Nos. 17-3752, 18-1253, 19-1129, and 19-1189

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

COMMONWEALTH OF PENNSYLVANIA AND STATE OF NEW JERSEY,
Plaintiffs-Appellees,

v.

PRESIDENT, UNITED STATES OF AMERICA; SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; SECRETARY, U.S. DEPARTMENT OF THE TREASURY; AND SECRETARY, U.S. DEPARTMENT OF LABOR, *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 OF MASSACHUSETTS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, DISTRICT OF COLUMBIA, HAWAII, ILLINOIS, IOWA, MAINE, MARYLAND, MICHIGAN, MINNESOTA, NEVADA, NEW MEXICO, NEW YORK, NORTH CAROLINA, OREGON, RHODE ISLAND, VERMONT, VIRGINIA, AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF PENNSYLVANIA AND NEW JERSEY

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INTERESTS OF *AMICI*

The *Amici* States—Massachusetts, California, Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Michigan, Minnesota, Nevada, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, Virginia, and Washington—have compelling interests in protecting the health, wellbeing, and economic security of our residents. To promote these interests, the *Amici* States are committed to ensuring a strong and robust regulatory regime that makes contraception as widely available and affordable as possible. Access to contraception advances educational opportunity, workplace equality, and financial empowerment for women; improves the health of women and children; and reduces healthcare-related costs for individuals, families, and the States.

The Patient Protection and Affordable Care Act's ("ACA") contraceptive mandate plays a critical role in securing our residents' access to affordable contraception. Most women receive health care coverage through employer-sponsored health plans. The ACA requires employer-sponsored plans to provide comprehensive, no-cost coverage for contraceptive care and services. The *Amici* States have an interest in ensuring that, in implementing the contraceptive mandate, the defendant federal agencies ("Defendants") develop regulations that further women's health and equality and that do not impose unjustifiable costs on

the States. In addition, the *Amici* States have an interest in a fair and transparent federal regulatory process. The *Amici* States depend on federal agencies to follow proper rulemaking procedures designed to incorporate a broad array of interests—including those of state and local governments—before making important, and often complex, regulatory decisions.

The two Final Rules challenged in this case, which authorize employers and universities nationwide to prevent their employees and students from receiving the seamless access to contraceptive care and services guaranteed by the ACA, threaten each of these interests. Pursuant to Federal Rule of Appellate Procedure 29(a)(2), the *Amici* States submit this brief to explain why they will be injured by the Final Rules, and why this Court should affirm the District Court's issuance of a nationwide preliminary injunction barring enforcement of the Final Rules.[1]

SUMMARY OF THE ARGUMENT

Through this case, the Commonwealth of Pennsylvania and the State of New Jersey (the "Plaintiff States") seek to protect themselves, other States, and women

[1] Reflecting the *Amici* States' strong interests at issue here, a number of the *Amici* States are parties to related litigation challenging these rules. *See Commonwealth of Massachusetts v. Dep't of Health & Human Servs. et al.*, No. 18-1514 (1st Cir.); *State of California et al. v. Dep't of Health & Human Servs. et al.*, No. 17-5783 (N.D. Cal.), *appeals pending*, Nos. 19-15072, 19-15118, and 19-15150 (9th Cir.) (joining California as plaintiffs or proposed intervenor-plaintiffs are Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Maryland, Michigan, Minnesota, Nevada, New York, North Carolina, Oregon, Rhode Island, Vermont, Virginia, and Washington).

across the country from the harms that will result from Defendants' attempt to eviscerate provisions of the ACA that guarantee women equal access to preventive medical care. Specifically, Defendants have threatened access to contraceptive care and services by issuing two Final Rules (the "Rules") that authorize employers with religious or moral objections to contraception to block employees, students, and their dependents from receiving contraceptive coverage. *See Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act*, 83 Fed. Reg. 57536 (Nov. 15, 2018); *Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act*, 83 Fed. Reg. 57592 (Nov. 15, 2018).

The Rules have caused—and will continue to cause—significant harm to the States nationwide. The Rules will deprive hundreds of thousands of employees, students, and their dependents of contraceptive coverage, threatening the health and wellbeing of the States' residents and the economic and public health of the States generally. As a result, the States will be forced to expend millions of dollars to provide replacement contraceptive care and services for their residents.

Because the Rules threaten to injure women and States across the country, the District Court issued a nationwide preliminary injunction against implementation of the Rules while the case below is litigated. *Pennsylvania v. Trump*, 351 F. Supp. 3d 791, 830–35 (E.D. Pa. 2019) ("*Pennsylvania II*"). When,

as here, federal regulatory action is unlawful, courts typically invalidate the action in its entirety, and the District Court acted well within its discretion in awarding such preliminary relief here. Such relief is especially warranted in this case, as the court recognized, where the damage caused by the Rules will transcend state lines, and where a preliminary injunction limited in scope to Pennsylvania and New Jersey would not guarantee the Plaintiff States complete relief. This Court should therefore affirm the District Court's preliminary injunction.

ARGUMENT

I. States Across the Country Will Be Injured by the Final Rules.

The District Court correctly concluded that the Plaintiff States have Article III standing to challenge the Rules. *Pennsylvania II*, 351 F. Supp. 3d at 808; *accord Pennsylvania v. Trump*, 281 F. Supp. 3d 553, 567 (E.D. Pa. 2017) ("*Pennsylvania I*") (Pennsylvania's standing to challenge Interim Final Rules); *California v. Azar*, 911 F.3d 558, 571–73 (9th Cir. 2018) (same, for five other States). Like the Interim Final Rules ("IFRs") that preceded them, the Final Rules will cause actual, imminent, direct, and irreparable harm to the States' public fiscs. *Pennsylvania II*, 351 F. Supp. 3d at 827-8. And the Rules also threaten irreparable harms to the Plaintiff States' "clear interest in securing the health and well-being of women residents and limiting their costs for contraceptive services." *Id.* at 829. Moreover, the Plaintiff States' basis for Article III standing to challenge the Final

Rules now is even stronger than their standing when Defendants issued the IFRs in October 2017: Defendants have now determined that far *more* women will be harmed by the Final Rules than they had previously estimated. *See* 83 Fed. Reg. 57578-80. These irreparable harms are multifaceted—and nationwide.

A. The Rules Will Cause Women in Every State to Lose Contraceptive Coverage and Thereby Inflict Financial Injury on States Nationwide.

Across the country, the Final Rules will result in hundreds of thousands of employees and students, as well as their dependents, losing the comprehensive contraceptive coverage guaranteed by the ACA. Those losses, in turn, will impose direct financial harms on the States. Many women who lose contraceptive coverage as a result of the Rules will obtain replacement care and services through state-funded programs. Others, who are not able to obtain replacement coverage, may experience unintended pregnancies that impose additional costs on the States.

1. The Rules Will Cause Tens of Thousands of People to Lose Coverage.

Defendants' own analysis shows the breadth of the Rules' impact. According to Defendants' Regulatory Impact Analysis for the Final Rules (hereinafter, "the RIA"),[2] approximately three million people receive health

[2] The RIA is Defendants' official, legally mandated explanation of each Rule's anticipated costs, benefits, and broader effects. *See* 83 Fed. Reg. 57573. The RIAs contained in the Final Rules largely adopt the analysis contained in the IFRs,

insurance through employers and universities that have already asserted religious objections to providing coverage for contraceptive care and services under the ACA. *See* 83 Fed. Reg. 57575-78. And many more receive insurance through employers that will be newly eligible to invoke the expanded religious and moral exemptions provided by the Final Rules. *See, e.g.*, 82 Fed. Reg. 47792, 47823 (Oct. 13, 2017) (IFRs' comparison of the prevalence of religious and moral objections to contraception); 83 Fed. Reg. 57628 (Final Rules' acknowledgment that "uncertainty" concerning the prevalence of moral objections justifies higher estimates of the Rules' impact).

Out of these millions, Defendants estimate that between 70,515 ("lower-bound estimate") and 126,400 ("upper-bound estimate") women will lose employer-based coverage for their chosen method of contraception if the Final Rules go into effect. *See* 83 Fed. Reg. 57578, 57580, 57627-28. These figures include only "women whose contraceptive costs will be impacted by the expanded exemptions in these final rules." 83 Fed. Reg. 57578. Notably, they represent a significant increase from the estimates contained in the IFRs. In the IFRs, Defendants indicated that between 31,715 and 120,000 women were likely to lose coverage. *See* 82 Fed. Reg. 47821, 47823, 47858. The increase from the IFRs to

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except that Defendants have significantly increased their estimate of the number of women who will lose coverage as a result of the Rules. *See infra* at 11-12.

the Final Rules is largely attributable to the fact that, in the IFRs, Defendants underestimated the number of people receiving contraceptive coverage through the accommodation by approximately 2,000,000. *Compare* 82 Fed. Reg. 47821 (stating that 1,027,000 people "are covered in accommodated plans"), *with* 83 Fed. Reg. 57577 (stating that 2,907,000 people "were covered in plans using the accommodation under the previous regulations").

These figures offer a conservative snapshot of the Rules' direct and immediate effects. The actual number of women affected is likely to be "significantly higher," *Pennsylvania I*, 281 F. Supp. 3d at 582, because Defendants make a number of assumptions that create a "tendency toward underestimation." 83 Fed. Reg. 57581 n.112. For example, Defendants' estimates are based on the assumption that "approximately 43.6% of women of childbearing age use women's contraceptive methods covered by the [ACA]." 83 Fed. Reg. 57576.[3] The cited data, however, is an estimate of how many women of childbearing age report having used various contraceptive methods "in the past month."[4] Of course, over any period of time longer than a month, a higher, cumulative percentage of women will use these methods of contraception. *See* Guttmacher Institute, *supra* note 3

[3] The source cited for this claim is a Fact Sheet published by the Guttmacher Institute, *Contraceptive Use in the United States* (July 2018), https://www.guttmacher.org/fact-sheet/contraceptive-use-united-states. *See* 83 Fed. Reg. 57576 n.85.

[4] *See* Guttmacher Institute, *supra* note 3.

(while only approximately 15% of women have used birth control pills "in the past month," approximately 80% have used them ever).

The lower- and upper-bound estimates of the Final Rules' immediate effects are based on two different calculation methods. *See* 83 Fed. Reg. 57575-81. The upper-bound estimate—126,400 women—is based on nationwide survey data concerning the number of employers that excluded contraceptive coverage from their insurance plans in 2010, before the ACA went into effect. *See* 83 Fed. Reg. 57578-81; 82 Fed. Reg. 47821-24. Defendants use this data to produce an estimate of the number employers that will use the expanded moral and religious exemptions provided by the Rules. *See* 83 Fed. Reg. 57578-81; 82 Fed. Reg. 47821-24. Notably, Defendants assume that the number of women who will lose coverage as a result of the Rules will be only a small fraction of the number of women who were denied contraceptive coverage prior to the ACA. *See* 83 Fed. Reg. 57579 & n.102.

The lower-bound estimate—70,515—is based primarily on the number of employers that have previously asserted religious objections to providing contraceptive coverage under the ACA, either through litigation ("litigating employers") or by using the ACA's existing accommodation ("accommodated employers"). *See* 83 Fed. Reg. 57575-78; 82 Fed. Reg. 47815-21. Of these 70,515 women, only 15 are attributed to the new moral exemption. *See* 83 Fed. Reg.

57627. And Defendants do not know how many employers are actually using the existing accommodation; under the prior regulations, not all employers were required to provide notice to Defendants in order to use the accommodation, and many did not do so. *See* 83 Fed. Reg. 57576; 82 Fed. Reg. at 47817-18. For the purposes of the RIA, Defendants estimate that 209 employers have been using the accommodation. 83 Fed. Reg. 57576. This figure is taken from an estimate originally made by the Department of Health and Human Services in 2014, 82 Fed. Reg. at 47817, which it has characterized as "likely…[an] underestimate," 80 Fed. Reg. 41318, 41332 (July 14, 2015). Defendants' "uncertainty" about this low number was a basis for including the upper-bound estimate in the RIA. 83 Fed. Reg. 57628.[5]

Importantly, the figures provided in the RIA are adjusted for many factors that could affect employers' use of the expanded exemptions. For example, Defendants take into account the fact that some objecting employers will continue to use the ACA's existing accommodation—which provides seamless alternate coverage for contraception—rather than the expanded exemptions, *see, e.g.*, 83 Fed. Reg. 57575, 82 Fed. Reg. 47815; that some employers are covered by

[5] Unlike the lower bound, the upper-bound estimate accounts, at least to some extent, for the strong likelihood that additional employers other than those who have already objected to providing contraception coverage (via litigation or the ACA's existing religious accommodation) will make use of the expanded religious exemption and new moral exemption. *See* 83 Fed. Reg. 57578-81.

injunctions exempting them from the contraceptive mandate, 83 Fed. Reg. 57575-76, 82 Fed. Reg. 47818; and that some employers who choose to use the expanded exemptions will object to covering only a few contraceptive methods, 83 Fed. Reg. 57581, 82 Fed. Reg. 47823.

In sum, the RIA establishes that, at a minimum, tens of thousands of women who are currently using a method of contraception covered by the ACA will immediately lose their employer-sponsored coverage as a direct result of the Rules, should the Rules go into effect.

2. The Rules Will Have a Nationwide Impact.

The Rules will affect women across the country. As discussed, Defendants' more comprehensive (albeit conservative) analysis of the Rules' likely impact—that 126,400 women will lose coverage as a result of both the expanded moral and religious exemptions—is based on nationwide survey data. *See supra* at 13. And nothing in the Administrative Record suggests a basis to believe that women residing in any particular region or State will be peculiarly unaffected by the Rules.

Indeed, the Administrative Record itself demonstrates the Rules' nationwide impact. It identifies litigating and accommodated employers and universities that have already raised religious objections to providing contraceptive coverage under

the ACA. *See* Joint Appendix (J.A.) 350-83.[6] And it identifies the litigating employers and universities that Defendants expect will use the expanded religious exemption created by the Rules. *See id.* These litigating employers and universities are located in nearly every State in the country, including in Pennsylvania, New Jersey, and the *Amici* States:[7]

State	**Examples of Litigating Employers and Universities That Are Not Required by State Law to Provide Contraceptive Coverage, and That the Federal Defendants Expect to Drop Contraceptive Coverage Under the Expanded Exemptions**
Alabama	Hobby Lobby Stores, Inc.; Eternal World Television Network, Inc.
Arizona	Hobby Lobby Stores, Inc.
Arkansas	Hobby Lobby Stores, Inc.; Mardel
California	Hobby Lobby Stores, Inc.
Colorado	Hobby Lobby Stores, Inc.; Association of Christian Schools, International; Colorado Christian University; Mardel; Continuum Health Partnerships Inc.; Mountain States Health Properties LLC; Continuum Health Management LLC; CH-Greeley LLC; Family Talk
Connecticut	Hobby Lobby Stores, Inc.

[6] The cited portion of the Joint Appendix includes two spreadsheets that Defendants used to calculate the number of women likely to be affected by the Rules in the RIA. *See* J.A. 350-83. The RIA estimates that "6,400 women of childbearing age that use contraception covered by the Guidelines…will be affected by use of the expanded exemption among *litigating* entities." 83 Fed. Reg. 57577 (emphasis added). The record identifies the "litigating entities" included in this estimate. *See* J.A. 350-56.

[7] This table was compiled by using the spreadsheets in the Joint Appendix, *see supra* note 6; complaints filed in each case brought by litigating employers and universities; and publicly available information about employer and university locations. The chart is not exhaustive; for example, employers and universities other than the listed "litigating entities" are likely to make use of the new exemptions. *See supra* at 10-15.

Florida	Hobby Lobby Stores, Inc.; Mersino Management Co.; CMA d/b/a Shell Point Retirement Center; Ave Maria University; Ave Maria School of Law; Rhodora J. Donahue Academy, Inc.; Beckwith Electrical Co.; Alliance Community for Retirement Living; Cherry Creek Mortgage Co.
Georgia	Hobby Lobby Stores, Inc.
Idaho	Hobby Lobby Stores, Inc.
Illinois	Hobby Lobby Stores, Inc.; Samaritan Ministries International; Tyndale House Publishers, Inc.; Franciscan Alliance; Wheaton College
Indiana	Hobby Lobby Stores, Inc.; Taylor University; Indiana Wesleyan University; Mersino Management Co.; University of St. Francis; St. Anne Home; Our Sunday Visitor; Franciscan Alliance; Grace College and Seminary; Grote Industries, LLC; Ozinga Bros. Inc.; Cherry Creek Mortgage Co.; Tonn and Blank Construction, LLC; University of Notre Dame
Iowa	Hobby Lobby Stores, Inc.; Dordt College
Kansas	Hobby Lobby Stores, Inc.; Mardel; Sealco LLC; Villa St. Francis Catholic Care Center; Randy Reed Automotive, Inc.
Kentucky	Hobby Lobby Stores, Inc.; Asbury Theological Seminary; Encompass Develop Design and Construct LLC; The C.W. Zumbiel Co.
Louisiana	Hobby Lobby Stores, Inc.; Mardel
Maine	Hobby Lobby Stores, Inc.
Maryland	Hobby Lobby Stores, Inc.; Global Pump Co.; Mersino Management Co.
Massachusetts	Hobby Lobby Stores, Inc.; Autocam Medical
Michigan	Hobby Lobby Stores, Inc.; Autocam Medical; Midwest Fastener Corp.; Mersino Management Co.
Minnesota	Hobby Lobby Stores, Inc.; Crown College; Annex Medical Inc.; Sacred Heart Medical, Inc.; Doboszenski & Sons, Inc.; Feltl & Co., Inc.; American Mfg Co.; Hastings Automotive, Inc.; Hastings Chrysler Center, Inc.; Cherry Creek Mortgage Co.; Stinson Electric Inc.; The QC Group, Inc.; SMA, LLC
Mississippi	Hobby Lobby Stores, Inc.; American Family Association

Missouri	Hobby Lobby Stores, Inc.; Mardel; Sharpe Holdings, Inc.; Sioux Chief Mfg. Co., Inc.
Montana	Hobby Lobby Stores, Inc.
Nebraska	Hobby Lobby Stores, Inc.; Mersino Management Co.
Nevada	Hobby Lobby Stores, Inc.
New Hampshire	Hobby Lobby Stores, Inc.
New Jersey	Hobby Lobby Stores, Inc.
New Mexico	Hobby Lobby Stores, Inc.
New York	Hobby Lobby Stores, Inc.
North Carolina	Hobby Lobby Stores, Inc.; Conestoga Wood Specialties Corp.
North Dakota	Hobby Lobby Stores, Inc.; Trinity Bible College; Treasure Island Coins
Ohio	Hobby Lobby Stores, Inc.; Freshway Foods; Freshway Logistics; The C.W. Zumbiel Co.; Electrolock Inc.; Stone River Management Co.; Dunstone Co.; Johnson Welded Products, Inc.
Oklahoma	Hobby Lobby Stores, Inc.; Mardel; Southern Nazarene University; Oklahoma Wesleyan University; Oklahoma Baptist University; Korte & Luitjohan Contractors, Inc.
Oregon	Hobby Lobby Stores, Inc.
Pennsylvania	Hobby Lobby Stores, Inc.; Alliance Home of Carlisle (d/b/a Chapel Pointe at Carlisle); Conestoga Wood Specialties Corp.; Geneva College; Westminster Theological Seminary; Seneca Hardwood Lumber
Rhode Island	Hobby Lobby Stores, Inc.
South Carolina	Hobby Lobby Stores, Inc.; Electrolock Inc.
South Dakota	Hobby Lobby Stores, Inc.
Tennessee	Hobby Lobby Stores, Inc.; Autocam Medical; Union University
Texas	Hobby Lobby Stores, Inc.; Mersino Management Co.; Mardel; East Texas Baptist University; The Criswell College; The QC Group, Inc.; University of Dallas; Catholic Charities; Sealco LLC; Insight for Living Ministries; M&N Plastics, Inc.; Cherry Creek Mortgage Co.
Utah	Hobby Lobby Stores, Inc.; Cherry Creek Mortgage Co.
Vermont	Hobby Lobby Stores, Inc.

Virginia	Hobby Lobby Stores, Inc.; Media Research Center; Trijicon, Inc.
Washington	Hobby Lobby Stores, Inc.; Conestoga Wood Specialties Corp.
West Virginia	Hobby Lobby Stores, Inc.
Wisconsin	Hobby Lobby Stores, Inc.
Wyoming	Hobby Lobby Stores, Inc.

Collectively, these employers and universities employ or enroll hundreds of thousands of people across the country, many of whom also have dependents receiving insurance through these plans. *See* J.A. 350-56.

The contraceptive equity laws that exist in some of the States may mitigate, but will not eliminate, the harm caused by the Rules in those States. With respect to the lower-bound estimate, Defendants expect that approximately 63% of women who work for accommodated employers and who lose coverage because of the Rules have self-funded employer-based plans exempt from state regulation due to preemption by the Employee Retirement and Income Security Act. *See* 83 Fed. Reg. 57577. State contraceptive equity laws cannot, therefore, protect these women. And the upper-bound estimate of women who will lose coverage already excludes women protected by state contraceptive equity laws; the survey that the estimate is based upon was taken in 2010, after 29 States had already enacted such laws.[8]

[8] *See* Institute of Medicine, Clinical Preventive Services for Women: Closing the Gaps 51 (2011), https://www.nap.edu/read/13181/chapter/1.

3. The Rules Will Result in More Women Receiving Contraceptive Care Through State-Funded Programs.

The RIA estimates that the direct cost of providing replacement contraceptive care and services for women who lose employer-sponsored coverage because of the Rules will be between $41.2 and $67.3 million annually.[9] *See* 83 Fed. Reg. 57578. States will bear a significant share of this cost. As Defendants acknowledge—in attempting to downplay the Rules' impact on women and their families—many women who lose coverage as a result of the Rules will end up obtaining care and services through state-funded programs. *See, e.g.*, 82 Fed. Reg. 47803.

Among the Plaintiff and *Amici* States, eligibility limits for state-sponsored programs extend up to 300% of the Federal Poverty Level ("FPL") (and in limited circumstances beyond), with many such programs falling in the range of 200% to 250% of FPL.[10] With the 2018 FPL set at $20,780 for a family of three, $25,100 for a family of four, and higher for larger families, *see* 83 Fed. Reg. 2642, 2643 (Jan. 18, 2018), this means that many women earning more than $40,000 per year and even some women earning over $70,000 may be eligible for these programs.

[9] As with the number of women likely to lose coverage, this cost estimate increased from the IFRs' earlier estimate of $18.5 to $63.8 million annually. *See* 82 Fed. Reg. 47821, 47823-24.

[10] Guttmacher Institute, *Medicaid Family Planning Eligibility Expansions* (May 2018), https://www.guttmacher.org/state-policy/explore/medicaid-family-planning-eligibility-expansions.

State programs typically fall into three categories: Medicaid, Medicaid Family Planning Expansion, and Title X/State Family Planning. Coverage through employer-sponsored insurance generally does not make women ineligible, particularly where coverage has been declined by the employer. Accordingly, a significant number of women *with employer-sponsored insurance* will be income-eligible for coverage under state programs when their employers choose to avail themselves of the exemptions created by the Rules. *See* Table A, *infra* at 37-39 (collecting data for 24 States regarding the number of women who are income-eligible for state-funded programs that provide contraceptive care and services); Table B, *infra* at 40 (collecting data for 14 States regarding the number of women with employer-sponsored coverage who are income-eligible to use Medicaid as secondary payer for contraception). Overall, for the States included in the estimate, there are 7,288,650 income-eligible women, with 4,473,075 in plans that are not subject to any state-imposed contraception mandate. *Infra* at 37.

The *Amici* States' experience confirms that women who cannot use existing health care coverage (particularly when it comes to reproductive health) do indeed routinely seek coverage from state-funded programs, including at community health centers. Thus, many women who lose employer-based contraceptive coverage because of the Rules already will have a connection to such state programs. In Massachusetts, for example, the Commonwealth's Medicaid

program, MassHealth, already provides secondary coverage to more than 150,000 residents who also have commercial insurance. For these women, if their employers cut off contraceptive coverage, they will *automatically* receive state-funded replacement coverage. And, of course, many others will either enroll in state Medicaid programs for secondary coverage for the first time, or visit a community health center.

4. States Will Bear Increased Health Care Costs Associated with Unintended Pregnancies and Negative Health Outcomes.

The reduction in access to contraception caused by the Rules will also lead to an increase in unintended pregnancies and negative health outcomes for women and children.[11] This will impose additional costs on the States, which already spend billions of dollars annually on unintended pregnancies.[12] And the fact that women who lose contraceptive coverage because of the Rules will retain the balance of coverage provided by their employer-sponsored plans will not insulate States from harm. Increased health care costs will be passed on to the States

[11] Defendants acknowledge that a "noteworthy" potential effect of the Rules will be an increase in spending on "pregnancy-related medical services." 83 Fed. Reg. 57585 & n.123.

[12] A. Sonfield et al., *Public Costs from Unintended Pregnancies and the Role of Public Insurance Programs in Paying for Pregnancy-Related Care: National and State Estimates for 2010*, Guttmacher Institute (Feb. 2015), https://www.guttmacher.org/sites/default/files/report_pdf/public-costs-of-up-2010.pdf.

through Medicaid and other programs that provide wraparound coverage and reimbursement for deductibles, co-insurance, emergency care, and other amounts and services not covered by primary insurance.[13] These are significant costs: the average employer-sponsored plan has an annual deductible of $1,573 for individuals and, depending on the type of plan, up to $4,527 for families, and most plans impose additional cost-sharing fees for emergency room and hospital care.[14] State Medicaid programs will thus assume significant costs associated with the unintended pregnancies of women who lose coverage because of the Rules.

B. These Economic Injuries Will Cross State Lines.

The economic injuries inflicted by the Rules not only will occur in every State, but also will cross the borders between the States. Accordingly, even the partial measures a state may take to mitigate the damages caused by the Final Rules—for example, a state contraception mandate applicable to non-self-funded plans—are of limited use in protecting that state's residents and forestalling financial injury to the state. For the same reason, an injunction limited only to the Plaintiff States could not protect them from all of the financial harms caused by the Final Rules.

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[13] *See, e.g.*, 130 Code Mass. Regs. 450.317 (MassHealth's wraparound insurance regulations).

[14] *See* Kaiser Family Foundation, *Employer Health Benefits: 2018 Annual Survey*, 103, 114 (2018), http://files.kff.org/attachment/Report-Employer-Health-Benefits-Annual-Survey-2018.

Consider a few examples. Workers today often commute to, or telework[15] for, employers that are located in states other than the state in which they live. Recent research on commuter patterns has found that employees congregate in "mega-regions" nationwide that span state boundaries, and that these mega-regions are a more meaningful representation of economic ties than are state borders.[16] Research on commuting patterns bears out this phenomenon. Significant numbers of New Jersey and Pennsylvania residents, for example, travel each day to jobs in other states—548,040 New Jersey residents, or 14% of the workforce, and 299,970 Pennsylvania residents, or 5.4% of the workforce.[17] Thus, some of the Pennsylvania and New Jersey women who will lose contraceptive coverage because of the Rules will likely work for out-of-state employers, but nevertheless obtain state-funded replacement care in the States in which they reside.

[15] *See, e.g.*, U.S. Dept. of Labor, Bureau of Labor Statistics, *24 Percent of Employed People Did Some or All of Their Work at Home in 2015*, The Economics Daily (July 8, 2016), https://www.bls.gov/opub/ted/2016/24-percent-of-employed-people-did-some-or-all-of-their-work-at-home-in-2015.htm.

[16] *See* G. Nelson & A. Rae, *An Economic Geography of the United States: From Commutes to Megaregions*, PLOS One (Nov. 30, 2016), https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0166083&type=printable; A. Swanson & J. O'Connell, *What the U.S. Map Should Really Look Like*, Wash. Post (Dec. 12, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/12/12/the-radical-new-map-that-would-really-reflect-life-in-the-u-s/?utm_term=.b6fc5de2efa4.

[17] U.S. Census Bureau, *Out-of-State and Long Commutes: 2011*, American Community Survey Reports, at 10 & tbl. 6 (Feb. 2013), https://www2.census.gov/library/publications/2013/acs/acs-20.pdf.

Defendants' brief fails in its attempt to minimize the scope of these extraterritorial impacts, *see* Br. 82. More than 600,000 residents of the Plaintiff States work in states other than New Jersey and Pennsylvania. Even assuming a number of these residents work in a state requiring health plans to include contraceptive coverage to some degree, New Jersey and Pennsylvania will still be harmed, because of the prevalence of self-insured employer plans that are exempt from such state requirements. *See California*, 911 F.3d at 573. And Defendants' suggestions of various other permutations of resident-employer relationships and circumstances that might result in the Rules not affecting particular New Jersey or Pennsylvania residents who work outside their home state merely serve to underscore the virtual impossibility of providing "complete relief to the plaintiffs," *Califano v. Kamasaki*, 442 U.S. 682, 702 (1979), without nationwide injunctive relief.

Defendants' brief also fails to address the hundreds of thousands of students who attend universities and colleges outside of their home state.[18] Each year, for example, Pennsylvania takes in more than 32,000 first-time out-of-state students alone—the second most of any state in the country.[19] Many of these out-of-state

[18] *See, e.g.*, Nat'l Ctr. for Education Statistics, *Residence and Migration of All First-Time Degree/Certificate-Seeking Undergraduates*, Digest of Education Statistics (2017), https://nces.ed.gov/programs/digest/d17/tables/dt17_309.20.asp?current=yes.

[19] *Id.*

students continue to receive health insurance coverage as dependents from their parents' employer-based plans.[20] Indeed, nationally, nearly 14 million people under the age of 26 remain on their parents' employer-sponsored health plans.[21] Thus, some of the women who will lose contraceptive coverage under the Rules will remain on their parents' out-of-state employer-based health plans, but obtain state-funded replacement care where they live and attend school in Pennsylvania or New Jersey.

As these examples illustrate, the harms caused by the loss of contraceptive coverage will spread across state lines, as commuters, remote workers, and dependents who reside in other states lose coverage and seek replacement care where they live. The injuries threatened by the Final Rules to the Plaintiff States, *Amici* States, and their residents are thus pervasive across all of the States: both because women will be affected in every State, and because the Rules' harms will reach individual women across state lines.

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[20] *See, e.g.*, Gov't Accountability Office, *Health Insurance: Most College Students Are Covered through Employer-Sponsored Plans, and Some Colleges and States Are Taking Steps to Increase Coverage* (Mar. 2008), https://www.gao.gov/assets/280/274105.pdf.

[21] *See, e.g.*, S. Rollins et al., *Young, Uninsured and in Debt: Why Young Adults Lack Health Insurance and How the Affordable Care Act is Helping*, The Commonwealth Fund, at 2 (June 2012), https://www.commonwealthfund.org/sites/default/files/documents/___media_files_publications_issue_brief_2012_jun_1604_collins_young_uninsured_in_debt_v4.pdf (estimating that approximately 14 million people under the age of 26 remain on their parents health insurance plan).

II. A Nationwide Injury, Like the Injury Threatened by the Final Rules, Warrants a Nationwide Preliminary Injunction.

In light of the nature of the injury threatened by the Rules, the District Court appropriately exercised its discretion in determining that it should enter a nationwide preliminary injunction barring implementation of the Rules.

A. The Plaintiff States Have Standing to Seek a Nationwide Injunction.

To come within a federal court's Article III jurisdiction, "a plaintiff must demonstrate standing for each claim [it] seeks to press and for each form of relief that is sought," whether the relief be in the form of damages, injunctive relief, or declaratory relief. *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017). Thus, "a plaintiff who has standing to seek damages must also demonstrate standing to pursue injunctive relief." *Id*. But once a plaintiff has established that it has standing for each claim and each form of relief, Article III imposes no further restraint on the *scope* of equitable relief that a district court may order. To the contrary, "[f]or 'several hundred years,' courts of equity have enjoyed 'sound discretion' to consider the 'necessities of the public interest' when fashioning injunctive relief." *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 496 (2001) (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329-30 (1944)); *see also Kansas v. Nebraska*, 135 S. Ct. 1042, 1053 (2015) ("When federal law is at issue and 'the public interest is involved,' a federal court's

'equitable powers assume an even broader and more flexible character then when only a private controversy is at stake.'" (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946))); *S.E.C. v. Wencke*, 622 F.2d 1363, 1371 (9th Cir. 1980) ("The Supreme Court has repeatedly emphasized the broad equitable powers of the federal courts to shape equitable remedies to the necessities of particular cases.").

The District Court determined, correctly, that the Plaintiff States have Article III standing to pursue their claims and seek equitable relief. *Pennsylvania II*, 351 F. Supp. 3d at 808; *see also Pennsylvania I*, 281 F. Supp. 3d at 564-69. The court therefore had broad authority, reviewed only for abuse of discretion, to issue an injunction tailored to the necessities of the case. *See eBay v. MercExchange, L.L.C.*, 547 U.S. 388, 391, 394 (2006) ("[T]he decision whether to grant or deny injunctive relief rests within the equitable discretion of the district courts," and that "act of equitable discretion" is reviewable on appeal only "for abuse of discretion."). And the court's exercise of that authority was consistent with numerous decisions from the Supreme Court and Courts of Appeals that have upheld nationwide preliminary or permanent injunctions, consistent with Article III. *See, e.g., Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087-88 (2017); *Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687, 699 (9th Cir. 2007), *aff'd in part & rev'd in part on other grounds by Summers v. Earth Island Inst.*, 555

U.S. 488 (2009); *Ciba-Geigy Corp. v. Bolar Pharm. Co., Inc.*, 747 F.2d 844, 85, 855-56 (3d Cir. 1984).

B. A Preliminary Injunction Invalidating the Rules Nationwide Is Necessary to Prevent Irreparable Harms That Will Be Caused by the Rules.

The District Court's award of a nationwide preliminary injunction was not only consistent with Article III, but also well within the court's discretion under the circumstances of this case: where the court concluded that the Plaintiff States were likely to prevail on the merits of both procedural and substantive Administrative Procedure Act ("APA") challenges to the Final Rules, and where allowing the Final Rules to go into effect during the pendency of the litigation would inflict irreparable harms on the Plaintiff States. *See Pennsylvania II*, 351 F. Supp. 3d at 812-29. Such relief accords with the principle that legally deficient regulations are invalid in their entirety, not only as applied to the plaintiffs; ensures that the Plaintiff States do not incur irreparable injuries during the pendency of this case due to incomplete preliminary relief; and addresses the magnitude of the harms that will be inflicted on women, the States, and the public interest nationwide.

"'[W]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed.'" *Nat'l Mining Ass'n v. U.S. Army Corps of*

Eng'rs, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (quoting *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989)). That settled rule follows directly from the APA, which empowers courts both to "hold unlawful" and to "set aside" legally infirm "agency action." 5 U.S.C. § 706(2). In accordance with that rule, this Court has frequently vacated regulations—in their entirety—that were not promulgated in compliance with the APA. *See, e.g.*, *Prometheus Radio Project v. FCC*, 652 F.3d 431, 453-54 & n.25 (3d Cir. 2011) (vacating FCC regulation that was not promulgated in compliance with the APA); *Council Tree Commc'ns, Inc. v. FCC*, 619 F.3d 235, 258 (3d Cir. 2010) (same). As a consequence of vacatur, invalidated regulations have no effect anywhere in the country, and regulations previously in force are reinstated. *See Council Tree Commc'ns*, 619 F.3d at 258 ("'vacating or rescinding invalidly promulgated regulations has the effect of reinstating prior regulations'" (quoting *Abington Mem. Hosp. v. Heckler*, 750 F.2d 242, 244 (3d Cir. 1984))).

This approach accords with the practical reality that invalid federal regulations, like those at issue here, often inflict harm on a nationwide basis. As discussed, Defendants have identified employers in virtually every State in the country that will likely use the Rules to drop contraceptive coverage for their employees. *See supra* at 15-19. States across the country, including the Plaintiff States and the *Amici* States, will be forced to provide for replacement contraceptive

care and services through state programs or Medicaid and to provide for healthcare associated with unintended pregnancies. *See supra* at 20-23. And the District Court acted well within its discretion in concluding that the flow of employees and students across state lines counseled in favor of a nationwide preliminary injunction in order to provide "complete relief" to the Plaintiff States themselves during the pendency of this litigation. *Pennsylvania II*, 351 F. Supp. 3d at 832–34.

A preliminary injunction limited to the Plaintiff States, by contrast, would be inconsistent with the "ordinary" rule that invalid regulations must be vacated in their entirety. *Nat'l Mining*, 145 F.3d at 1409. It would create serious inequities for women employed by Hobby Lobby, Mersino Management Co., and other employers with locations in multiple states that are expected to drop contraceptive coverage. And it would not provide "complete relief" from irreparable injuries during the pendency of this litigation to Pennsylvania and New Jersey, *Madsen v. Women's Health Ctr. Inc.*, 512 U.S. 753, 765 (1994) (quoting *Califano v. Yamasaki*, 442 U.S. at 702): irremediable financial injuries stemming from coverage losses among the thousands of Pennsylvania and New Jersey residents who receive health insurance coverage through out-of-state employers, *see supra* at 23-26, and injuries to the Plaintiff States' quasi-sovereign interest in protecting the health and wellbeing of their residents, including residents who work out-of-state, *see Alfred L. Snapp & Sons, Inc. v. Puerto Rico*, 458 U.S. 592, 597-98, 607-08

(1982) (recognizing Puerto Rico's interest in protecting residents from discrimination by companies located in Virginia).

Finally, issuance of nationwide relief is consistent with the "primary purpose of a preliminary injunction": "maintenance of the status quo until a decision on the merits of a case is rendered." *Acierno v. New Castle Cty.*, 40 F.3d 645, 647 (3d Cir. 1994). The Rules represent a departure from the status quo, which had ensured that women retain seamless access to contraceptive coverage, while also accommodating employers' and universities' religious beliefs. A nationwide preliminary injunction preserves the rights of the thousands of women across the country expected to lose to contraception coverage as a result of the Rules, as well as the rights of the States expected to assume the costs of their contraceptive care.

CONCLUSION

For the foregoing reasons, the *Amici* States urge this Court to affirm the District Court's preliminary injunction.

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CERTIFICATES OF COMPLIANCE AND BAR MEMBERSHIP

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

2. I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 6,198 words, excluding the parts of the brief exempted under Rule 32(f).

3. Pursuant to the Third Circuit Local Appellate Rule 31.1(c), I hereby certify that the text of this electronic brief is identical to the text in the hard, paper copies of the brief.

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5. Pursuant to Third Circuit Local Appellate Rule 28.8(d), I hereby certify that I am a member of the bar of this Court.

/s/ Elizabeth N. Dewar
Elizabeth N. Dewar

Dated: March 25, 2019

CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2019, I electronically filed the foregoing document with the Clerk of the Court of the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ *Elizabeth N. Dewar*
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Dated: March 25, 2019

ADDENDUM

Table A: Number of Women with Employer-Sponsored Insurance Who Are Income-Eligible for State-Funded Contraceptive Coverage[1]

State	Insured, Income-Eligible Women Ages 15-45[2]	Percent of Enrollees Covered Under a Self-Funded Plan[3]	Insured, Income-Eligible Women Ages 15-45 in Self-Funded Plans[4]
California	1,415,247	41.6%	588,743
Colorado	114,652	57.2%	65,581
Connecticut	151,198	59.3%	89,660
Delaware	45,491	68.3%	31,070
District of Columbia	27,375	49.8%	11,641
Hawaii	88,650	37.6%	33,332
Illinois	612,778	63.3%	387,888
Iowa	221,138	57.4%	126,933
Maine	45,678	57.7%	26,356
Maryland	277,509	49.6%	137,644
Massachusetts	365,762	56.6%	207,021
Michigan	519,728	61.4%	319,113
Minnesota	183,765	[no state mandate]	183,765
Nevada	78,575	47.5%	37,323
New Jersey	380,913	55.1%	209,883
New Mexico	84,771	69.1%	58,577
New York	811,392	53.9%	437,340
North Carolina	380,983	62.5%	298,579
Oregon	188,570	53.7%	101,262
Pennsylvania	580,295	[no state mandate]	580,295
Rhode Island	54,512	47.9%	26,111
Vermont	23,575	60.2%	14,192
Virginia	318,424	[no state mandate]	318,424
Washington	317,669	57.4%	182,342
Total	**7,288,650**	**-**	**4,473,075**

[1] The Table above includes both *Amici* States and States that are plaintiffs in litigation concerning the Rules. The numbers provided are derived from the University of Minnesota's Interactive Public Use Microdata Series, https://usa.ipums.org/usa/, which provides detailed data from the U.S. Census Bureau's American Community Survey (2015), the State Health Access Data Assistance Center, and the Agency for Healthcare Research and Quality ("ARHQ Database"). Each person is assigned to a household health insurance unit ("HIU"). The incomes of all members of the same HIU are summed and divided by the FPL for the relevant household size to generate the income of the HIU as a percentage of the FPL. For Column 2, the number reflects women who: (a) are between the ages of 15 and 45; (b) have employer/union provided health insurance; and (c) have HIU income under the relevant percent of the FPL to qualify for that State's program. That initial estimate is further refined (Column 4) based on the percentage of enrollees in self-insured employer plans in each State (Column 3), provided that the State has a contraceptive equity law. We recognize that other data sources and methodologies may achieve different results. Whatever the precise calculations, however, the ultimate conclusion—that millions of women with employer-sponsored insurance are income-eligible for state-funded programs—remains accurate.

[2] For each State on the list, the following is the FPL eligibility threshold for a broadly applicable program that is at least partially state funded: California, 200%; Colorado, 138%; Connecticut, 263%; Delaware, 250%; District of Columbia, 215%; Hawaii, 250%; Illinois, 250%; Iowa, 300%; Maine, 209%; Maryland, 250%; Massachusetts, 300%; Michigan, 250%; Minnesota, 200%; Nevada, 138%; New Jersey, 250%; New Mexico, 250%; New York, 223%; North Carolina, 200%; Oregon, 250%; Pennsylvania, 220%; Rhode Island, 250%; Vermont, 200%; Virginia, 200%; and Washington, 260%. States may have programs that have higher FPL eligibility thresholds, including programs that are available to a narrower class of residents, for example the Children's Health Insurance Program ("CHIP") which extends eligibility above 300% FPL for women under the age of 19 in many States. *See* Kaiser Family Foundation, *Fact Sheet: Where Are States Today? Medicaid and CHIP Eligibility Levels for Children, Pregnant Women, and Adults*, (2018), http://files.kff.org/attachment/Fact-Sheet-Where-are-States-Today-Medicaid-and-CHIP-Eligibility-Levels-for-Children-Pregnant-Women-and-Adults.

[3] The percentage of self-insured plans is taken from: U.S. Dept. of Health & Human Services, Medical Expenditure Panel Survey, *Percent of Private-Sector Enrollees That Are Enrolled in Self-Insured Plans at Establishments That Offer Health Insurance by Firm Size and State: United States, 2016*,

https://meps.ahrq.gov/data_stats/summ_tables/insr/state/series_2/2016/tiib2b1.pdf ("ARHQ Database"). In many cases, the ARHQ Database provides significantly lower self-insured coverage rates than other sources. We have used the figures provided by the Database to provide a conservative estimate.

[4] All of the listed States except Minnesota, Pennsylvania, and Virginia have contraceptive equity laws that generally require state-regulated plans to cover all FDA-approved forms of contraception. For the States without contraceptive equity laws, this column includes all insured, income-eligible women ages 15 to 45.

Table B: Number of Women with Employer-Sponsored Insurance Who Are Income-Eligible for Medicaid as Secondary Payer for Contraceptive Services[5]

State	Insured, Income-Eligible Women Ages 15-45[6]	Percent of Enrollees Covered Under a Self-Funded Plan	Insured, Income-Eligible Women Ages 15-45 in Self-Funded Plans
Connecticut	85,157	59.3%	50,498
Delaware	25,163	68.3%	17,186
District of Columbia	27,375	49.8%	11,641
Hawaii	44,278	37.6%	16,649
Illinois	340,905	63.3%	215,793
Maryland	168,016	49.6%	83,336
Massachusetts	195,584	56.6%	110,701
Minnesota	127,349	[no state mandate]	127,349
New Mexico	43,566	69.1%	30,104
Oregon	99,246	53.7%	53,295
Pennsylvania	376,451	[no state mandate]	376,451
Rhode Island	32,695	47.9%	15,661
Vermont	18,613	60.2%	11,205
Washington	160,796	57.4%	92,297
Total	**1,745,194**	**-**	**1,212,166**

[5] The Medicaid program serves as a secondary payer for contraceptive services in each of the States listed above. This list is not exhaustive; secondary coverage may be available in additional states.

[6] For all of the States listed in this table, the relevant Medicaid FPL used to calculate the figures is 138%, except the District of Columbia (215%).