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; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; SECRETARY, U.S. DEPARTMENT OF THE TREASURY; U.S. DEPARTMENT OF THE TREASURY; SECRETARY, U.S. DEPARTMENT OF LABOR; AND 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 THE PUBLIC INTEREST LAW CENTER AND FOUR AFFILIATED LAWYERS' COMMITTEES FOR CIVIL RIGHTS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *amici curiae* certifies that *amici* are not publicly held corporations, do not have a parent corporation, and that no publicly held corporation owns 10 percent or more of stock in the respective *amici*.

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STATEMENT OF INTEREST

Amici curiae are:

- The Public Interest Law Center (Philadelphia, Pennsylvania);
- Washington Lawyers' Committee for Civil Rights and Urban Affairs (Washington, D.C.);
- Chicago Lawyers' Committee for Civil Rights (Chicago, Illinois);
- Lawyers' Committee for Civil Rights of the San Francisco Bay Area (San Francisco, California); and
- Public Counsel (Los Angeles, California).

Amici are nonpartisan, nonprofit organizations whose shared roots date to 1963, when President John F. Kennedy enlisted the private bar's leadership and resources in combating racial discrimination, and the resulting inequality of opportunity. These five independently funded and governed organizations battle injustice in its many forms and create systemic reform.[1]

Amici work on some of the most important national issues of our times including voting rights; employment discrimination; healthcare; fair housing and community development; environmental health and justice; educational opportunity; rights of persons with disabilities; and immigration. Together these *amici* are part of the largest network of private lawyers in America focused primarily on civil rights issues.

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[1] Complete contact information for *amici* is attached to this Brief as Appendix A.

This appeal challenges a federal court's ability to issue a nationwide injunction. But, for the most vulnerable communities represented by *amici*, including the poor, and historically disenfranchised people of color, nationwide injunctions are often critical for achieving justice. Indeed, many of the *amici* have sought nationwide injunctions, involving a variety of claims and contexts. For example, *amicus curiae* Public Counsel successfully advocated on behalf of six Deferred Action for Childhood Arrivals ("DACA") recipients for a nationwide injunction preventing the federal government from ending the DACA program. *See Regents of the Univ. of Cal. v. United States Dep't of Homeland Sec.*, 298 F. Supp. 3d 1304 (N.D. Cal. 2018), *aff'd*, 908 F.3d 476 (9th Cir. 2018). In addition, earlier this month, Public Counsel obtained a nationwide injunction prohibiting the federal government from including a citizenship question on the 2020 census. *See California v. Ross*, No. 18-cv-02279-RS, 2019 U.S. Dist. LEXIS 36230 (N.D. Cal. Mar. 6, 2019).

Amicus curiae the Washington Lawyers' Committee for Civil Rights and Urban Affairs regularly seeks nationwide injunctions, including in lawsuits it files under federal anti-discrimination laws. *See*, *e.g.*, *Irving v. Berryhill*, No. 17-cv-1730-BAS (KSC) (S.D. Cal.) (seeking to require the Social Security Administration to ensure accessibility of its kiosks for persons who are blind or low-vision); *Stanley v. Barbri, Inc.*, No. 3:16-cv-01113-O (N.D. Tex.) (seeking to enjoin a national bar preparation company from maintaining barriers to Bar examination preparation services for blind students in

violation of the ADA); *Equal Rights Center v. Mid-America Apartment Communities, Inc.*, No. 17-cv-02659 (D.D.C) (seeking to enjoin owner of apartment complexes across the country from implementing a criminal records screening policy that plaintiff alleged disproportionately harmed African American and Latinx persons in violation of the Fair Housing Act).

In short, nationwide injunctions are vital tools in advancing the cause of equal justice under law in a wide range of litigation. The issue of their legality directly impacts the mission and work of *amici curiae*.

Amici submit this brief without an accompanying motion for leave to file because the parties agreed to blanket consents to *amicus* briefs before this Court. *See* FED. R. APP. P. 29(a)(2). No party to this appeal, or counsel for a party, authored or contributed monetarily to the preparation or submission of any part of this brief. And, no person other than *amici* or their counsel has made a monetary contribution intended to fund the preparation or submission of this brief. *See* FED. R. APP. P 29(4)(E).

SUMMARY OF THE ARGUMENT

Exercising its discretion in fashioning equitable relief, the district court granted plaintiff-appellees Commonwealth of Pennsylvania and State of New Jersey (together, "Plaintiff States") injunctions prohibiting implementation of interim and final federal agency rules that allow certain organizations to deny insurance coverage for family planning medical care to their employees. Because the agency rules facially apply to the entire United States, the district court's injunctions likewise enjoin the

rules from application across the country. Appellant federal agencies appealed the district court's injunction rulings.

Amici address two discrete legal issues federal appellants raised in asking this Court to reverse the district court's grants of nationwide injunctions. First, as conceded by the government, the scope of the district court's equitable powers is as broad as was understood at the founding of the United States. Contrary to federal appellants' brief, however, courts—including English courts before the founding of the Republic, and many United States courts—have a long, deep tradition of granting equitable remedies that apply beyond the parties before the court, to address harms in an efficient manner, and to render complete justice. There is nothing about nationwide injunctions that is distinguishable from traditional equity remedies benefiting non-parties that calls into question courts' equitable jurisdiction and power to grant such relief.

Second, the district court found that Plaintiff States established they would be harmed by the rules at issue, and thus had jurisdictional standing to assert their claims. Such standing is all that was necessary for the district court to exercise its discretion in crafting an injunction to prevent harm to Plaintiff States, which, in this case, extended beyond Pennsylvania and New Jersey, to the entire country.

ARGUMENT

I. DISTRICT COURTS HAVE AUTHORITY TO GRANT EQUITABLE RELIEF THAT APPLIES NATIONWIDE, TO PARTIES BEYOND THOSE BEFORE THE COURT.

When government acts wrongfully, the impact can be felt throughout the community, the state, or the country. Providing ***effective*** remedies to cure serious, wide-reaching wrongs is not only a well settled use of the judicial power, it also may be the ***only*** remedy available to courts to redress adequately the threat of immediate, irreparable harm. Federal appellants assert that "nationwide injunctions are a modern invention," Br. for Federal Appellants at 79, and call into question whether such a form of equitable relief is consistent with "historical practice," *id.*, and, thus, Constitutional. Federal appellants' premise is wrong.

ARTICLE III of the Constitution provides that "[t]he judicial Power" of the federal courts "shall extend to all Cases, in Law and Equity, arising under this Constitution [and] the Laws of the United States[.]" U.S. CONST., ART. III, SEC. 2. As to such "judicial Power" in equity cases, "settled doctrine . . . is, that the ***remedies in equity are to be administered*** . . . according to the practice of ***courts of equity in the parent country*** . . . ; subject, of course, . . . to such alterations and rules as . . . the courts of the United States may, from time to time, prescribe." *Boyle v. Zacharie*, 32 U.S. (6 Pet.) 648, 658 (1832) (Story, J.) (emphasis added); *see also Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999) ("authority to administer" equity suits consistent with "principles of the system of judicial

remedies . . . devised and . . . administered by the English Court of Chancery at the time of the separation of the two countries"); *Vattier v. Hinde*, 33 U.S. (7 Pet.) 252 (1833) (Marshall, C.J.) (equitable powers of federal courts "generally understood to adopt the principles, rules and usages of the court of chancery of England"); A. Dobie, HANDBOOK OF FEDERAL JURISDICTION AND PROCEDURE, at 660 (1928) ("equity jurisdiction of the federal courts is the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act"). Nationwide injunctions—that is, injunctions issued by federal courts enjoining a party's conduct, and protecting parties and non-parties affected throughout the United States—are entirely consistent with historical practice in both English courts and early precedent in the United States, and thus are within the "judicial Power" granted by the Constitution.

Justice Thomas's concurrence in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), cited by the federal government in this appeal, *see* Br. for Federal Appellants at 79-80, expressed skepticism to whether courts have authority to impose "universal injunctions." *Trump*, 138 S. Ct. at 2425. Relying on one law review article (also cited by federal appellants), Justice Thomas wrote that nationwide injunctions against the government do not comport with historic English equity practice in two ways: first, the English courts of equity "had no authority to enjoin" the King, *id.* at 2427 (citing S. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417

(2017)), and second, "as a general rule, American courts of equity did not provide relief beyond the parties to the case." *Id.*; *see also* Br. for Federal Appellants at 79. In his article, Bray argues that, while English courts in equity did sometimes protect the rights of persons not before the court, they did not afford relief as broad as a national injunction in modern America. *See* Bray, 131 HARV. L. REV. at 426.

But there can be no dispute: long-standing English and early American precedents establish that, as of the time of the Constitution's adoption, courts of equity could issue broad injunctions that affected the rights or duties of parties not before the court. The exercise of this authority by English courts of equity had been settled by at least the 17th Century, and American courts frequently exercised this authority from 1789, and thereafter through today (including in cases against federal, state, or local governments). These courts did so, as one American state supreme court put it in 1854, to prevent "irreparable mischief, or such multiplied vexations, and such constantly recurring causes of litigation" as would arise if courts were limited to issuing decrees that bound only the parties before them. *Knight v. Carrollton R. Co.*, 9 La. Ann. 284, 286 (1854). That court further identified the reason English and American courts of equity imposed broad-reaching relief: "If indeed courts of equity did not interfere in such like cases, the justice of the country would be very lame and inadequate." *Id.*

English practice during the pre-Constitution era, and United States courts thereafter consistently exercised equity jurisdiction whenever a party's wrongful conduct would do harm to others, and, where necessary, extended that jurisdiction well beyond the parties.

A. "Principles, Rules, and Usages" of English Equity Before 1789 Included Granting Injunctions that Extended Beyond the Parties Before the Court.

A federal court's authority to provide equitable relief, including an injunction with nationwide scope, is clear because such a remedy accords with "the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries." *Atlas Life Ins. Co. v. W. I. Southern, Inc.*, 306 U.S. 563, 568 (1939); *see also*, *e.g., Grupo Mexicano de Desarrollo, S.A.*, 527 U.S. at 319. Justice Thomas's concurrence and Bray's article address English equity precedents in cursory fashion, but at the time of the adoption of the Constitution, English decisions had long recognized that the decrees of an equity court could broadly bind non-parties, and that American courts have followed this precedent from the earliest days of the country's founding.

1. English equity decisions before 1789.

English practice on these issues had been well-established by the 1676 decision in *Brown v. Vermuden*, 1 Ch. Cas. 272 & 283, 22 E.R. 796 & 802 (1676).[2]

[2] The Chancellor issued two decisions in *Brown v. Vermuden*; both addressed whether an equitable decree applied to non-parties.

Brown sued to enforce a decree "against certain Persons Workers and Owners of Lead Mines in Derbyshire" requiring defendants to pay a certain amount based on the quantity of lead ore mined. *Id.* at 283, 22 E.R. at 802. The original suit proceeded against four defendants, but the Chancellor entered a judgment in favor of Brown's predecessor, and his successors, "whereby a certain manner of tithing of Lead [Ore] was decreed, not only against the particular Persons named Defendants, but all other Owners and Workers." *Id.* at 272, 283, 22 E.R. at 797, 802.

Brown's predecessor served the decree on Vermuden, "who owned and wrought a Mine there." *Id.* at 273, 22 E.R. at 797. Vermuden "insisted that he [was] not bound by the Decree, for that he was not Party to" the original suit, and was not in privity with a party. *Id.* Vermuden argued that he "could have no Bill of Review of [the decree] if it be erroneous, and therefore ought not to be bound" by its terms. *Id.*; *see also id.* at 283, 22 E.R. at 802 ("Vermuden pleaded . . . That he was a Stranger").

The Lord Chancellor overruled Vermuden's plea, holding, the "Decree passed against the four" defendants in the original case brought by Brown's predecessor required not just "that the Defendants," but that "all the Miners should pay." *Id.* at 273, 22 E.R. at 797. "If [Vermuden] should not be bound, ***Suits of this Nature*** . . . ***would be infinite, and impossible to be ended***." *Id.* (emphasis added). The Chancellor thus enforced the decree against Vermuden, though he had not been a party to the original action, or in privity with the parties. *Id.* at 273, 22 E.R. at 797; *id.*

at 283, 22 E.R. at 802. Numerous other courts of equity in early England reached the same result. *See, e.g., Ewelme Hospital v. Andover*, 1 Vern. 266, 267, 23 E.R. 460, 461 (1684) (allowing action in equity to proceed without all parties in interest); *Fitton v. Macclesfield*, 1 Vern. 287, 292-93, 23 E.R. 474, 476 (1684) (denying "bill of review" and finding court had equitable jurisdiction over prior matter despite failure to have before it all parties in interest); *How v. Tenants of Bromsgrove*, 1 Vern. 22, 23 E.R. 277 (1681) (concluding "Bills of peace" applicable to non-parties "are proper in equity" "to prevent multiplicity of suits").

The House of Lords, in *City of London v. Perkins*, 3 Bro. P. C. 602, 1 E.R. 1524 (1734), discussed the rationale for the broad reach of this practice. *Perkins* involved serial disputes over the right of London to collect a duty, to be "applied to the use of the lord mayor for the time being, for supporting the dignity of his office." *Id.* at 603, 1 E.R. at 1524. In a later dispute, London instituted an equity action in the Court of Exchequer, pleading the prior decrees as grounds to require payment of the duties. On appeal, the House of Lords recognized that "the duty in question was a demand against the ***common rights and freedom of every subject of England***." *Id.* at 606, 1 E.R. at 1527 (emphasis added). The Lords, on this ground, enforced the earlier decrees against defendants, none of whom had been parties in those earlier cases. Thus, equity jurisdiction extended in England to cases involving matters of broad public importance, where the decree would bind many members of the public

not before the court as parties. *See also Blagrave v. Blagrave*, 1 De Gex & Smale 252, 258, 63 E.R. 1056, 1058 (1847) (clarifying that issue in *Perkins* was equitable relief applying to "the public"); *Mayor of York v. Pilkington*, 1 Atk. 282, 26 E.R. 180 (1737) ("all the king's subjects" could be bound by decree in equity in a case, even where only few subjects were parties).

These cases, among others, establish that "the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries," *Grupo Mexicano de Desarrollo, S.A.*, 527 U.S. at 318, and the "principles, rules and usages of the court of chancery of England" at that time, *Vattier*, 33 U.S. (7 Pet.) at 274, included broad authority to issue decrees that bound parties not before the Chancellor. This authority applied where the dispute involved "a general exclusive right," *Lord Tenham v. Herbert*, 2 Atk. 483, 484, 26 E.R. 692, 692 (1742); where "all the king's subjects may be concerned in this right," *Pilkington*, 1 Atk. at 284, 26 E.R. at 181; where the suit was between government and "the public," *Blagrave*, 1 De Gex & Smale at 258, 63 E.R. at 1058; "to prevent multiplicity of suits," *Ewelme Hospital*, 1 Vern. at 267, 23 E.R. at 461; where "one general right was liable to invasion by all the world," *Dilly v. Doig*, 2 Ves. junr. 486, 487, 30 E.R. 738, 738 (1794), or where individual suits "would be infinite, and impossible to be ended," *Brown*, 1 Ct. Ch. at 274, 22 E.R. at 797. In short, whenever parties

otherwise "must [go] all round the compass to" settle the issues in dispute. *Lord Tenham*, 2 Atk. at 484, 26 E.R. at 692.

2. Calvert's treatise also demonstrates that equitable relief applied broadly under English law.

The leading English treatise addressing the scope of equity practice prior to the establishment of the Constitution is A TREATISE UPON THE LAW RESPECTING PARTIES TO SUITS IN EQUITY (2d ed. 1847), by Frederic Calvert ("PARTIES IN EQUITY").[3] Calvert began by stating the general rule regarding parties to equitable actions: "whether the relief sought in the bill, in other words, the equity of the bill touches any particular person, so as to obtain from him a benefit, or to fasten upon him a duty," such a person is a "necessary party." PARTIES IN EQUITY at 16, 21. But, this rule "is founded upon general convenience," and is subject to numerous "occasions for the relaxation of the rule." *Id.* at 21. Calvert explained that "relaxation" is necessary in equity because:

> The complication of human affairs has, however, become such, that it is impossible always to act strictly on this general rule. Cases arise, in which if you hold it necessary to bring before the court every person having an interest in the question, the suit could never be brought to a conclusion. The consequence would be that ***if the court adhered to the strict rule, there would in many cases be a denial of justice***.

[3] Justice Joseph Story wrote that no "comprehensive and accurate" treatment of this subject existed before PARTIES IN EQUITY. *See* J. Story, COMMENTARIES ON EQUITY PLEADINGS, AND THE INCIDENTS THEREOF, ACCORDING TO THE PRACTICE OF THE COURTS OF EQUITY, OF ENGLAND AND AMERICA (3d. 1844) ("STORY'S EQUITY PLEADINGS") at xi.

Id. at 21-22 (emphasis added; internal quotation, citation omitted). Calvert discussed over a dozen "instances of relaxation" for various circumstances, *id.* at 22-54, each of which Calvert supported by citations to numerous cases decided before the establishment of the United States. All of the "relaxations" of the general rule, and the English cases cited in support of them, illustrate the great flexibility the English equity courts had before 1789 to permit bills that affected the rights of persons or entities not before the court as parties.

Calvert rooted the "relaxations" of the general rule regarding parties in fundamental principles of the courts of equity in England: "A Court of Law decides some one individual question, which is brought before it," whereas "a ***Court of Equity*** not merely makes a decision to that extent but also ***arranges all the rights***, which the decision immediately affects." *Id.* at 3 (emphasis added). Calvert added that a "'***Court of Equity, in all cases, delights to do complete justice, and not by halves***'; to put an end to litigation, and to give decrees of such a nature, that the performance of them may be perfectly safe to all who obey them: [it is in the interest of the public that litigation come to an end]." *Id.* (emphasis added; translated from Latin; quoting *Knight v. Knight,* 3 P. Wms. 331, 333, 24 E.R. 1088, 1089 (1734)).

Calvert's analysis in PARTIES IN EQUITY supports the conclusion that English courts possessed the equitable authority to bind persons who were ***not*** parties to the action, notably in cases involving general interests, and the rights of the public.

English equity practice as of 1789 fully supports the use of equitable power by federal courts in this country to issue injunctions with nationwide scope.

B. Early American Equity Practice Granted Relief that Applied Beyond the Parties to a Litigation.

These principles of English practice carried over to early American equity courts, as demonstrated by both the leading 19th and 20th Century treatises on the subject, and federal and state equity decisions.

1. STORY'S EQUITY PLEADINGS establishes that equitable relief in United States courts never was limited to the parties before the court.

The leading American treatise on equity in the 19th Century was STORY'S EQUITY PLEADINGS, by Justice Joseph Story. Justice Story analyzed at length the usages, rules, and practices that the English cases established in equity before 1789, and illustrated how American courts had adopted and applied these principles in the early days of the United States. Justice Story wrote that he aimed his book especially to address "the principles, which govern . . . the subject of the proper and necessary Parties to Bills." STORY'S EQUITY PLEADINGS at xi; *see also* J. Pomeroy, A TREATISE UPON EQUITY JURISPRUDENCE AS ADMINISTERED IN THE UNITED STATES OF AMERICA, VOL. I (3rd ed. 1905) ("POMEROY") §§ 243-275, at pp. 356-458 (state and federal cases applied approaches of cases such as *Perkins*, *Pilkington*, and other English decisions regarding scope of equitable relief).

Justice Story's work tracked Calvert's research and conclusions: after stating the general rule that all persons materially interested in the subject matter of a suit in equity should be made parties to it, STORY'S EQUITY PLEADINGS § 72, at p. 83, the Justice recognized an "exception to the general rule[.]" *Id.* § 94, at pp. 114-15. Where such persons "are exceedingly numerous, and it would be impracticable to join them without almost interminable delays and other inconveniences, which would obstruct, and probably defeat the purposes of justice," they need not be parties to the case, even though the decree would be binding upon them. *Id.* He observed, "the doctrine above stated as to the necessity of all persons being made actual parties" was riddled with so "many qualifications" that it was questionable whether it was "maintainable at all in its general signification." *Id.* § 94, at p. 116.

The exceptions derive from the fact that "***there always exists a common interest, or a common right***, which the Bill seeks to establish and enforce, or a general claim or privilege, which it seeks to establish, or to narrow, or take away." *Id.* § 120, at p. 146 (emphasis added). "It is obvious," he stated, "that, under such circumstances, the interest of persons, not actual parties to the suit, may be in some measure affected by the decree; but the suit is nevertheless permitted to proceed without them, in order ***to prevent a total failure of justice***." *Id.* (emphasis added). Justice Story cited English cases that antedated the Constitution, including *Pilkington* and *Perkins*. *Id.* § 120, at p. 146, nn. 1-4.

Justice Story cited *Perkins* as an example of a case allowing a bill in equity "where there has been a general right claimed by the plaintiff," *id.* § 124, at p. 150, emphasizing that, in *Perkins*, the Chancery Court had allowed the bill to go forward "notwithstanding the objection, that ***all the subjects of the realm might be concerned*** in the right." *Id.* § 124, at pp. 149-50 (emphasis added). This was because, "[i]n such a case, a great number of actions might otherwise be brought, and ***almost interminable litigation would ensue***; and, therefore, the Court suffered the Bill to proceed, although the defendants might make distinct defences, and although there was no privity between them and the city." *Id.* § 124, at p. 150 (emphasis added).

Justice Story also analyzed *Pilkington*. He wrote that the Chancellor had sustained the action because "such a Bill, under the circumstances, . . . furnish[ed] a ground ***to quiet the general right***, not only as to the persons before the Court, but as to all others in the same predicament." *Id.* § 125, at p. 150 (emphasis added); *see also*, *e.g.*, *id.* § 125, at pp. 150-51, n.3. Justice Story summarized the law on this point:

> In all these classes of cases, ***it is apparent, that all the parties*** stand, or are supposed to stand, in the same situation, and ***have one common right***, or one common interest, ***the operation and protection of which will be for the common benefit of all***[.]

Id. § 126, at pp. 151-52 (emphasis added).

2. Early federal and state decisions in equity granted relief that applied beyond the parties to the litigation.

Justice Story also addressed equity practice as to absent parties as Circuit Justice in *West v. Randall*, 2 Mason 181, 29 F. Cases 718 (C. Ct. D.R.I. 1820). In *West*,

plaintiff instituted in federal court "a bill [in equity] against the defendants, as survivors of four trustees, for a discovery and account of certain real and personal estate, alleged to have been conveyed to them by one William West[.]" 2 Mason at 189, 29 F. Cases at 721. West had died, and plaintiff was one of his heirs. Plaintiff did not name as parties West's other heirs, or West's personal representative, and one defendant sought dismissal for failure to name them. *Id.* at 189-90, 29 F. Cases at 721.

Justice Story began by acknowledging the "general rule in equity that all persons materially interested, either as plaintiffs or defendants in the subject matter of the bill ought to be made parties to the suit, however numerous they may be." *Id.* at 190, 29 F. Cases at 721. But this "being a general rule, established for the convenient administration of justice," Justice Story said, "it must not be adhered to in cases, to which consistently with practical convenience it is incapable of application." *Id.* at 193, 29 F. Cases at 722.

Justice Story gave two illustrations when the exception comes into play: "where the parties are very numerous, and the court perceives, that it will be almost impossible to bring them all before the court; or where the question is of general interest, and ***a few may sue for the benefit of the whole***." *Id.* (emphasis added). Accordingly, "[i]n these and analogous cases of general right," a court of equity will:

> dispense with having all the parties, who claim the same right, before it, from the manifest inconvenience, if not impossibility of doing it, and is satisfied with ***bringing so many before it, as may be considered as***

> ***fairly representing that right, and honestly contesting in behalf of the whole***, and therefore binding, in a sense, that right.

Id. at 195, 29 F. Cases at 723 (emphasis added).

In *Elmendorf v. Taylor*, 25 U.S. (10 Wheat.) 152 (1825), Chief Justice Marshall, writing for a unanimous Court, recognized the flexibility that federal courts of equity have in administering the rules as to parties in equity actions before them. In that case, defendants argued that plaintiff in the equitable action was "a tenant in common with others, and ought not to be permitted to sue in equity, without making his co-tenants parties to the suit," which he had not done. *Id.* at 166. The Court noted that "[t]his objection ***does not affect the jurisdiction***" of the federal court, "but addresses itself to the policy of the Court" to the effect that in an action in equity, "all parties concerned shall be brought before them, that the matter in controversy may be finally settled." *Id.* (emphasis added).

But, "[t]his equitable rule," the Court said, "is framed by the Court itself, and is subject to its discretion." *Id.* at 166-67. The rule is not "inflexible," such that "a failure to observe [it] turns the party out of Court, because it has no jurisdiction over his cause." *Id.* at 167. "[B]eing introduced by the Court itself, for the purposes of justice," the Court held, the rule "is susceptible of modification for the promotion of those purposes." *Id.* The Court observed that "it may be proper to say, that the rule which requires that all persons concerned in interest, however remotely, should be made parties to the suit, though applicable to most cases in the Courts of the United

States, is not applicable to all," and that the federal courts had discretion to apply, or not apply, the rule depending on the circumstances of the case. *Id.*; *see also Vattier*, 33 U.S. (7 Pet.) at 265 ("a general rule, established for the convenient administration of justice," "is subject to some exceptions, introduced from necessity, or with ***a view to practical convenience***") (emphasis added).

In *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), the Supreme Court again considered a request for injunctive relief that extended beyond the actual parties to the case, and, in fact, applied to the entire state government. Although the Court found that it did not have jurisdiction over the Cherokee Nation's request to prevent enforcement of Georgia state law within the Nation's territory, *Cherokee Nation*, 30 U.S. at 19-20, a dissent authored by Justice Thompson, and joined by Justice Story, concluded that, as a matter of equity, it was within the courts' powers to grant the requested injunction. *Id.* at 77-80.

These decisions illustrate Justice Story's statement that "Courts of Equity do not require, that all persons, having an interest in the subject-matter, should, under all circumstances, be before the Court as parties." STORY'S EQUITY PLEADINGS § 142, at p. 176. "On the contrary," both English and American equity decisions established that "there are cases, in which certain parties before the Court are entitled to be deemed the ***full representatives of all other persons***, or at least so far as to bind

their interests under the decree, although they are not, or cannot be made parties." *Id.* at 177 (emphasis added).

3. Pomeroy's TREATISE UPON EQUITY JURISPRUDENCE and additional early American decisions.

The leading 20th Century treatise on equity rules, POMEROY, concluded that the possibility of a multiplicity of suits alone "shows that the legal remedies are inadequate, and ***cannot meet the ends of justice***, and therefore a court of equity interferes" on that ground to provide "some specific equitable remedy, which gives, perhaps in one proceeding, more substantial relief than could be obtained in numerous actions at law." POMEROY § 244, at p. 358 (emphasis added).

POMEROY identified several "classes" of cases in which English and American courts of equity had exercised jurisdiction for the purpose of avoiding a multiplicity of actions. *Id.* § 245, at pp. 359-61. These cases included "[w]here a number of persons have separate and individual claims and rights of action against the same party," all of which "***arise from some common cause***, are governed by the same legal rule, and involve similar facts, ***and the whole matter might be settled in a single suit*** brought by all these persons uniting as co-plaintiffs, or one of the persons suing on behalf of the others, or ***even by one person suing for himself alone***." *Id.* § 245, at p. 360 (emphasis added); *see also id.* § 255, at p. 390 (common interests "may perhaps be enforced by one equitable suit" alone).

POMEROY listed "the equitable relief which might be obtained by the single plaintiff in the one case, or by all the plaintiffs united in the other" as including "***a perpetual injunction . . . or the declaration and establishment of some common right*** or duty affecting all the parties." *Id.* § 250, at p. 367 (emphasis added). The treatise noted that "[t]he decisions are full of examples illustrating this most important feature of the doctrine." *Id.*

Finally, POMEROY cited "the very numerous recent cases illustrating" equitable relief being granted to avoid repetitious litigation. *Id.* § 261, at 411, n.(b). These included cases where the court enjoined: a defendant from bringing actions at law against numerous parties; "the enforcement of an invalid municipal ordinance affecting many persons"; wrongful acts affecting numerous persons; a defendant from breaching a contract where many other parties had a right to enforce it; enforcing promissory notes made by numerous persons; and a defendant to provide pecuniary relief to many people. *See id.* § 261, at pp. 414-15, n.(b).

The cases POMEROY cited illustrate that English precedents such as *Perkins* and *Pilkington*, recognizing the authority of a court of equity to bind persons not before it to the requirements of its decree, maintained their vitality in America into the 20th Century. For example, in *Bailey v. Tillinghast*, 99 F. 801 (6th Cir. 1900), the court of appeals held that "to bring a case within the jurisdiction" of a federal court of equity involving the rights of parties not before the court, all that was necessary was that

there existed a common interest among the persons not before the court and the parties to the action regarding "the question involved and the kind of relief sought." 99 F. at 806 (citing *Perkins*, *Pilkington*, and *Lord Tenham*).

In a decision by a leading state court judge in the early years of the Republic, *Brinkerhoff v. Brown*, 6 Johns. Ch. 139 (N.Y. Ch. 1822) (Kent, Ch.), the court found it well settled that, when general rights are at issue, a court of equity would exercise jurisdiction "for the sake of peace, and to prevent a multiplicity of suits." *Id.* at 155 (citing *Pilkington*). The court explained "[t]he rules of pleading in chancery are not so precise and strict as at law," but "are more flexible in their modification, and ***can more readily be made to suit the equity of the case*** and the policy of the court." *Id.* at 157 (emphasis added).

The principle of equity applying beyond the parties to a case also is seen in numerous cases regarding tax disputes in the 1800s. *See*, *e.g.*, *Carlton v. Newman*, 1 A. 194 (Me. 1885); *McTwiggan v. Hunter*, 30 A. 962 (R.I. 1895); *see also* POMEROY § 260, at pp. 391-410 (equity suits by one taxpayer could enjoin enforcement of tax against all). In these cases, courts found that the taxes to be imposed were improper, and enjoined the government from collecting them from plaintiffs, ***and others*** subject to the taxes.

As POMEROY found, "[u]nder the greatest diversity of circumstances, and the greatest variety of claims arising from unauthorized public acts, private tortious

acts, invasion of property rights, [and] violation of contract obligations," the "weight" of American "authority is simply overwhelming that" the authority of a court of equity:

> may and ***should be exercised***, either ***on behalf of a numerous body of separate claimants against a single party***, or on behalf of a single party against a numerous body . . . where there is and because there is merely a community of interest among them in ***the questions of law and fact involved in the general controversy***, or in the kind and form of relief demanded and obtained[.]

POMEROY § 269, at p. 445 (emphasis added).

Early American equity decisions were thus entirely consistent with "the principles, rules and usages which belonged to"' the "court of Chancery England" in 1789. American courts (both state and federal) have always had the ability to issue equitable decrees binding persons not before them as parties to the litigation, so as to ensure that American justice is not "lame and inadequate." In cases involving the general interest, the public's rights, or the prospect of a multiplicity of lawsuits, courts of equity in England had enjoyed that authority since at least the 17th century. Federal (and state) courts of equity in the new United States recognized that authority from the start of the new nation in 1789, and well into the 20th Century.

C. The Civil Rights Era Provided Widespread Injunctive Relief to Address Harm to Broad Populations.

During the period from Reconstruction through (and after) passage of the Civil Rights Act of 1968, civil rights plaintiffs asked courts to apply their equitable authority broadly to end unconstitutionally discriminatory practices and policies. In these cases, plaintiffs needed both a declaration of illegality, and a vehicle to provide a

basis for strong enforcement—injunctions applied broadly to parties and non-parties alike. *See* J. Altman, *Implementing a Civil Rights Injunction: A Case Study of* NAACP v. Brennan, 78 COLUM. L. REV. 739, 739-40 (1978) (summarizing use of injunctions to address civil rights violations in variety of settings).

For example, plaintiffs in *Bailey v. Patterson*, 323 F.2d 201 (5th Cir. 1963), alleged that Mississippi unlawfully discriminated against African Americans by enacting and enforcing state and local statutes and ordinances mandating racial segregation in public accommodations. Several transportation carriers—including local, interstate, and international carriers—also allegedly discriminated against African Americans by requiring racial segregation in their facilities. *Id.* at 203, n.2. Residents of Jackson, Mississippi sought a declaratory judgment that the statutes and ordinances violated the United States Constitution and the Interstate Commerce Act, and sought an order enjoining the carriers from continuing their unlawful segregation. *Id.* at 203.

The district court granted declaratory relief, but declined to issue an injunction, reasoning that, because the suit was not a class action, no relief could be granted beyond that which each named plaintiff was specifically entitled. *Id.* at 202, 204. On appeal, the Fifth Circuit itself enjoined the City of Jackson and its officials from "seeking to enforce or encouraging" racial segregation in the transportation facilities, and granted injunctions against the transportation carrier defendants. *Id.* at

202, 204, 207-08. Importantly, the Fifth Circuit declined to limit relief simply because the case was not a class action:

> Appellants . . . seek the right to use facilities which have been desegregated, that is, which are open to all persons, appellants and others, without regard to race. ***The very nature of the rights appellants seek to vindicate requires that the decree run to the benefit not only of appellants but also for all persons similarly situated***.

Id. at 205-206 (emphasis added). The court further held that denying the injunction was improper given the "threat of continued or resumed violations of appellant's federally protected rights remains actual." *Id.* (citing *United States v. W. T. Grant Co.*, 345 U.S. 629 (1953)); *see also Vulcan Soc'y of N.Y.C. Fire Dept., Inc. v. Civil Service Com.*, 360 F. Supp. 1265, 1278, n.8 (S.D.N.Y. 1973) (granting injunction, and holding "any equitable relief . . . should take the form of an injunction prohibiting further use of those procedures determined to be unconstitutional, which would automatically benefit all individuals similarly situated"), *aff'd*, 490 F.2d 387 (2d Cir. 1973).

These are but exemplars of the many cases in more recent times granting injunctions as a remedy that applied to parties and non-parties; nationwide injunctions are one variety of such equitable relief. These remedies are well established as appropriate and available.

* * *

The power to grant equitable relief that applies beyond the parties before the court, through local, regional, or, indeed, national injunctions, is consistent with the

scope of equitable powers recognized by English courts, American courts, and respected authorities, and is necessary to afford complete justice as a matter of equity. This Court should affirm the district court on this basis.

II. THE GOVERNMENT INCORRECTLY CONFLATES STANDING WITH THE SCOPE OF THE COURTS' EQUITABLE POWERS.

Federal appellants also argue that the district court could not grant a nationwide injunction because Plaintiff States do not have standing to obtain that particular form of relief. *See* Br. for Federal Appellants at 78. But this confuses separate concepts. Once a party establishes jurisdictional standing, the district court can fashion an equitable remedy to suit the circumstances. *See*, *e.g.*, *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (observing, "the scope of injunctive relief is dictated by the extent of the violation established," not by geography). The cases cited by federal appellants do not undermine this principle.

In *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645 (2017), the issue was whether an intervenor must itself meet the requirements of Article III standing, or whether plaintiff's standing was sufficient to confer jurisdiction to all. 137 S. Ct. at 1650. The Court held that an intervenor must have Article III standing to pursue relief that is different from that which a party with standing sought. *Id.* The Court's holding has nothing to do with the bounds of equitable relief sought by plaintiffs, such as here, who establish standing to pursue their claims and injunctive relief. *See*, *e.g.*, *id.* ("[a]t least one plaintiff must have standing to seek each ***form of relief*** requested in the

complaint") (emphasis added). The same question arose in *Gill v. Whitford*, 138 S. Ct. 1916 (2018): could ***any*** plaintiff demonstrate Article III standing to bring suit, and ask for equitable relief? The Court found plaintiffs had not made that showing, but remanded the case to the district court to afford them an opportunity to do so. *Id.* at 1930, 1933. Again, *Gill* was ***not*** a case in which the Court held that a district court could not grant equitable relief to those other than plaintiffs who had standing in the case.

Finally, this Court's decision in *Ameron, Inc. v. U.S. Army Corps of Eng'rs*, 787 F.2d 875 (3d Cir. 1986) also does not support reversal of the district court. In *Ameron, Inc.*, a bidder for a government contract requested an injunction prohibiting the government and the winning bidder from proceeding under the contract during plaintiff's bid protest. *Ameron, Inc.*, 787 F.2d at 888. The district court granted an injunction that applied beyond the bid, protest, and contract at issue. This Court held that the injunction should have been narrower, because an injunction as to only plaintiff's bid and protest was sufficient to protect plaintiff's rights, and concerns about ***potential*** Constitutional issues did not justify a broader injunction. *Id.* Although the Court narrowed the injunction at issue, it reaffirmed that "considerable discretion [is] granted to the district court in framing injunctions," and that "[t]he trial court must be given ***leeway to fashion effective remedies*** to correct offenses to the Constitution." *Id.* at 887 (citations omitted; emphasis added). In contrast, in this case, the district

court concluded that an injunction limited to Pennsylvania and New Jersey would ***not*** be sufficient to protect Plaintiff States from harm, so granting a nationwide injunction was necessary. This Court should not reverse that determination.

CONCLUSION

Amici urge the Court to reject appellants' incorrect argument that a national injunction exceeds the district court's equitable powers.

Dated: March 25, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FED. R. APP. P. 29(a)(5) and 32(a)(7)(B) and because it contains 6,453 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(f) and 3d Cir. Local Appellate Rule 29.1 (2011).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5), and the type style requirements of Rule 32(a)(6), because it has been prepared in a proportionally spaced typeface, using Microsoft Word 2016, in 14 pt. Garamond font.

Dated: March 25, 2019

/s/ Thomas W. Hazlett
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CERTIFICATION OF IDENTICAL COMPLIANCE OF BRIEF

I, Thomas W. Hazlett, hereby certify that the electronic version of this brief is identical to the text version in the paper copies that were dispatched by hand delivery to the Clerk of the Court of the United States Court of Appeals for the Third Circuit.

Dated: March 25, 2019

/s/ *Thomas W. Hazlett*
Thomas W. Hazlett

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I, Thomas W. Hazlett, hereby certify that this document was scanned using Windows Defender Security Center, and no viruses were detected.

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CERTIFICATION OF COUNSEL

I, Thomas W. Hazlett, hereby certify that I am a member of the bar of this Court.

Dated: March 25, 2019

/s/ Thomas W. Hazlett
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CERTIFICATE OF SERVICE

I, Thomas W. Hazlett, certify that on this 25th day of March, 2019, I caused ten (10) copies of this Brief of The Public Interest Law Center and Four Affiliated Lawyers' Committees for Civil Rights as *Amici Curiae* in Support of Plaintiffs-Appellees to be dispatched by hand delivery to the Clerk of the Court for the United States Court of Appeals for the Third Circuit, and filed an electronic copy of the brief via CM/ECF. I further certify that counsel for the parties are users of the Court's CM/ECF system.

Dated: March 25, 2019

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