UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA and STATE OF NEW JERSEY, Plaintiffs, v. DONALD J. TRUMP, *in his official capacity as President of the United States*; ALEX M. AZAR II, *in his official capacity as Secretary of Health and Human Services*; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; STEVEN T. MNUCHIN, *in his official capacity as Secretary of the Treasury*; UNITED STATES DEPARTMENT OF THE TREASURY; RENE ALEXANDER ACOSTA, *in his official capacity as Secretary of Labor*; UNITED STATES DEPARTMENT OF LABOR; and UNITED STATES OF AMERICA, Defendants, and LITTLE SISTERS OF THE POOR SAINTS PETER AND PAUL HOME, Intervenor-Defendant.	**No. 2:17-cv-04540-WB**

PLAINTIFFS' COMBINED RESPONSE IN OPPOSITION TO MOTIONS TO DISMISS

Plaintiffs the Commonwealth of Pennsylvania and the State of New Jersey respectfully submit this combined opposition to the motions to dismiss filed by the Federal Defendants (the "Defendants") and the Intervenor-Defendant (the "Intervenor") in this action.[1] Both motions should be denied.

[1] *See* Federal Defendants' Mem. in Supp. of Mot. to Dismiss, ECF No. 157-1 (Mar. 28, 2019) ("Def. Mot."); Br in Supp. of Intervenor-Defendant's Mot. to Dismiss, ECF No. 159-1 (Mar. 29, 2019) ("Int. Mot.").

I. THE STATES HAVE STANDING TO BRING THIS ACTION.[2]

This Court has held on two previous occasions that the States have standing. *See* Mem. & Op. 8–17, ECF No. 59 (Dec. 15, 2017) ("PI Op. I"); Mem. & Op. 13–20, ECF No. 136 (Jan. 14, 2019) ("PI Op. II"). The Final Rules invade the interests of Pennsylvania and New Jersey in at least two ways: they will directly injure their proprietary interests through the increased use of state-funded programs that provide contraceptive and other medical services, and they will directly injure their quasi-sovereign interests through harm to their residents' health and well-being and denial of their residents' full enjoyment of federal benefits.

A. Standard of Review

A motion to dismiss for lack of Article III standing filed before the complaint has been answered or defendants have offered competing factual evidence should be treated as "a facial attack" on this Court's subject matter jurisdiction. *Constitution Party of Pennsylvania v. Aichele*, 757 F.3d 347, 358–59 (3d Cir. 2014). As a result, the Court "must accept as true all material allegations set forth in the complaint, and must construe those facts in favor of the complaining party." *Id.* at 356 n.12 (quoting *Storino v. Borough of Point Pleasant Beach*, 322 F.3d 293, 296 (3d Cir. 2003)).

Defendants seem to suggest that they instead pose a "factual" challenge to the States' standing, Def. Mot. 5 n.1 (citing *U.S. ex rel. Schumann v. AstraZeneca Pharm. L.P.*, 769 F.3d 837, 845 (3d Cir. 2014)), and they cite to exhibits submitted as part of the States' Second Motion for Preliminary Injunction. But because Defendants have not put forward any evidence to contest the factual allegations in the States' Amended Complaint, the States are entitled to the "more generous standard of review associated with" a facial attack, and the allegations in the complaint

[2] Because the Court is well-versed in the facts of this case, the States have not repeated them here.

must be taken as true. *Constitution Party*, 757 F.3d at 359. The States have nevertheless included in this memorandum citations to the supporting exhibits they submitted in connection with their motion for a preliminary injunction to show that the allegations in the Amended Complaint are supported by evidence in the record. And under either standard, the States have amply demonstrated that they have standing to bring this action.

B. The Rules Injure the States' Proprietary Interests.

The States have alleged—and their motion for a preliminary injunction demonstrated—that the Rules will impose increased financial burdens on Pennsylvania and New Jersey because the loss of ACA-mandated coverage under the Rules will make contraceptive care unaffordable or inaccessible for many women, as cost is a significant barrier to women's access to and use of contraception. *See* Am. Compl. ¶¶ 75, 143; *see also* Weisman Decl. (Exh. D to States' Mem.[3]) ¶¶ 45-48; Butts Decl. (Exh. F) ¶ 55; Chuang Decl. (Exh. E) ¶ 38; Adelman Decl. (Exh. S) ¶¶ 19–20, 24; Coulter Decl. (Exh. U) ¶¶ 22–32; Gennace Decl. (Exh. T) ¶¶ 18-19.

The loss of access to cost-free contraception will directly impact the States in two ways:

First, Pennsylvania and New Jersey women who lose contraceptive coverage under the Rules will seek it elsewhere, including from state-funded programs.[4] *See* Am. Compl. ¶ 146; *see*

[3] "States Mem." refers to the States' Memorandum in Support of their Second Motion for a Preliminary Injunction, ECF No. 91-2 (Dec. 17, 2018).

[4] Defendants argue that the States have not sufficiently alleged harm with respect to the "individual exemption," which allows insurers to provide contraception-free coverage to objecting employee. *Cf. Real Alternatives, Inc. v. Sec'y Dep't of Health & Human Servs.*, 867 F.3d 338, 343, 360-64 (3d Cir. 2017) (rejecting argument that "an employee's religious beliefs are substantially burdened by the law's requirement that his or her employer's insurance plan cover contraceptives"). But the same harm is present: an employee who utilizes the individual exemption denies contraceptive coverage to his or her female dependents, thus shifting the burden of providing such coverage to the States. *E.g.*, Mendelsohn Decl. (Exh P to States' Mem.) ¶ 17 ("Moreover, because the Final Rules contemplate that individuals, covered by employer plans that provide contraceptive care, may nevertheless opt out of the ACA's Contraceptive Care Mandate, and, in so doing, effectively deny contraceptive care to all of the individual's female

also Steinberg Decl. (Exh. R) ¶¶ 25–27; Allen Decl. (Exh. Q) ¶ 23; Coulter Decl. (Exh. U) ¶ 28; Mendelsohn Decl. (Exh P) ¶¶ 15, 17–18. For many women who lose access, government-funded care is likely the only available option. Women who are citizens of Pennsylvania and New Jersey with incomes up to 138% of the federal poverty level can enroll in Medicaid, which is known as "Medical Assistance" in Pennsylvania and "NJ FamilyCare" in New Jersey. *See* Am. Compl. ¶¶ 147–48; *see also* Allen Decl. (Exh. Q) ¶ 8; Adelman Decl. (Exh. S) ¶¶ 9–11. Those with incomes up to 215% of the poverty level ($25,929 for an individual and $52,890 for a family of four) can participate in Pennsylvania's Family Planning Services Program, *see* Am. Compl. ¶ 147; *see also* Allen Decl. (Exh. Q) ¶ 9, while, beginning this year, New Jersey residents with incomes up to 205% of the federal poverty level will be eligible to participate in a family planning benefit program known as "Plan First." These programs provide contraceptive care and rely on a combination of federal and states funding. Other women will seek coverage from Title X clinics, which receive funding from the States and have no income-based eligibility requirements. Am. Compl. ¶¶ 147–48; *see also* Steinberg Decl. (Exh. R) ¶ 29; Chuang Decl. (Exh. L ¶ 22); Coulter Decl. (Exh. U), ¶¶ 4–5. These clinics also help women who are eligible for other state-funded healthcare to enroll in these programs to offset their own costs. Therefore, because of the Rules, the States' cost to fund Medicaid, family planning programs, and Title X clinics will increase.[5]

Second, other women will forgo contraceptive health services altogether, and the States will bear increased costs through these same programs. Women who stop using contraception

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dependents covered by the same plan, still more women may be denied access to contraceptive coverage.").

[5] Intervenor seems to concede this point, arguing that women denied employer-sponsored contraceptive coverage may "obtain coverage though a family member's employer, through an individual insurance policy purchased on an Exchange or directly from an insurer, *or through Medicaid or another government program*." Int. Mot. at 5 (emphasis added) (cleaned up).

entirely will experience more unintended pregnancies and negative health outcomes. *See* Am. Compl. ¶ 149; *see also* Butts Decl. (Exh. F) ¶¶ 56–58; Coulter Decl. (Exh. U) ¶¶ 31–32. These outcomes will impose additional costs on Pennsylvania's and New Jersey's state-funded health programs. *See* Am. Compl. ¶ 150; *see also* Coulter Decl. (Exh. U) ¶ 28; Steinberg Decl. (Exh. L) ¶ 30 (discussing study finding that 68% of unplanned births are paid for by public insurance programs, compared to 38% of planned births).

Contrary to Defendants' assertions, these fears are not speculative. Defendants themselves concluded that at least 70,500 "women that use contraception covered by the Guidelines" would lose their contraceptive coverage due to the Final Rules. *See* Religious Exemption Rule, 83 Fed. Reg. 57,536, 57,578 (Nov. 15, 2018) (attached as Exh. A to Amended Complaint, ECF No. 89-1 (Dec. 14, 2018)). They reached this conclusion by attempting to identify the number of women who worked for employers that either litigated against the Mandate or had taken advantage of the Accommodation. A number of the entities identified by Defendants as part of this process are based in Pennsylvania and New Jersey. Among them are: Bingaman and Son Lumber Inc., Kreamer, PA (number of employees unknown); Conestoga Wood Specialties Corporation, East Earl, PA (950 employees); Cummins Allison, Philadelphia, PA (number of employees unknown); DAS Companies, Inc., Palmyra, PA (number of employees unknown); Earth Sun Moon Trading Company, Inc., Grove City, PA (number of employees unknown); Hobby Lobby (13,240 total employees, at least 15 stores in Pennsylvania and 10 stores in New Jersey[6]); and Holy Ghost Preparatory School, Bensalem, PA (number of

[6] Hobby Lobby, *Store Finder*, https://www.hobbylobby.com/store-finder (last visited Nov. 5, 2018).

employees unknown). Am. Compl. ¶ 136; *see also* Exhs. V & W to States' Mem.[7] Therefore, by the agencies' own estimates, Pennsylvania and New Jersey women will lose contraception coverage. In sum, because the States fund programs that provide contraceptive services to women who lack employer coverage, the Rules will increasingly burden these services when Pennsylvania and New Jersey employers use the Rules to exclude coverage for their female employees.[8]

Defendants raise two objections to this Court's previous determination that the States have standing. First, they take issue with the Court's reference to their own assertion that there are "multiple Federal, State, and local programs that provide free or subsidized contraceptives for low-income women." Def. Mot. 8 (quoting PI Op. II at 18). But Defendants cannot hide from their own admissions so easily: they had discussed these other programs in the Rules precisely because they recognized that some number of women would lose coverage as a result, and they sought to downplay the resulting harm. Second, they argue that this Court was in error to rely on *Texas v. United States*, 809 F.3d 134, 151 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016). In that case, Defendants argue, at least 500,000 immigrants would have been eligible to apply for the DAPA program and, if granted relief, would have imposed costs on Texas—whereas the States here have not identified a "similarly large potential pool of women."

[7] In estimating the impact of the Final Rules, Defendants excluded those entities that had obtained permanent injunctions against the Mandate since the issuance of the IFRs. 83 Fed. Reg. at 57,575-76. (Following the issuance of the IFRs, a number of the entities that had litigated against the Mandate filed motions for permanent injunctions, which Defendants did not oppose. Intervenor lists a number of these injunctions in Exhibit A to its motion.) Geneva College, based in Pennsylvania and previously identified by Defendants, is one such entity; Intervenor is another.

[8] Defendants note that employers utilizing the exemptions would have to provide their employees with 60-days' notice under the Public Health Service Act, and suggest that the States should be able to identify employers who have done so. Def. Mot. 7. Given that the Rules have been enjoined, it would be surprising if an employer did, in fact, provide such notice.

Def. Mot. 9. But it is the existence of an injury that is relevant for standing purposes, not the size of that injury.[9] And by Defendants' logic, the injury in *Texas* was entirely speculative as well: Texas pointed only to a pool of individuals eligible for DAPA, but could not demonstrate with certainty that any of these individuals would apply and be granted status under the program—much less subsequently be eligible for, apply for, and be granted a driver's license.

Nothing in Defendants' or Intervenor's motions undermines the logic of this Court's prior decisions finding that the Rules will injure the States' proprietary interests. Their motions should be rejected.

C. The Final Rules Threaten the States' Quasi-Sovereign Interests.

The States may also assert standing under the long-established *parens patriae* doctrine, which allows states to sue based on an invasion of their quasi-sovereign interests. *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 607, 607–08 (1982); *see also Massachusetts v. EPA*, 549 U.S. 497, 518–26 (2007); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237–38 (1907); *Missouri v. Illinois*, 180 U.S. 208, 241 (1901). Here, the Rules threaten the States' quasi-sovereign interests in the general physical and economic "well-being of [their] populace" and in "ensuring that the State[s] and [their] residents are not excluded from the benefits that are to flow from participation in the federal system." *Snapp*, 458 U.S. at 602, 608. Because these injuries are caused by Defendants and redressable by a court, the States have standing.

[9] *Cottrell v. Alcon Labs.*, 874 F.3d 154, 162 (3d Cir. 2017) ("The injury-in-fact requirement is very generous to claimants, demanding only that the claimant allege some specific, identifiable trifle of injury.") (cleaned up). And even if the magnitude of injury was relevant for Article III standing, the States face a per-user cost at least five times as large as that faced by Texas. *Compare Texas*, 809 F.3d at 155 ("Texas subsidizes its licenses and would lose a minimum of $130.89 on each one it issued to a DAPA beneficiary."), *with* 83 Fed. Reg. at 57,581 (estimating "an average *annual* expenditure on contraceptive products and services of $584 per user" (emphasis added)).

Only a decade ago, the Supreme Court reaffirmed a state's standing to protect its quasi-sovereign interests. *Massachusetts v. EPA*, 549 U.S. at 518–26. There, Massachusetts sought to challenge the EPA's refusal to regulate greenhouse gases as required by the Clean Air Act. *Id.* at 514. The Court recognized that Massachusetts surrendered "certain sovereign prerogatives" when it joined the Union: it could not "invade" or "negotiate a [] treaty with" a federal agency to ensure its compliance with federal law. *Id.* at 519. But Massachusetts "did not renounce the possibility of making reasonable demands on the ground of [its] still remaining quasi-sovereign interests." *Georgia v. Tenn. Copper Co.*, 26 U.S. at 237. As a result, "the special position and interest of Massachusetts" as a "sovereign State" was of "considerable relevance," entitling it to "special solicitude in our standing analysis." *Massachusetts v. EPA*, 549 U.S. at 515, 520.

Here, the States proceed under the procedural right afforded by the APA[10] and allege that Defendants issued the final Rules in violation of the APA and the ACA. The Final Rules will cause women in the States to lose access to cost-free contraceptive coverage, with the resultant harms to their physical and economic well-being. Some women who lose access to contraception under the Rules will forgo contraceptive health services entirely. Am. Compl. ¶¶ 143, 146. And women who lose access to contraceptive care will experience unplanned pregnancies and/or significant health problems as a result. *Id.* ¶ 146. Among the negative health outcomes for mothers and children associated with unintended pregnancy are depression, domestic violence, preterm births, and low birth weight. *Id.* ¶¶ 61–67. The Final Rules will also cause women to no longer enjoy the cost-free preventive care guaranteed by the Women's Health Amendment. In light of the States' position in the federal system, filing a lawsuit is their only recourse to force

[10] The APA creates a cause of action for any "person" who is "adversely affected or aggrieved by agency action." 5 U.S.C. § 702. The States are "'person[s]' entitled to enforce" the APA. *E.g.*, *Texas*, 809 F.3d at 152 (allowing states to sue under APA).

Defendants to comply with federal law and there are entitled to special solicitude in doing so. *See Massachusetts v. EPA*, 549 U.S. at 515, 520; *Georgia v. Tenn. Copper Co.*, 206 U.S. at 237.[11]

Defendants and Intervenors nonetheless argue that the States may not assert *parens patriae* standing against the federal government. Def. Mot. 9–11; Int. Mot. 3, 7. But the cases they cite do not support this broad claim. Rather, they stand for the more limited proposition that, under principles of prudential standing, a state cannot ordinarily bring a *parens patriae* suit to "protect her citizens from the operation of federal statutes." *Massachusetts v. EPA*, 549 U.S. at 520 n.17 (quoting *Georgia v. Pa. R.R. Co.*, 324 U.S. 439, 447 (1945)); *id.* at 539–40 & n.1 (Roberts, C.J., dissenting) (referring to state's inability to bring a *parens patriae* suit against a federal statute as a "prudential requirement"); *accord Massachusetts v. Mellon*, 262 U.S. 447, 484–86 (1923). Here, however, the States seek to *enforce* existing federal statutes—specifically, the APA and the ACA—in the same way Massachusetts was allowed to enforce the Clean Air Act over a decade ago. *Massachusetts v. EPA*, 549 U.S. at 520 n.17 (finding that a state has standing "to assert its rights under federal law").[12]

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[11] Defendants try to distinguish *Massachusetts v. EPA* by arguing that the existence of injury was undisputed in that case, claiming, "Indeed, in *Massachusetts*, there was no dispute that the State was already being injured—'rising seas ha[d] already begun to swallow Massachusetts' coastal land.'" Def. Mot. 5 (quoting *Massachusetts v. EPA*, 549 U.S. at 522). In fact, there was considerable dispute over this point, as the dissenters in that case asserted, "Thus, aside from a single conclusory statement, there is nothing in petitioners' standing declarations and accompanying exhibits to support an inference of actual loss of Massachusetts coastal land from 20th-century global sea level increases. It is pure conjecture." 549 U.S. at 542 (Roberts, C.J., dissenting).

[12] *Pennsylvania v. Porter*, 659 F.2d 306, 318 (3d Cir. 1981), does not bar the States' *parens patriae* claim. *Porter* involved Fourteenth Amendment claims against local civil and law enforcement officials, not claims brought under the APA against federal regulations. And in any case, *Porter* preceded *Massachusetts v. EPA*, which affirmed a state's ability "to assert its rights under federal law" against a federal agency. 549 U.S. at 520 n.17.

All counts brought by the States proceed under the APA, which allows a claim to challenge agency action that is "not in accordance with law" or "contrary to [a] constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2). They do not allege that the Final Rules have usurped any state power, nor that the ACA or APA are unconstitutional. Because the States seek only to ensure that a federal agency complies with a duly-enacted law of Congress, no prudential limitation bars their assertion of *parens patriae* standing here.

D. The States Have Standing to Pursue Their Establishment Clause, Equal Protection, and Title VII Claims.

Intervenor claims that the States lack standing to bring claims under the Establishment Clause, the equal protection provisions of the Fifth Amendment, and Title VII. Int. Mot. 2–3. Defendants have not raised this argument. The APA allows the States to challenge any agency action that is "not in accordance with law" or "contrary to [a] constitutional right." 5 U.S.C. § 706(2)(A), (B); *see, e.g.*, *Texas*, 809 F.3d at 152 (allowing states to sue under APA). As a result, the States' claims that the Final Rules are contrary to law and the Constitution because, among other things, they violate the Establishment Clause, the equal protection provisions of the Fifth Amendment, and Title VII, are cognizable as violations of the APA. And as demonstrated above, the States have Article III standing to raise their APA claims because the Final Rules infringe on the States' proprietary interests and implicate the States' role as *parens patriae*.

E. The States Satisfy the Remaining Elements of Standing.

In its motion, Intervenor claims that the States cannot satisfy the traceability and redressability requirements of Article III standing. There is no merit to these arguments.

First, Intervenor claims that the States' injuries are "self-inflicted." But the law is clear that an injury "cannot be deemed 'self-inflicted' when a party faces only two options: full compliance with a challenged action or a drastic restructure of a state program." *Texas v. United*

States, 86 F. Supp. 3d 591, 619 (S.D. Tex.), *aff'd*, *Texas*, 809 F.3d 134, *aff'd by an evenly divided Court*, 136 S. Ct. 2271 (2016). Here, the States face exactly such a choice: to avoid the harm from the Rules they would have to abandon their commitment to protect the health of their residents. *Pennsylvania v. New Jersey*, 426 U.S. 660 (1976), relied on by Intervenor, does not point to a different result. As the Ninth Circuit explained, that case involved a situation in which a state's statutes "directly and explicitly tied the states' finances (revenue loss caused by tax credit) to another sovereign's laws (other states' taxes on nonresident income)." *California v. Azar*, 911 F.3d 558, 574 (9th Cir. 2018). As a result, that decision has little relevance here.

Second, Intervenor claims that the States' injuries are not redressable by the relief sought. To satisfy the redressability prong, "[i]t is sufficient for the plaintiff to establish a substantial likelihood that the requested relief will remedy the alleged injury in fact." *Toll Bros. v. Twp. of Readington*, 555 F.3d 131, 143 (3d Cir. 2009) (cleaned up). Here, invalidation of the Rules will ensure that women who would otherwise be denied coverage will receive it from their employers, thus eliminating the burden on State-funded programs. Intervenor's string of hypotheticals, Int. Mot. at 8-9, does nothing to change this analysis.

Finally, Intervenor claims, yet again, that this Court cannot invalidate the Rules because the *prior* rules are "subject to the same alleged APA problems." Int. Mot. at 9. This Court has rightly dismissed this argument in the past. *See* Jan. 10, 2019, Tr. 51:9-13, ECF 154 (Mar. 7, 2019) ("The issue of the validity of the earlier IFR is not in front of me or whether the contraceptive mandate should be in or out should be included in the definition of preventive services, that's not in front of me, and I think that it has not been challenged in this litigation."). The federal defendants have agreed that the prior rules "are not at issue." *Id.* 52:3-4. To be clear, in this action the States are challenging the two Rules issued by Defendants on November 13,

2018, which finalized the IFRs issued on October 6, 2017. The States are not challenging any of the rules issued beforehand, and the legality of these prior rules is simply not at issue in this litigation.[13]

Intervenor cannot unilaterally rewrite the States' complaint to interject issues that are irrelevant to the claims the States have raised. To the contrary, "the plaintiff is the master of the complaint." *Caterpillar v. Williams*, 482 U.S. 386, 398–99 (1987). And the relief the States seek here—invalidation of the Rules—does not require this Court to address the legality of prior rules. Intervenor was free to challenge those earlier rules, and in fact it did so; but a challenge to the subsequent rules does not require this Court to rule upon the legality of the rules issued beforehand.[14] Intervenor does not point to a single authority that supports this argument, because it is without merit. This Court should reject Intervenor's repeated attempts to relitigate unrelated issues in this action.

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In sum, the States' Amended Complaint, taken as true, more than satisfies the standing requirements of Article III.

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[13] Intervenor claims that the Accommodation, which was created by earlier rules not challenged in this litigation, "is central to the States' arguments, because if it doesn't exist, the Supreme Court's decision in *Hobby Lobby* applies, and the mandate violates RFRA [the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*]." Int. Mot. at 9. This argument is backwards: in fact, the Accommodation was central to the decision in *Hobby Lobby*. *See* 573 U.S. 683, 730–31 (2014). The Court held that the Mandate violated RFRA under the facts of that case only because a less restrictive option—the Accommodation—existed. *Id.* So it is impossible to know how that decision would have turned out if the Accommodation did not exist.

[14] Intervenor's challenge to the application of the earlier rules resulted an amicable resolution with the government. *See Little Sisters of the Poor v. Azar*, No. 13-cv-2611, Dkt. 82 (D. Colo. May 29, 2018). As a result of that resolution, Intervenor will not be affected in any way by the result of this action, as this Court has previously noted. *See* PI Op. II at 56 n.27.

II. VENUE IS PROPER IN THIS DISTRICT.

Defendants assert that venue is not proper in this district, but they cannot carry their burden to override the Plaintiff States' choice of venue. *See Myers v. Am. Dental Ass'n*, 695 F.2d 716, 724–25 (3d Cir. 1982) (burden lies with party challenging venue). The Court has already rightly concluded that venue is proper in the Eastern District of Pennsylvania because one of the State plaintiffs resides here, PI Op. II at 20–23 (citing 28 U.S.C. § 1391(e)(1)(C)), and Defendants elected not to contest that finding on appeal.[15] Venue is also proper because "a substantial part of the events or omissions giving rise to the claim occurred" in this district. 28 U.S.C. § 1391(e)(1)(B).

A. Venue is Proper Under 28 U.S.C. § 1391(e)(1)(C) Because the Commonwealth of Pennsylvania Resides in the District.

Defendants are incorrect that a state containing multiple federal judicial districts "resides," for purposes of § 1391(e)(1)(C), only in the district where its capital is located. *See* Def. Mot. 12–14. Rather, a plaintiff State "is held to reside in any district within it." 14D Charles Alan Wright & Arthur C. Miller, *Fed. Practice & Procedure* § 3815 (4th ed. 2018 update) (citing *Alabama v. U.S. Army Corps of Eng'rs*, 382 F. Supp. 2d 1301, 1327–28 (N.D. Ala. 2005)); *Alabama*, 382 F. Supp. 2d at 1329 ("[C]ommon sense dictates that a state resides throughout its sovereign borders[.]").[16] The Ninth Circuit recently reaffirmed this principle in a case brought by California in the Northern District of California challenging the same IFRs at issue in this case. *California*, 911 F.3d at 570. Rejecting Defendants' assertion that California can sue only in the Eastern District of California, the Ninth Circuit recognized that "[a] state is ubiquitous

[15] *See* Br. for Appellants, *Pennsylvania v. President*, No. 19-1189 (3d Cir.) (Feb. 15. 2019).

[16] Although *Alabama* was decided before Section 1391 was amended, nothing in the language of the statute or its legislative history reflects an intent to address, much less change, the preexisting understanding of state residency.

throughout its sovereign borders." *Id.* Therefore, § 1391 "dictates that a state with multiple judicial districts 'resides' in every district within its borders." *Id.*; *see also Atlanta & Fla. R.R. Co. v. W. Ry. Co. of Ala.*, 50 F. 790, 791 (5th Cir. 1892) (noting that "the state government . . . resides at every point within the boundaries of the state").

No sound authority supports Defendants' argument to the contrary. Defendants cite decisions discussing a corporation's place of residence and decisions holding that Pennsylvania *state officials* and *agencies* sued in their official capacity reside in the Middle District of Pennsylvania. *See* Def. Mot. 12 & n.7. But, as the Court rightly noted in its recent opinion on Plaintiffs' Second Motion for a Preliminary Injunction, none of these decisions addresses the residence of the Commonwealth itself or applies the venue statute to an action brought by the Commonwealth as a sovereign plaintiff.[17] PI Op. II at 22, n.14; *Cf. Alabama*, 382 F. Supp. 2d at 1328 (distinguishing suits brought by States from suits brought by state officials).

Equally unsupported is Defendants' reliance on 28 U.S.C. § 1391(c)(2), which provides that "an entity with the capacity to sue and be sued in its common name under applicable law, whether or not incorporated, shall be deemed to reside, . . . if a plaintiff, only in the judicial district in which it maintains its principal place of business." The text and history of § 1391(c)(2) make clear that the provision's reference to "an entity" does not "encompass[] a state acting as a plaintiff." *California*, 911 F.3d at 570. As originally enacted in 1948, § 1391(c) spoke only to the residency of defendant corporations. *See* Wright & Miller, *supra*, § 3811. Congress enacted § 1391(c)(2) in 2011 to resolve "a division in authority as to the venue treatment of

[17] In their motion, Defendants respond that the Commonwealth was a named defendant in a single unreported district court case they cite in support of their position. *See Gaskin v. Pennsylvania*, 1995 WL 154801, at *1 (E.D. Pa. Mar. 30, 1995). Def. Mot. 12–13 & n.7. But, as the Court previously recognized, *Gaskin* solely evaluated "the residency of state agencies or officials, which is different in kind from the residency of a sovereign State itself." PI Op. II at 22, n.14.

unincorporated associations," by "restor[ing] the parity of treatment" between corporations and unincorporated associations and treating both like partnerships and labor unions. H.R. Rep. No. 112-10, at 21 (2011); *see also California*, 911 F.3d at 570. Nothing in the legislative history indicates any intent on the part of Congress for § 1391(c)(2) to limit the venues in which a plaintiff State might sue.

Defendants suggest that, in ruling on Plaintiffs' Second Motion for a Preliminary Injunction, the Court erroneously considered the legislative history of § 1391(c)(2) because "legislative history cannot override clear text." Def. Mot 13. Yet both the plain statutory language and the legislative history support the Court's analysis. The Court recognized that the "legislative history confirms" its interpretation of § 1391, which is rooted in statutory text. PI Op. II at 21–22. Indeed, § 1391(c)(2) applies to entities "whether or not incorporated" that have a "principal place of business"—terms that most naturally apply to corporate and business associations, not sovereign states. *See California*, 911 F.3d at 570 (noting that reference to "the incorporation status of the 'entity[]' indicat[es] that the term refers to some organization, not a state"). Nor does § 1391(c), by defining residency for "all venue purposes," necessarily assign residency for all possible parties, as Defendants suggest, Def. Mot. 13. Defendants point to nothing in § 1391(c)(2) indicating that Congress used the word "entity" to lump States—which enjoy sovereign prerogatives separate and apart from private litigants, *e.g.*, *Snapp*, 458 U.S. at 600-02—together with partnerships and corporations.

What is more, relying upon the statutory text, the Court rightly determined that "Congress explicitly distinguishes between States and entities within Section 1391. *Compare* 28 U.S.C. § 1391(c) (defining the residency of an 'entity'), with *id.* § 1391(d) ('Residency of corporations in States with multiple districts')." PI Op. II at 22. Defendants contest the Court's

conclusion that Congress's use of separate terms for States and entities signifies any distinction between States and entities covered by § 1391(c)(2). But the "use of different words or terms within a statute demonstrates that Congress intended to convey a different meaning for those words." *Spencer Enters., Inc. v. U.S.*, 345 F.3d 683, 689 (9th Cir. 2003).

Defendants' interpretation of § 1391 not only "would defy common sense," *California*, 911 F.3d at 570, but also would permit federal defendants to forum-shop in cases of national importance by selectively raising or waiving this novel venue objection. While Defendants are challenging the ability of Pennsylvania and California to sue in federal districts within their borders, they are voicing no objection to Texas simultaneously pursuing litigation against the federal government in the Northern and Southern Districts of Texas, neither of which is home to its state capital. *See* Fed. Defs.' Mem. in Response to Pls.' App. for Prelim. Inj., *Texas v. United States*, No. 18-167 (N.D. Tex.), ECF No. 92 (Texas challenge to Affordable Care Act); Fed. Defs.' Resp. to Pls.' Mot. for Prelim. Inj., *Texas v. Nielsen*, No. 18-68 (S.D. Tex.), ECF No. 71 (Texas challenge to immigration policies). The Court should again reject Defendants' strained interpretation of § 1391 and follow the common-sense view that a State may sue the federal government in any district within its sovereign borders.

Ultimately, even if the Court were to adopt Defendants' unsupported reading of Section 1391, venue would remain proper. If Defendants were correct that States are "entities" within the meaning of Section 1391(c)(2), it would logically follow that the United States and any of its agencies also are "entities" within the meaning of that provision.[18] On this view, venue would be proper in a suit against the United States, a federal agency, or a federal officer and employee "in

[18] The existence of a separate statutory provision, § 1391(e), addressing venue where the defendant is the federal government supports the conclusion that "an entity" under Section 1391(c)(2) does not encompass a sovereign government, such as a state.

any judicial district in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question." 28 U.S.C. § 1391(c)(2); *see id.* § 1391(e)(1)(A). And, because personal jurisdiction over Defendants is not disputed in this case, venue would be proper under Section 1391(e)(1)(A).

B. Venue is Proper Under 28 U.S.C. § 1391(e)(1)(B) Because a Substantial Part of the Events Giving Rise to Plaintiffs' Claims Occurred in this District.

Venue also lies in the Eastern District of Pennsylvania because "a substantial part of the events or omissions giving rise to the claim occurred" in this district. 28 U.S.C. § 1391(e)(1)(B). That the Final Rules were drafted in Washington is irrelevant: "In the context of declaratory judgments or prospective injunctive relief regarding unconstitutional statutes, it has been held that suits challenging official acts may be brought in the district where the *effects of the challenged regulations are felt* even though the regulations were enacted elsewhere." *Bishop v. Oklahoma ex rel. Edmonson*, 447 F. Supp. 2d 1239, 1254 (N.D. Okla. 2006) (cleaned up), *rev'd in part on other grounds*, 333 F. App'x 361 (10th Cir. 2009); *accord Mo. Ins. Coalition v. Huff*, No. 12-2354, 2013 WL 363406, *2 (E.D. Mo. Jan. 30, 2013) (collecting cases); *League of Women Voters of Fla. v. Browning*, No. 08-21243, 2008 WL 11332046, *2 & n.2 (S.D. Fla. May 29, 2008) (finding venue proper because "the harm Plaintiffs allege . . . will occur in this district"); *Farmland Dairies v. McGuire*, 771 F. Supp. 80, 82 n.3 (S.D.N.Y. 1991) ("[S]uits challenging official acts may be brought in the district where the effects of the challenged regulations are felt even though the regulations were enacted elsewhere.").

Here, the States have shown that the effects of the Final Rules will be felt in the Eastern District of Pennsylvania. *See* Am. Compl. ¶ 136 (Dec. 14, 2018) (listing employers in Bensalem, East Earl, and Philadelphia—all of which are in this district—that Defendant Agencies themselves counted as likely to take advantage of the exemptions). Moreover, as the Eastern

District of Pennsylvania is "one of the nation's largest districts . . . with over 5 million people residing in its nine counties" and includes the major metropolitan area of Philadelphia (which is the country's fifth largest city),[19] it is reasonable to expect that a substantial number of the women effected by the Final Rules will be residents of this district.[20] *See Merchants Nat'l Bank v. Safrabank (Cal.)*, 776 F. Supp. 538, 541 (D. Kan. 1991) (noting that § 1391 does not require court to determine where the events giving rise to the claim "were most substantial"—if events in the selected district "are 'substantial', it should make no difference that another's are more so, or the most so"). Thus, venue is also proper under § 1391(e)(1)(B).

[19] U.S. Dep't of Justice, *Welcome to the United States Attorney's Office Eastern District of Pennsylvania*, https://www.justice.gov/usao-edpa (last visited Dec. 29, 2018).

[20] Defendants' assertion that the States must identify "specific residents of this district" who will be affected by the Final Rules, *see* Def. Mot. 14, is specious given that the States have identified multiple employers in district who are likely to take advantage of the exemptions and the effects of the Rules will clearly be felt here. Defendants' argument that venue must be based on events that have "already occurred," *id.* at 15, is similarly unpersuasive since the States are bringing this action for injunctive relief specifically to forestall the expected harmful effects of the Final Rules here and elsewhere in Pennsylvania and New Jersey.

CONCLUSION

For the reasons set forth above, the motions to dismiss should be denied.

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