives for low-income women, the district court asserted that Pennsylvania "need not sit idly by and wait for fiscal harm to befall it." JA 20 (citing 82 Fed. Reg. at 47,803, 47,821). But the agencies' analysis alone does not show that it is likely rather than inherently speculative that (1) any of the women who could lose contraceptive coverage reside in Pennsylvania; (2) any such Pennsylvania women would wish to use the particular contraceptive

method to which their employer objects; and (3) any of those Pennsylvania women would seek and qualify for financial assistance from the Commonwealth. Future injury must be "certainly impending," not "conjectural or hypothetical." *Lujan*, 504 U.S. at 560, 567 n.3 (cleaned up).

B. Pennsylvania's Status as a Sovereign State Does Not Alter the Standing Analysis

1. Pennsylvania argued below that it also "has *parens patriae* standing based on its quasi-sovereign interest in protecting the health and well-being of its residents." Pl.'s Opp'n to Mot. to Dismiss at 4, dkt. no. 37. The district court declined to reach this rationale (JA 23), and this Court should reject it as foreclosed by precedent.

The Supreme Court has long held that "[a] State does not have standing as *parens patriae* to bring an action against the Federal Government." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982). In other words, "a state may not attempt as parens patriae to enforce rights of its citizens 'in respect of their relations with the Federal Government.'" *Pennsylvania v. Porter*, 659 F.2d 306, 317 (3d Cir. 1981) (en banc) (quoting *Massachusetts v. Mellon*,

262 U.S. 447, 486 (1923)). That is "no part of [a State's] duty or power," because the citizens of a State are also citizens of the United States, and "it is the United States, and not the state, which represents them as parens patriae, when such representation becomes appropriate." *Mellon*, 262 U.S. at 485-86.

Massachusetts v. EPA, 549 U.S. 497 (2007), is not to the contrary. There, the Supreme Court concluded that Massachusetts had standing to challenge the EPA's decision not to regulate greenhouse-gas emissions. But in finding standing, the Court did not invoke Massachusetts's *parens patriae* interests—*i.e.*, its interests in protecting its citizens' well-being. Rather, the Court relied on Massachusetts's own interests in protecting its sovereign territory. *Id.* at 522; *see also Center for Biological Diversity v. U.S. Dep't of the Interior*, 563 F.3d 466, 476 (D.C. Cir. 2009) (observing that Massachusetts was suing in its individual interest).

In any event, even if a State could challenge the interim rules in its *parens patriae* capacity, Pennsylvania has not demonstrated standing to do so here. As discussed, Pennsylvania has not shown any injury to its residents traceable to the interim rules: it has not

identified any Pennsylvania employers that will use the expanded exemption, let alone a woman who would be adversely affected by such an employer's decision.

2. Contrary to the district court's conclusion (JA 16-19), Pennsylvania cannot overcome these obstacles to standing by invoking the "special solicitude" for States referred to in *Massachusetts*, 549 U.S. at 520. To begin, "special solicitude" would be of no help to Pennsylvania, as it does not alter the requirement to demonstrate a concrete injury. Indeed, in *Massachusetts*, there was no dispute that the State was *already* being injured—"rising seas ha[d] already begun to swallow Massachusetts' coastal land." *Id.* at 522; *see also Delaware Dep't of Nat. Res. & Envtl. Control v. FERC*, 558 F.3d 575, 579 n.6 (D.C. Cir. 2009) ("This special solicitude does *not* eliminate the state petitioner's obligation to establish a concrete injury, as Justice Stevens' opinion amply indicates."). As discussed, Pennsylvania has not demonstrated injury to its fisc or to the well-being of its residents, as the Commonwealth has not even identified a single woman who is likely to lose contraceptive coverage she wants.

In any event, Pennsylvania has not asserted the sort of sovereign interest that warrants special solicitude. In *Massachusetts*, the State asserted an injury akin to the injury that would occur if a contiguous State redrew its boundaries to assert dominion over part of Massachusetts's territory: Massachusetts alleged that rising seas would "lead to the loss of [its] sovereign territory." 549 U.S. at 523 n.21. Such a loss of territory would mean the loss of Massachusetts's ability to regulate conduct—either because Massachusetts has no jurisdiction over adjacent water or because that loss of territory would move inland the outer boundaries of Massachusetts's jurisdiction over adjacent water (*e.g.*, if Massachusetts's jurisdiction extends a certain distance from the coastline).

The special solicitude afforded Massachusetts should not be extended to the type of injury that is asserted here—whether the alleged economic injury asserted directly by Pennsylvania or the alleged injury to the well-being of its residents asserted by Pennsylvania in its *parens patriae* capacity. The standing doctrine is built on separation-of-powers principles and "concern about the proper—and properly limited—role of the courts in a democratic society." *Allen v. Wright*, 468

U.S. 737, 750, 752 (1984). These concerns apply with special force where, as here, the actions of one of the branches of the government are being challenged, *see Raines v. Byrd*, 521 U.S. 811, 819-20 (1997), and thus, in the absence of an overriding sovereign interest—such as the interest a State has in its own territorial boundaries—the Supreme Court's "standing inquiry has been especially rigorous," *id.* at 819.[3]

II. The Eastern District of Pennsylvania Is Not the Proper Venue for This Action

The district court ignored our venue objection. But neither of the bases for venue that the Commonwealth asserted in its complaint (JA 87 ¶ 26) supports bringing this action in the Eastern District of Pennsylvania.

1. Venue does not lie under 28 U.S.C. § 1391(e)(1)(C). That subparagraph permits official-capacity suits against a federal agency or officer to be brought in a district where "the plaintiff resides." *Id.* A non-

[3] That *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), was affirmed by an equally divided Supreme Court does not render that decision's analysis of state standing controlling here. Such affirmances are not precedential, including on standing. *Cf. American Elec. Power Co. v. Connecticut*, 564 U.S. 410, 420 (2011). Indeed, any implicit conclusion on standing is at most a drive-by, and thus non-precedential, jurisdictional ruling.

natural plaintiff (including a State) is "deemed to reside . . . *only* in *the* judicial district in which it maintains its *principal* place of business." *Id.* § 1391(c)(2) (emphases 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." 14D Wright & Miller, *Federal Practice and Procedure* § 3805 (4th ed.); *cf. In re BigCommerce, Inc.*, 890 F.3d 978, 982 (Fed. Cir. 2018) ("A plain reading of 'the judicial district' speaks to venue in only one particular judicial district in the state.").

The Commonwealth of Pennsylvania resides in the Middle District of Pennsylvania because that is "*the* judicial district" in which its "principal place of business"—Harrisburg—is located. Harrisburg is the state capital, it is where the Pennsylvania legislature sits, and it is where the Governor's primary office and official residence, as well as numerous state offices, are located. *See*, *e.g., Stanton-Negley Drug Co. v. Pennsylvania Dep't of Pub. Welfare*, No. 07-1309, 2008 WL 1881894 (W.D. Pa. Apr. 24, 2008) (suits against Commonwealth agencies or officials may be brought only in the Middle District of Pennsylvania).

Pennsylvania's reliance on *Alabama v. U.S. Army Corps of Engineers*, 382 F. Supp. 2d 1301 (N.D. Ala. 2005), is misplaced. That case relied on the "absence of authority" on the issue to conclude, on the basis of "common sense," 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), without addressing where a plaintiff such as a State "resides." The current statute now provides the very authority the *Alabama* court found lacking, and makes clear that a State resides only in its principal place of business.

2. Venue also does not lie under 28 U.S.C. § 1391(e)(1)(B). That subparagraph authorizes venue where "a substantial part of the events or omissions giving rise to the claim occurred." *Id.* Pennsylvania facially challenges two rules that it alleges were improperly issued by federal agencies. The only "events or omissions giving rise to [Pennsylvania's] claim" occurred in Washington, D.C., when the agencies promulgated the rules at their headquarters. *See, e.g.*, *Perkins v. Snyder*, No. 94-4785, 1994 WL 530045 (E.D. Pa. Sept. 2, 1994) (events giving rise to

claim occurred in state capital, where plaintiff challenged statewide policies and actions of policymakers).

That the *effects* of the rules may be felt in the Eastern District of Pennsylvania does not make venue proper there. Section 1391(e)(1)(B) does not identify the place of alleged harm as a permissible venue. That provision "require[s] courts to focus on the relevant activities of the defendant, not the plaintiff." *Woodke v. Dahm*, 70 F.3d 983, 985 (8th Cir. 1995). Thus in *Cottman Transmission Systems, Inc. v. Martino*, 36 F.3d 291 (3d Cir. 1994), this Court rejected the assertion of venue where the plaintiff "suffer[ed] injury" and concluded that venue lay where the defendant's omissions (that caused the injury) occurred. *Id.* at 295-96; *see also Leroy v. Great W. United Corp.*, 443 U.S. 173, 186 (1979) (rejecting reasoning, under prior version of statute, that "claim arose" where "statute had its impact on [plaintiff]").[4]

[4] This Court has recognized that *Leroy* "still retains viability" even though it was decided before the 1990 amendment adopting the current statutory language. *Cottman*, 36 F.3d at 294.

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

The APA ordinarily 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). But the APA also recognizes that Congress may modify that requirement if it does so "expressly." *Id.* § 559. Moreover, the APA allows an agency to depart from the usual notice-and-comment requirement for "good cause." *Id.* § 553(b). Both exceptions apply here.

A. Congress Expressly Authorized the Agencies to Issue Interim Final Rules

1. The Secretaries of the three agencies are expressly permitted by law to promulgate "interim final rules" to administer the statutory provisions that 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, 29 U.S.C. § 1191c) and the Internal Revenue Code (section 9833, 26 U.S.C. § 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)]."[5] 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.[6] Indeed, the agencies expressly relied on this statutory authority to issue interim final rules relating to the contraceptive-coverage mandate in 2010, 2011, and 2014. *See*

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[5] 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.

[6] *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); 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).

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 discretion to depart from normal notice-and-comment requirements in promulgating the rules at issue here. While Congress must act "expressly" to authorize departure from the APA's notice-and-comment requirement, 5 U.S.C. § 559, 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) (cleaned up). 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) (cleaned up).

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 (finding express congressional intent to allow departure from notice-and-comment requirement where statute authorized "not a

proposed rule, but an 'interim final rule'"); *Methodist Hosp. of Sacramento v. Shalala*, 38 F.3d 1225, 1237 (D.C. Cir. 1994) (statute authorizing issuance of interim final rules followed by opportunity for comment expressed Congress's "clear intent" that notice-and-comment procedures "need not be followed"). "Interim final rule" is a term of art that refers to rules issued without prior notice and comment, *see* Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 Admin. L. Rev. 703, 703 (1999), and failing to construe it as waiving the APA's notice-and-comment requirement would render the term superfluous, especially where, as here, the statutes at issue separately authorize the agencies to promulgate regulations.

Moreover, 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 lack 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 need only have reviewed the Secretaries' determination of "appropriate[ness]" required by these statutes, not the Secretaries' additional finding of "good cause" under the APA. And while neither determination was "arbitrary [and] capricious" under the APA, 5 U.S.C. § 706, the Secretaries' authority is especially clear if the standard for issuing these interim final rules is merely "appropriate" rather than "good cause." *See infra* Pt. III.B.

2. The district court (JA 28) found the statutory language insufficiently clear to demonstrate congressional intent to dispense with notice and comment absent good cause. But the court's analysis 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 (cleaned up). 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). Indeed, at no point did the court or Pennsylvania offer any response to this objection.

The district court (JA 28) deemed *Asiana Airlines* and *Methodist Hospital* inapposite because the statutes at issue there *commanded* the issuance of interim final rules, whereas the statutes here provide *discretion* to do so. But the D.C. Circuit made no such distinction in either of those cases. Moreover, nothing in § 559's text or purpose suggests that Congress may expressly authorize departure from APA notice-and-comment procedures only by *requiring* such a departure, and it would be superfluous to provide discretion merely to issue interim final rules consistent with the APA, as the APA already confers that discretion. Nor was the fact that "Congress imposed an expeditious

timetable on the agencies in issuing the IFRs which justified bypassing notice and comment," JA 29 n.7, necessary to the D.C. Circuit's findings of express congressional intent to displace APA notice-and-comment procedures in those cases. *See Asiana Airlines*, 134 F.3d at 395; *Methodist Hosp.*, 38 F.3d at 1237. Just as the timetables there expressly departed from the APA's timetable, the "appropriate" standard here for interim final rules expressly departs from the APA's "good cause" standard.

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 expressly authorize them to depart from the APA's notice-and-comment requirements, 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).

a. Here, 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.*

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

In response to *Zubik*, the agencies issued a request for information, *see* 81 Fed. Reg. 47,741 (Jul. 22, 2016), but despite receiving over 54,000 comments, 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.

Given this unsustainable state of affairs and the agencies' determination that "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, good cause existed to bypass the normal notice-and-comment requirements. In particular, 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 [the

agencies'] regulations are consistent with any approach [they] have taken in resolving certain litigation 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. *See Philadelphia Citizens in Action v. Schweiker*, 669 F.2d 877, 881 (3d Cir. 1982) (noting that notice and comment "[is] not required inexorably or inflexibly in situations where [it is] unnecessary or even counter-productive"). Indeed, in *Service Employees International Union, Local 102 v. County of San Diego*, 60 F.3d 1346 (9th Cir. 1994), 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. Similar circumstances, coupled with the agencies' own conclusion that they were not complying with their statutory obligations, provides ample support for the good-cause determination here.

b. For similar reasons, the agencies also had good cause to issue the moral exemption as an interim final rule. There too, the agencies

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. In concluding that the agencies lacked good cause to issue these interim rules, the district court emphasized (JA 30) that "urgency alone [is] sufficient [to provide good cause] only when a deadline imposed by Congress, the executive, or the judiciary requires action in a timespan that is too short to provide a notice and comment period." *United States v. Reynolds*, 710 F.3d 498, 511 (3d Cir. 2013). Unlike in *Reynolds*, however, the agencies here are not relying on "urgency alone," or the need to eliminate "*any* possible uncertainty" regarding the existing law. *Id.* (emphasis added).

Rather, as noted, the agencies issued these interim rules in response to (1) conflicting court decisions regarding the legality of the accommodation; (2) an inability to resolve the issues presented by those cases, despite more than 54,000 public comments on that question; and (3) the need to protect objecting employers that were not already protected by court injunctions from the threat of crippling civil penalties for following their religious and moral precepts. That satisfies *Reynolds*'s requirement of "some statement of facts" demonstrating the potential for "serious harm," and is far from a mere concern about "[u]rgency for urgency's sake." 710 F.3d at 512.

IV. The Agencies Had Statutory Authority to Issue the Religious and Moral Exemptions

A. The ACA Gives the Agencies Discretion to Extend and Modify Exemptions for Any Contraceptive-Coverage Mandate

1. The ACA grants HRSA, and in turn the agencies, significant discretion to shape the content and scope of any preventive-services guidelines adopted pursuant to § 300gg-13(a)(4). The ACA does not specify the types of preventive services that must be included in such guidelines. Instead, as relevant here, it provides only that, "with respect to women," coverage must include "such additional preventive care and

screenings . . . as provided for in comprehensive guidelines supported by [HRSA]." 42 U.S.C. § 300gg-13(a)(4). Several textual features of § 300gg-13(a) demonstrate that this provision grants HRSA broad discretionary authority.

First, unlike the other paragraphs of the statute, which require preventive-services coverage based on, *inter alia*, "current recommendations of the United States Preventive Services Task Force," recommendations "in effect . . . from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention," or "the comprehensive guidelines" that HRSA had already issued with respect to preventive care for children, the paragraph concerning preventive care for women refers to "comprehensive guidelines" that did not exist at the time. *Compare* 42 U.S.C. § 300gg-13(a)(1), (2), (3), *with id.* § 300gg-13(a)(4). That paragraph thus necessarily delegated the content of the guidelines to HRSA.

Second, nothing in the statute mandated that the guidelines include contraception, let alone for all types of employers with covered plans. On the contrary, the statute provides only for coverage of preventive services "as provided for in comprehensive guidelines

supported by [HRSA] for purposes of this paragraph." 42 U.S.C. § 300gg-13(a)(4). The use of the phrase "for purposes of this paragraph" makes clear that HRSA should consider the mandate in shaping the guidelines, and the use of the phrase "*as* provided for" suggests that HRSA may define not only the services to be covered under that mandate, but also the manner or reach of that coverage. That suggestion is further reinforced by the absence of the words "evidence-based" or "evidence-informed" in this subsection, as compared with § 300gg-13(a)(1), (3), which indicates that Congress authorized HRSA to consider factors beyond the scientific evidence in deciding whether to support a coverage mandate for particular preventive services.

Accordingly, § 300gg-13(a)(4) must be understood as a positive grant of authority for HRSA to develop the women's preventive-services guidelines and for the agencies, as the administering agencies of the applicable statutes, to shape that development. *See* 26 U.S.C. § 9833; 29 U.S.C. § 1191c; 42 U.S.C. § 300gg-92. That is especially true for HHS, as HRSA is a component of HHS that was unilaterally created by the agency and is subject to the agency's general supervision. *See* 47 Fed. Reg. 38,409 (Aug. 31, 1982). The text of § 300gg-13(a)(4) thus plainly

authorized HRSA to recognize an exemption from otherwise-applicable guidelines that it adopts, and nothing in the ACA prevents HHS and the other agencies from directing that HRSA recognize such an exemption. Indeed, since their first rulemaking on this subject in 2011, the agencies have consistently interpreted the broad delegation to HRSA in § 300gg-13(a)(4) as including the power to reconcile the ACA's preventive-services requirement with sincerely held views of conscience on the sensitive subject of contraceptive coverage—namely, by exempting churches and their integrated auxiliaries from the contraceptive-coverage mandate. *See* 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011).

In light of this statutory and regulatory backdrop, the agencies' exercise of authority to expand the exemption is, at the very least, a reasonable construction of the statute and thus entitled to deference. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

2. Despite conceding that § 300gg-13(a) "does not contain language specifically precluding the [agencies] from developing exemptions," the district court held that the agencies were precluded

from doing so by "the mandatory language" stating that covered health plans "'shall'" cover (with respect to women) such additional preventive care as provided for in the HRSA guidelines. JA 38 (quoting § 300gg-13(a)(4)). But while the term "shall" imposes a mandatory obligation *on covered plans* to cover the preventive services that Congress authorized HRSA to specify, it does not limit *HRSA's* authority (which is ultimately the authority of HHS and the other agencies) to decide what preventive services must be covered and by what categories of regulated entities.

Any contrary conclusion would mean that the government likewise lacked (and continues to lack) the statutory authority it has consistently asserted to create the exemption for churches. Although the district court responded that the church exemption is "required under RFRA and the First Amendment's free exercise protections," JA 42, that attempt to evade the problem fails. The existing exemption, which applies automatically to all churches whether or not they have even asserted a religious objection to contraception, *see* 45 C.F.R. § 147.141(a), is not tailored to any plausible free-exercise concerns. And as for RFRA, the court provided no explanation how RFRA could require the church exemption but not the expanded religious exemption

in the interim rules, given that the accommodation is no less an available alternative for the former than the latter. *See infra* pp. 62-63. Notably, although the district court purported to ground its position in what "the Supreme Court has held," it cited *a dissent*. *Compare* JA 42, *with Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2794 & n.14 (2014) (Ginsburg, J., dissenting) (discussing inapposite cases). Likewise, while the district court claimed that "the Third Circuit [has] confirmed that the Original Religious Exemption was plainly required by federal and constitutional law," JA 42, the cited case said only that such "accommodations may be extended" "[e]ven when . . . not strictly required," *Real Alternatives, Inc. v. Secretary, HHS*, 867 F.3d 338, 352 (3d Cir. 2017).

The district court also wrongly concluded (JA 38) that Congress's inclusion elsewhere of an exemption from the preventive-services requirement for grandfathered plans demonstrates an intent to preclude the agencies from recognizing other exemptions. The *expressio unius* canon applies "only when 'circumstances support[] a sensible inference that the term left out must have been meant to be excluded.'" *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 940 (2017). The ACA's

grandfathering exemption was "designed to ease the transition of the healthcare industry into the reforms established by the [ACA] by allowing for gradual implementation of reforms through a reasonable grandfathering rule." 75 Fed. Reg. 34,538, 34,541 (June 17, 2010). Congress's decision to itself create an exemption for covered health plans in light of that goal in no way suggests that Congress intended to foreclose the agencies from recognizing other exemptions, let alone exemptions like the church exemption that accommodate conscience objections to providing contraceptive coverage that did not need to be included in the HRSA guidelines at all.

Finally, the district court's concerns about the interim rules' supposed "remarkable breadth," JA 36, are also unfounded. As the agencies observed, even before the ACA, "the vast majority of entities already covered contraception." 82 Fed. Reg. at 47,819. Moreover, employers have "no significant financial incentive" not to comply with the mandate, since compliance "is cost-neutral," and noncompliance with the mandate in the past had led to "serious public criticism and in some cases organized boycotts." *Id.* The interim rules will at most only moderately expand the number of employers that use the exemption.

See id. at 47,816-24; 82 Fed. Reg. at 47,856-59. And indeed, Pennsylvania has yet to identify even a single resident employer that plans to use the exemption to deprive employees of coverage they received before the issuance of the interim rules.

B. RFRA Both Authorizes and Requires the Religious Exemption

1. Even apart from § 300gg-13(a)(4), RFRA independently authorizes the religious exemption. RFRA prohibits the government from "substantially burden[ing] a person's exercise of religion" unless the application of the burden to that person is "the least restrictive means" of furthering a "compelling governmental interest." 42 U.S.C. § 2000bb-1(b). Under *Hobby Lobby*, RFRA requires the government to eliminate the substantial burden imposed by the contraceptive-coverage mandate. The expanded religious exemption is a permissible—and in the case of some objecting employers, required—means of doing so.

In *Hobby Lobby*, the Supreme Court held that the contraceptive-coverage mandate, standing alone, "imposes a substantial burden" on objecting employers. 134 S. Ct. at 2775-78. And the Court further held that application of the mandate to objecting employers was not the least

restrictive means of furthering any compelling governmental interest, because the accommodation would have satisfied the objecting employers' religious concerns in that case. *See id.* at 2780-83. But the Court did not decide whether the accommodation would satisfy RFRA for all religious claimants; nor did it suggest that the accommodation is the only permissible way for the government to comply with RFRA and the ACA, even assuming the existence of a compelling governmental interest. *See id.* at 2782. Moreover, as the agencies noted, other lawsuits have shown that "many religious entities have objections to complying with the accommodation based on their sincere religious beliefs." 82 Fed. Reg. at 47,806.

The agencies reasonably decided to adopt the religious exemption to satisfy their RFRA obligation to eliminate the substantial burden imposed by the mandate. Although RFRA prohibits the government from substantially burdening a person's religious exercise where doing so is not the least restrictive means of furthering a compelling interest—as is the case with the contraceptive-coverage mandate, per *Hobby Lobby*—RFRA does *not prescribe* the remedy by which the government must eliminate that burden. The prior administration *chose*

to attempt to do so through the complex accommodation it created, but nothing in RFRA compelled that novel choice or prohibits the current administration from employing the more straightforward choice of an exemption—much like the existing and unchallenged exemption for churches. Indeed, if the agencies had simply adopted an exemption from the outset—as they did for churches—no one could reasonably have argued that doing so was improper because the agencies should have invented the accommodation instead. Neither RFRA nor the ACA compels a different result here based merely on path dependence.

The agencies' choice to adopt an exemption in addition to the accommodation is particularly reasonable given the existing litigation over whether the accommodation violates RFRA. *See* 82 Fed. Reg. at 47,798; *see also Ricci v. DeStefano*, 557 U.S. 557, 585 (2009) (holding that an employer need only have a strong basis to believe that an employment practice violates Title VII's disparate-impact ban in order to take certain types of remedial action that would otherwise violate Title VII's disparate-treatment ban).

To be sure, if providing an exemption for an objecting religious employer would prevent the contraceptive-coverage mandate from

achieving a compelling governmental interest as to that employer, then RFRA would not authorize that exemption. *See Hobby Lobby*, 134 S. Ct. at 2779-80. But the agencies expressly found that application of the mandate to objecting entities neither serves a compelling governmental interest nor is narrowly tailored to any such interest. That is so for multiple reasons, including: that Congress did not mandate coverage of contraception at all; that the preventive-services requirement was not made applicable to "grandfathered plans"; that the previous religious exemption excused churches and their related auxiliaries, and also effectively exempted entities that participated in self-insured church plans; that multiple federal, state, and local programs provide free or subsidized contraceptives for low-income women; and that entities bringing legal challenges to the mandate have been willing to provide coverage of some, though not all, contraceptives. *See* 82 Fed. Reg. at 47,800-06. Accordingly, the agencies reasonably exercised their discretion in adopting the exemption as a valid means of complying with their obligation under RFRA to eliminate the substantial burden imposed by the contraceptive-coverage mandate, whether or not the

accommodation is a valid means of compliance. *See* 82 Fed. Reg. at 47,800, 47,806.

Of course, that is especially true because the accommodation *does* violate RFRA for at least some employers, by using plans that they themselves sponsor to provide contraceptive coverage that they object to on religious grounds, which they sincerely believe makes them complicit in providing such coverage. *See* 82 Fed. Reg. at 47,800. In light of that sincere religious belief, forcing objecting employers to use the accommodation plainly imposes a substantial burden under *Hobby Lobby*. *See Sharpe Holdings, Inc. v. HHS*, 801 F.3d 927, 939-43 (8th Cir. 2015), *vacated and remanded sub nom. HHS v. CNS Int'l Ministries*, 136 S. Ct. 2006 (2016) (mem.). Indeed, after extensive study, the previous administration determined that it could identify no means short of an exemption that would resolve all religious objections, *see supra* p. 13. It thus was not just reasonable, but required, for the agencies to satisfy their RFRA obligations concerning the contraceptive-coverage mandate by providing an exemption rather than just the accommodation.

2. In holding that RFRA does not authorize the religious exemption, the district court reasoned that the religious exemption is "not required under RFRA" because the accommodation does not "impose[] a substantial burden." JA 42 & n.15; *accord id.* at 41. This reasoning is flawed for several reasons.

Most fundamentally, the court provided no explanation why the exemption must be the "required" means under RFRA of eliminating the substantial burden imposed by the contraceptive-coverage mandate, rather than simply a *permissible* means of doing so. As discussed, nothing in law or logic compelled the agencies to try to satisfy RFRA by choosing the accommodation rather than the exemption in the first place, and there likewise is no reason the agencies cannot now make a different choice to satisfy their RFRA obligations.[7]

Indeed, under the district court's reasoning, it is not apparent why the accommodation itself would have been statutorily authorized: the

[7] The district court appears (JA 42 n.15) to have confused (1) the inapposite question whether the agencies are entitled to deference in their *interpretation* of RFRA's obligations with (2) the critical question whether they have discretion in choosing *among means to satisfy* their RFRA obligation to eliminate the substantial burden imposed by the contraceptive-coverage mandate.

agencies had no greater authority under § 300gg-13(a)(4) to deviate from the contraceptive-coverage mandate's requirements by creating the accommodation, and the accommodation too was not "required" by RFRA in the sense that there was no other means of eliminating the substantial burden imposed by the contraceptive-coverage mandate. And conversely, under the district court's reasoning, the purported validity of the accommodation would imply that the church exemption would not be authorized by RFRA, because it too would not be "required."

In any event, the district court was wrong to conclude that the accommodation does not impose a substantial burden on religious exercise. Some employers "have a sincere religious belief that their participation in the accommodation process makes them morally and spiritually complicit in providing abortifacient coverage," because their "self-certification" is necessary to trigger "the provision of objectionable coverage through their group health plans." *Sharpe*, 801 F.3d at 942.

Although a panel of this Court concluded that this does not constitute a substantial burden, *see Geneva College v. Secretary, HHS*, 778 F.3d 422 (3d Cir. 2015), the Supreme Court vacated that decision,

Zubik, 136 S. Ct. at 1561. The district court emphasized that *Zubik* vacated *Geneva College* "on other grounds," JA 41 n. 14, but this Court has correctly recognized that "*Geneva* is no longer controlling," *Real Alternatives*, 867 F.3d at 356 n.18. And while *Real Alternatives* expressed agreement with *Geneva College*'s substantial-burden holding, *id.*, that was *dicta*: the question presented in *Real Alternatives* was whether the contraceptive-coverage mandate imposed a substantial burden on *employees*, *id.* at 343, and the panel held that it did not for reasons that do not apply to *employers*, *id.* at 362 (noting a "material difference between employers arranging or providing an insurance plan that includes contraception coverage . . . and becoming eligible to apply for reimbursement for a service of one's choosing").[8]

V. Pennsylvania Does 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,

[8] To the extent that *Real Alternatives* or *Geneva College* is nevertheless deemed to foreclose any of our arguments, we preserve those arguments for possible en banc or Supreme Court review.

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 government required reversal of preliminary injunction, even where plaintiffs showed irreparable harm, and independent of likelihood of success on the merits).[9]

Pennsylvania's speculative allegations of injury are not even sufficient to establish standing, *see supra* Pt. I, let alone the kind of likely, imminent, and irreparable harm necessary to support a preliminary injunction. *See Winter*, 555 U.S. at 22 (irreparable injury must be "likely" in the absence of an injunction, not merely "possibl[e]").

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 a substantial

[9] 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).

interest in protecting religious liberty and conscience. *See Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) (allegation of RFRA violation satisfies irreparable-harm requirement); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) (same). Far from "merely delay[ing] [the agencies'] preferred regulatory outcome," JA 49, the preliminary injunction here requires the agencies to maintain rules that they believe, and that some courts have held, substantially burden employers with sincere, conscience-based objections to contraceptive coverage.

These institutional injuries to the government and conscience injuries to employers far outweigh the speculative economic injuries to Pennsylvania and its residents that may flow from the inability to conscript employers into paying for employees' contraceptive coverage. The Supreme Court confirmed the relevance and weight of such conscience injuries when on four occasions it took the extraordinary step of issuing interim injunctions to ensure that objecting organizations would not be required to violate their sincere religious beliefs while they challenged the accommodation, despite expressing no view on whether the accommodation actually violated RFRA. *See Zubik v. Burwell*, 135 S. Ct. 2924 (2015); *Wheaton Coll. v. Burwell*, 134 S. Ct.

2806, 2807 (2014); *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.

The district court erred in reasoning that Congress "already struck the balance" in Pennsylvania's favor in § 300gg-13(a)(4). JA 48. That analysis wrongly assumes that the agencies lacked statutory authority to issue these rules and disregards the agencies' uncontested statutory authority to issue the prior religious exemption and accommodation.

The court also erred in concluding (JA 49) that the public interest supports enjoining the rules. No one disputes that some employers have sincere conscience objections to complying with the accommodation. Regardless of whether those objections permit (if not require) the expanded exemption on the merits, the public interest at least requires recognizing that the exemptions protect important religious-liberty and moral-conscience interests that the prior rules left unguarded—which led to extensive unresolved litigation, pressure from courts, and no solution (despite the solicitation of comment on the very issue) that would satisfy those objections and provide employees with cost-free contraceptive coverage. *See* 82 Fed. Reg. at 47,814.

VI. This Court Should Not Construe the Preliminary Injunction as Applying Nationwide

The preliminary injunction enjoins the agencies from enforcing the interim rules. The order does not expressly state whether the injunction applies nationwide; nor did the district court make any findings to justify application of the injunction beyond Pennsylvania. If this Court affirms the injunction, it should hold that the injunction goes no further than redressing any cognizable injuries to Pennsylvania.

Under Article III, 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). The Supreme Court recently applied this principle to hold that a set of voters had not demonstrated standing to challenge alleged statewide partisan gerrymandering beyond the legislative districts in which they resided, reasoning that a "plaintiff's remedy must be limited to the inadequacy that produced his injury in fact" and that "the Court's constitutionally prescribed role is to vindicate the individual rights of the people appearing before it." *Gill v. Whitford*, 138 S. Ct. 1916, 1930 (2018) (cleaned up). This Court likewise has recognized that a plaintiff lacks "standing to seek an injunction"

beyond what is necessary to "provide [it] full relief." *Ameron, Inc. v. U.S. Army Corps of Eng'rs*, 787 F.2d 875, 888 (3d Cir. 1986).

Equitable principles likewise require that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs" before the court. *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *see also Meyer v. CUNA Mut. Ins. Soc'y*, 648 F.3d 154, 170-71 (3d Cir. 2011). The equitable jurisdiction of federal courts is grounded in historical practice, *see Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999), yet nationwide injunctions are a modern invention, *see* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 428-37 (2017).

Moreover, nationwide injunctions "take a toll on the federal court system—preventing legal questions from percolating through the federal courts, encouraging forum shopping, and making every case a national emergency for the courts and for the Executive Branch." *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring). That concern has already materialized in the context of challenges to the interim rules. *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).

Nationwide injunctions also create an inequitable "one-way-ratchet" under which any prevailing party obtains relief on behalf of all others, but a victory by the government would not preclude other potential plaintiffs from "run[ning] off to the 93 other districts for more bites at the apple." *City of Chicago v. Sessions*, 888 F.3d 272, 298 (7th Cir. 2018) (Manion, J., concurring in the judgment and dissenting in part), *reh'g en banc granted*, Order of June 4, 2018 (vacating panel judgment "insofar as it sustained the district court's decision to extend preliminary relief nationwide"), *reh'g en banc vacated as moot*, Order of Aug. 10, 2018; *cf. United States v. Mendoza*, 464 U.S. 154, 158-62 (1984) (holding that nonparties to an adverse decision against the federal government may not invoke the decision to preclude the government from continuing to defend the issue in subsequent litigation). Indeed, this Court has repeatedly held that nonparty injunctions should not be used as an end-run around the class-action procedure. *Ameron*, 787 F.2d at 888; *Meyer*, 648 F.3d at 170.

That concern is fully actualized here, given another district court's rejection—on Article III standing grounds that cannot be reconciled with the district court's opinion below—of Massachusetts's challenge to the interim rules. *See Massachusetts v. HHS*, 301 F. Supp. 3d 248 (D. Mass. 2018), *appeal docketed*, No. 18-1514 (1st Cir. June 6, 2018). Construing the injunction here as applying nationwide would effectively grant Massachusetts the relief that the district court in Massachusetts refused to provide. This Court should reject that misguided practice and, at a minimum, hold that the injunction is limited to redressing only any cognizable, irreparable harm to Pennsylvania.

CONCLUSION

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

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COMBINED CERTIFICATIONS

1. Government counsel are not required to be members of the bar of this Court.

2. This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,996 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it has been prepared in 14-point Century Schoolbook, a proportionally spaced font.

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CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Third 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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