No. 19-454

IN THE

Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,

Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA, ET AL.,

Respondents.

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

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Public Citizen is a consumer advocacy organization that appears on behalf of its members and supporters before Congress, administrative agencies, and the courts. Public Citizen often participates in notice-and-comment rulemaking proceedings as a commenter, and is often involved in litigation either challenging or defending agency actions under the Administrative Procedure Act (APA). This amicus brief focuses on the second and third questions presented in No. 19-454, which involve issues of administrative law that affect Public Citizen's work as a commenter in agency rulemakings and as a litigator in APA cases in federal court.

The second question in No. 19-454 concerns a practice that some agencies have adopted of promulgating legislative rules by issuing so-called "interim final rules" alongside a request for comment. Public Citizen is concerned that this practice, if left unchecked, will diminish agencies' incentive to follow the notice-and-comment process required by the APA. In this brief, Public Citizen proposes a standard to address this concern that preserves agency flexibility to issue interim final rules where the agency legitimately has good cause for dispensing with notice-and-comment procedures.

The third question in No. 19-454 concerns the power of a court reviewing a facial challenge to an agency rule to enjoin the agency from implementing

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[1] This brief was not written in whole or in part by counsel for a party. No one other than amicus curiae or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel for the parties have filed blanket consents to the filing of amicus briefs.

the rule under review. Public Citizen believes that a court's power to issue orders with nationwide effect, including orders to stay, set aside, or enjoin enforcement of agency rules, is firmly founded in the APA. The government's contrary position would disrupt the orderly administration of the federal regulatory system.

SUMMARY OF ARGUMENT

I. Under the APA, an agency may adopt substantive rules that have the force and effect of law in two ways. First, the agency may adopt such "legislative" rules after publishing a notice of proposed rulemaking providing interested parties an opportunity to comment on the proposal, and considering and responding to those comments when issuing the final rule. Second, the agency may adopt legislative rules that have immediate effect if it has "good cause" to dispense with notice-and-comment procedures. Courts have interpreted the APA's good-cause exception narrowly to prevent agencies from circumventing the notice-and-comment process.

This case concerns the standard that courts should apply when an agency invokes the good-cause exception to promulgate an interim final rule, requests comment on the interim rule, and then promulgates a final rule based on the administrative record thus created. This practice—in which the interim final rule plays the role of a notice of proposed rulemaking—enables an agency to promulgate legislative rules without following the sequence of procedures required by the APA. A standard of judicial review that places no meaningful constraint on the use of interim final rules in this manner would upset the balance that Congress struck in the APA when it established the notice-and-

comment process as the principal method through which agencies should promulgate legislative rules.

Lower courts have adopted disparate approaches to address this concern. Some courts ask whether, despite the failure to follow the notice-and-comment process, the agency kept an "open mind" in evaluating the administrative record generated by the post-promulgation comment period. Other courts ask whether the agency committed harmless error. These standards, however, are not well-suited to address the structural problem occasioned by incentivizing agencies to bypass notice-and-comment procedures. Instead, the correct standard should consider the objective circumstances surrounding the issuance of the interim final rule to assess whether the agency improperly circumvented the notice-and-comment process.

That inquiry should principally examine whether the agency correctly invoked the good-cause exception to issue the interim final rule. When an agency lawfully invokes good cause, a request for comment is less likely to have been motivated by a desire to circumvent notice-and-comment procedures. By contrast, when an agency improperly invokes the good-cause exception, permitting an agency to use the interim final rule as the equivalent of a notice of proposed rulemaking creates an avenue for the agency to circumvent the standard rulemaking process. To mitigate the risk of circumvention, a court should examine factors such as the agency's rationale for invoking the good-cause exception and the content and structure of the preamble to the interim final rule to determine whether the agency's failure to issue a separate notice of proposed rulemaking requires invalidation of the final rules under review.

As applied here, this standard supports the court of appeals' conclusion that the rules at issue violated the APA. As the court found, the agencies lacked a sound basis for invoking the good-cause exception. Moreover, in content and structure, the interim final rule was not an adequate substitute for a notice of proposed rulemaking. The preamble to the interim final rule does not read like a notice of proposed rulemaking; it does not contain, for example, a section devoted to seeking comment on the substance of the proposal. If the interim final rules in this case satisfied the APA's prior-notice requirement, it is difficult to envision an interim final rule that would not. Accepting a final rule resulting from such a flawed process would render the APA's bedrock notice-and-comment procedures effectively unenforceable.

II. The government's argument that courts reviewing facial challenges to agency rules may not grant relief with nationwide effect conflicts with basic principles of administrative law.

As an initial matter, the Court should decline the government's invitation to address broad questions about the propriety of nationwide injunctions in the context of this case. The courts below enjoined enforcement of the rules under review on a nationwide basis because they concluded that a narrower injunction would not be effective in affording respondents complete relief. The government acknowledges that an injunction can be as broad as necessary to afford a plaintiff complete relief, and it proposes no alternative injunction that would provide respondents complete relief from their injury. Those points offer a sufficient basis for affirming the injunction in this case.

If the Court examines the propriety of nationwide relief in APA cases generally, it should uphold reviewing courts' authority to grant such relief in the context of a facial challenge to agency action. The APA authorizes a reviewing court to stay or set aside an agency rule in certain circumstances, and to compel agency action in others. Such relief will ordinarily have nationwide effect, unless the court affirmatively exercises its equitable discretion to grant relief that is narrower in scope. These default remedies help to maintain the uniform application of agency rules and, thus, to avoid uncertainty among and disparate application to the regulated industry and the public. The government's position that courts should award relief that benefits only the parties to the litigation would, by contrast, raise knotty questions about the identity of the parties entitled to benefit from a court's injunction, and would result in a patchwork regulatory system in which litigants and non-litigants would be subject to different regulatory treatment.

The government's position also undermines the efficacy of facial challenges as a tool to hold agencies accountable for their actions. Judicial review of agency rules has become an essential tool because of its value for promoting agency accountability. If the government were to prevail on this point, however, an agency would have discretion to decide whether to modify the regulatory regime to conform to a reviewing court's judgment or, instead, to press forward with the agency's preferred course of action by applying a challenged rule to non-litigants, notwithstanding that the court had already concluded that the rule was unlawful. Departing from the default remedies authorized by the APA would thus remove a particularly important check on the power of the modern

administrative state. This Court should reject the government's invitation to do so.

ARGUMENT

I. The Court should not permit agencies to circumvent notice-and-comment rulemaking procedures through improperly issued interim rules.

A. The APA provides two avenues through which an agency may promulgate "legislative rules"—a term that this Court has used to refer to substantive regulations that "have the 'force and effect of law.'" *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015) (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 302–03 (1979)). First, an agency that seeks to promulgate a legislative rule normally "must issue a 'general notice of proposed rule making,'" "'give interested persons an opportunity to participate in the rule making,'" "consider and respond to significant comments received during the period for public comment," and include a "'concise general statement of [the rule's] basis and purpose'" when it issues the final rule. *Id.* (quoting 5 U.S.C. § 553(b) & (c)). As a general matter, "regulations subject to the APA cannot be afforded the 'force and effect of law' if not promulgated pursuant to the statutory procedural minimum found in that Act." *Chrysler Corp.*, 441 U.S. at 313.

The APA requires notices of proposed rulemaking and final rules to be published in the Federal Register, 5 U.S.C. §§ 552(a)(1)(D), 553(b), which is deemed "sufficient to give notice of the contents of the document to a person subject to or affected by it," 44 U.S.C. § 1507. Each document containing a "proposed or final rule" must include "a preamble, which will inform the reader, who is not an expert in the subject area, of the

basis and purpose for the rule or proposal." 1 C.F.R. § 18.12(a). The Federal Register is divided into separate sections: notices of proposed rulemaking are published in the "Proposed [R]ules" section, and final rules in the "Rules and [R]egulations" section. 1 C.F.R. § 5.9(b),(c); *see* Office of the Fed. Register, Nat'l Archives & Records Admin., Document Drafting Handbook chs. 2.1, 3.1 (revised Aug. 9, 2019) (Federal Register Handbook). The rules of the Federal Register prohibit "combin[ing] material that must appear under more than one category in the Federal Register"; thus, "a document may not contain both rulemaking and notice of proposed rulemaking material." 1 C.F.R. § 18.2(a).

Second, the APA permits an agency to issue a legislative rule without notice-and-comment procedures if the agency "for good cause finds" that those procedures "are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b). If an agency improperly invokes the good-cause exception, a reviewing court may vacate the rule for failure to adhere to notice-and-comment procedures. *See*, *e.g.*, *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 707 & n4 (D.C. Cir. 2014). Because Congress did not intend for the "exception[]" to act as an "escape clause[] that may be arbitrarily utilized at the agency's whim," lower courts have held that the good-cause exception is to be "narrowly construed and only reluctantly countenanced." *Am. Fed'n of Gov't Emp. v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981) (internal quotation marks omitted); *see also*, *e.g.*, *Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 113 (2d Cir. 2018); *California v. Azar*, 911 F.3d 558, 575 (9th Cir. 2018), *cert. denied sub nom. Little Sisters of the Poor Jeanne Jugan Residence v. California*, 139 S. Ct.

2716 (2019); *N.C. Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 767 (4th Cir. 2012).

The APA does not require an agency that properly invokes the "good cause" exception to seek public comment on the rule after the fact. Nonetheless, some agencies have developed a practice of invoking good cause to adopt a rule with immediate effect and then requesting post-promulgation comment on the rule. *See* Admin. Conference of the United States, Adoption of Recommendations, 60 Fed. Reg. 43,108, 43,111 (Aug. 18, 1995) (ACUS Rec. 95-4); U.S. Gov't Accountability Off., GAO-13-21, Federal Rulemaking: Agencies Could Take Additional Steps to Respond to Public Comments 3, 15–17 (2012) (GAO Report). Such post-promulgation procedures are "advantageous" because "[p]ublic comment can provide both useful information to the agency and enhanced public acceptance of the rule." ACUS Rec. 95-4, 60 Fed. Reg. at 43,112. They also serve to protect the agency against the possibility that a court might find good cause lacking for a permanent rule, while accepting its existence to justify a rule that will be in force only pending completion of notice-and-comment proceedings leading to a final rule. *See*, *e.g.*, *Mid-Tex. Elec. Co-op., Inc. v. FERC*, 822 F.2d 1123, 1132–33 (D.C. Cir. 1987). A rule issued with an opportunity for post-promulgation comment is commonly called an "interim final rule." *Id.* at 43,111.

The APA does not treat "interim final rules" as a distinct class of rules. Rather, an interim final rule is simply one type of "rule[] adopted" pursuant 5 U.S.C. § 553(c) for which no "[g]eneral notice of proposed rule making" was required under section 553(b). Interim final rules, accordingly, are published with their preambles in the "Rules and Regulations" section of the Federal Register, alongside rules adopted through

notice-and-comment rulemaking. *See* Federal Register Handbook ch. 3.1.

B. This case raises the question whether an interim final rule whose preamble contains a request for post-promulgation comment can serve as a substitute for the "[g]eneral notice of proposed rule making" required by 5 U.S.C. § 553(b). If the interim final rule cannot serve that purpose, then any final rule adopted after post-promulgation comment must be "set aside" due to the agency's failure to "observe[] … procedure required by law." 5 U.S.C. § 706(2)(D).

Establishing the correct standard for this situation is critical to ensuring that the regulatory state operates within the procedural bounds established by Congress. As the Court has recognized, the APA contains "a formula upon which opposing social and political forces have come to rest." *Chrysler Corp.*, 441 U.S. at 313 (internal quotation marks omitted). "Congress made a judgment that notions of fairness and informed administrative decisionmaking require that agency decisions be made only after affording interested persons notice and an opportunity to comment." *Id.* at 316. Congress also charged the courts "with maintaining the balance" by "ensuring that agencies comply with the 'outline of minimum essential rights and procedures' set out in the APA." *Id.* at 313 (quoting H.R. Rep. No. 79-1980, at 16 (1946)). Consistent with that charge, lower courts have long rejected agencies' arguments that they may promulgate a rule "in inverse order from that contemplated by the APA" by "redesignat[ing] the final rule as notice and claim[ing] the proceeding started from there." *Nat'l Tour Brokers Ass'n v. United States*, 591 F.2d 896, 902 (D.C. Cir. 1978); *see U.S. Steel Corp. v. EPA*, 595 F.2d 207, 214 (5th Cir. 1979) ("Permitting the submission

of views after the effective date is no substitute for the right of interested persons to make their views known to the agency in time to influence the rule making process in a meaningful way." (internal quotation marks omitted)); Pet. App. 29a.

The practice of issuing an interim final rule combined with a request for comment presents a risk that an agency will promulgate legislative rules without adhering to the sequence of procedures set forth in the APA. If an agency could "cure[]" its failure to adhere to notice-and-comment procedures simply by requesting comment when promulgating a rule, the APA's prior-notice-and-comment requirement would be "virtually unenforceable" because an "agency that wished to dispense with pre-promulgation notice and comment could simply do so, invite post-promulgation comment, and republish the regulation before a reviewing court could act." *U.S. Steel Corp.*, 595 F.2d at 214–15. "[G]iving effect to postpromulgation rulemaking would undoubtedly provide a powerful disincentive for agencies to comply with § 553's prepromulgation notice and comment requirements when they seek to bind the actions of regulated parties." Kristin E. Hickman & Mark Thomson, *Open Minds and Harmless Errors: Judicial Review of Postpromulgation Notice and Comment*, 101 Cornell L. Rev. 261, 286 (2016).

Moreover, improper use of interim final rules to initiate rulemakings undermines the APA's objective of "protecting the rights of individuals and enterprises against the abuse of power by unelected officials." Roni A. Elias, *The Legislative History of the Administrative Procedure Act*, 27 Fordham Envtl. L. Rev. 207, 224 (2015). When an agency follows the standard rulemaking process, a proposed rule is "simply a

proposal," signifying that the agency is "*considering* the matter." *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 175 (2007) (brackets removed). This process "is generally considered preferable because agencies are perceived by commenters as more likely to accept changes in a rule that has not been promulgated as a final rule—and potential commenters are more likely to file comments in advance of the agency's 'final' determination." ACUS Rec. 95-4, 60 Fed. Reg. at 43,111. Thus, by providing notice and an opportunity to comment before promulgating a legislative rule, the agency "ensure[s] that agency regulations are tested via exposure to diverse public comment, (2) … ensure[s] fairness to affected parties, and (3) … give[s] affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review." Pet. App. 29a (internal quotation marks omitted).

By contrast, when an agency issues an interim final rule with a request for post-promulgation comment, "forces like regulatory inertia, status quo bias, confirmation bias, and commitment bias all make it less likely the agency will deviate from its position." Hickman & Thomson, *supra*, at 287 (footnote references omitted). Once an agency has "made a 'final' determination" in the form of an interim final rule, it has "put its credibility on the line" and may "naturally tend to be more close-minded and defensive" about the rule. *Nat'l Tour Brokers Ass'n*, 591 F.2d at 902. On the flip side, "citizens might not take seriously the opportunity to offer comments after a rule is in effect, believing that, because an agency has already committed to enforcing a particular rule, submitting comments would just be a waste of time." Hickman & Thomson, *supra*, at 288. When an agency begins a

rulemaking by issuing an interim final rule, it "change[s] the question presented [in the rulemaking] from whether [it] should [adopt the rule] to whether [it] should depart from [the rule]." Pet. App. 31a. In that circumstance, the quality of "[p]ublic participation in the rule-making process," which the drafters of the APA regarded as "essential in order to permit administrative agencies to inform themselves and to afford safeguards to private interest," is compromised. APA, Legislative History, 79th Cong. 1944–46 (APA History), at 20 (internal quotation marks and ellipsis omitted) (quoting Final Report of the Attorney General's Comm. on Admin. Pro. 103 (1941)).

C. Lower courts have struggled with how to review agency rulemaking proceedings initiated by an interim final rule and followed by a post-promulgation comment period. *See* Hickman & Thomson, *supra*, at 268. Several circuits have framed their review in terms of whether an agency, after issuing the interim final rule, has kept an open mind. The D.C. Circuit, for example, examines whether the agency "has kept an 'open mind' throughout the subsequent comment period." *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 13 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 789 (2020); *see Levesque v. Block*, 723 F.2d 175, 188 (1st Cir. 1983); Pet. App. 30a; *see also* Hickman & Thomson, *supra*, at 294. The "open mind" inquiry considers whether the agency has "afforded the comments particularly searching consideration." *Advocates for Highway & Auto Safety v. Fed. Highway Admin.*, 28 F.3d 1288, 1292 (D.C. Cir. 1994) (internal quotation marks omitted). Alternatively, other courts have considered whether the opportunity for post-promulgation comment cured the failure to engage in prior notice-and-comment procedure or

rendered it harmless. *See*, *e.g.*, *United States v. Reynolds*, 710 F.3d 498, 515 (3d Cir. 2013); *U.S. Steel Corp.*, 595 F.2d at 215; *United States v. Dean*, 604 F.3d 1275, 1280 (11th Cir. 2010); *see also* 5 U.S.C. § 706 (requiring reviewing courts to take "due account … of the rule of prejudicial error").

These standards are appropriate tools to use when a court is reviewing final rules that are preceded by a notice of proposed rulemaking that is separate from the agency's interim final rule. If the agency has complied with the prior notice requirement, 5 U.S.C. § 553(b); has kept an open mind when considering "the relevant matter presented," *id.* § 553(c); and has not committed a prejudicial error in issuing its final rules, the agency has complied with its procedural responsibilities, and courts may not "impose obligations not required by the APA." *Chrysler Corp.*, 441 U.S. at 313.

Neither the open-mind nor the harmless-error standard, however, is ideally suited to address the specific structural problems that arise when agencies initiate rulemaking proceedings through an interim final rule rather than a separate notice of proposed rulemaking. As applied by the lower courts, the inquiry under either standard largely turns on the quality of the agency's *response* to the post-promulgation administrative record rather than the appropriateness of using the interim final rule as a starting point for the rulemaking. *See*, *e.g.*, *Advocates for Highway & Auto Safety*, 28 F.3d at 1292 (applying open-mind standard); *United States v. Johnson*, 632 F.3d 912, 931 (5th Cir. 2011) ("It follows that when a party's claims were considered, even if notice was inadequate, the challenging party may not have been prejudiced."). And neither standard vindicates the interests of potential commenters who may not have received notice

of the proposed rulemaking when it was embedded in an interim final rule, without a separate notice of proposed rulemaking, or who failed to comment due to a belief that the agency's decision was a fait accompli.

For these reasons, to mitigate agencies' incentive to use interim final rules to circumvent the APA's notice-and-comment procedures, this Court should not adopt a standard of review that focuses on how an agency responds to the comments received on an interim final rule. Instead, the standard should look to the objective circumstances surrounding the issuance of the interim final rule to assess whether the agency's failure to publish a notice of proposed rulemaking constituted an improper attempt to bypass notice-and-comment procedures.

The threshold consideration in this inquiry should be whether the agency properly invoked the good-cause exception when it issued the interim final rule. If the agency lawfully issued the interim final rule, then any associated request for comment is not likely to have been designed to circumvent notice-and-comment procedures, but to ensure that the agency action is not broader than is justified by the circumstances that establish good cause for taking immediate action and to obtain "useful information to the agency and enhanced public acceptance of the rule." ACUS Rec. 95-4, 60 Fed. Reg. at 43,112. Indeed, because the APA does not expressly require an agency to seek comment either before or after promulgating a rule under the good-cause exception, agencies should not be discouraged from seeking comment on interim final rules, lest they be incentivized to eschew "interim final" rules in favor of "final rules" for which public comment is never solicited.

Where, however, a reviewing court concludes that an agency lacked good cause to dispense with notice-and-comment procedures before issuance of the rule, the risk that the agency improperly circumvented those procedures is heightened. An agency invoking good cause may have acted in good faith, even if a court subsequently disagrees with the agency's conclusion. *See* APA History at 19 (stating that good-cause standard "requires agencies to act in good faith"); *see also* Hickman & Thomson, *supra*, at 291. But an agency may instead have invoked good cause to force immediate compliance with an administration's policy agenda, where no urgency was in fact present. In that situation, a standard that too easily upholds an agency's final rule based on post-promulgation procedures effectively gives agencies a green light to circumvent the statutory requirement that the agency issue a "[g]eneral notice of proposed rule making" before promulgating a legislative rule. 5 U.S.C. § 553(b).

Accordingly, to mitigate the risk of circumvention, a court should examine factors such as the agency's rationale for invoking the good-cause exception and the content and structure of the preamble to the interim final rule to determine whether the agency's failure to issue a separate notice of proposed rulemaking requires invalidation of the final rule under review. With respect to the agencies' rationale for invoking good cause, the parties here have assumed that this Court's review is *de novo*. U.S. Br. 41–42; Resp't

Br. 22.[2] This Court, accordingly, could adopt a bright-line standard that would invalidate *any* final rule that followed an improperly promulgated interim final rule. Such a standard would deter improper use of the good-cause exception, but could lead to invalidation of final rules for which an agency issued the interim final rule in good faith, albeit erroneously. Alternatively, the Court could set a more forgiving standard that examines whether the agency's justification for invoking good cause, even if erroneous when examined *de novo*, was unreasonable or arbitrary. Where the agency's rationale (and thus, the basis for proceeding through an interim final rule rather than a notice of proposed rulemaking) is weak, the agency would not be permitted to compound that error by treating the interim final rule as an adequate substitute for the notice of proposed rulemaking required by the APA.

The content and structure of the preamble to the interim final rule can also reveal whether an agency used the interim final rule to circumvent notice-and-comment procedures. If a preamble includes a separate and appropriately thorough discussion of the agency's proposal akin to the content typically found in notices of proposed rulemaking (*e.g.*, consideration of alternatives), it is less likely that the agency sought to use the interim final rule to circumvent section 553(b) requirements. By contrast, a preamble that lacks such content is evidence that the agency's decision to dispense with notice-and-comment procedures was not made in good faith. "[A]n utter failure to

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[2] The courts of appeals are divided on whether an agency's rationale for invoking good cause is subject to *de novo* or arbitrary-and-capricious review (or something in between). *See Reynolds*, 710 F.3d at 506–09.

comply with notice and comment cannot be considered harmless if there is any uncertainty at all as to the effect of that failure." *Safari Club Int'l v. Zinke*, 878 F.3d 316, 335 (D.C. Cir. 2017) (internal quotation marks omitted). An interim final rule that was not supported by good cause and that lacks the substance associated with bona fide notice of proposed rulemaking, accordingly, should not be regarded as a substitute for the type of prior notice that section 553(b) requires.

D. The objective circumstances surrounding the issuance of the rules under review in this case support the court of appeals' conclusion that the agencies acted for the purpose of circumventing notice-and-comment rulemaking. First, as the court of appeals found, Pet. App. 23a–28a, the agencies' justification for issuing the interim final rule lacked merit because the statutory authority they invoked for dispensing with notice and comment did not expressly grant them that authority, as required by 5 U.S.C. § 559. Pet. App. 24a. The court also found that their "good cause" arguments could not survive even "the most deferential of the potential standards" of review—"reviewing the agency's good cause determination to see if it is arbitrary and capricious." *Id.* at 26a–27a & n.22; *see also id.* at 30a (citing "the Agencies' justifications for avoiding notice and comment to the [interim final rules]" as supporting the conclusion that the agency violated the APA). In particular, the court of appeals noted that the interim final rules sought to settle a long-simmering controversy through "a dramatic overhaul" of existing agency regulations. *Id.* at 28a. The good-cause exception was not designed for that purpose.

With respect to content and structure, the preambles to the interim final rules do not contain separate sections devoted to seeking comment on the substance of the proposal. Rather, the agencies contend that they satisfied notice-and-comment procedures because they "'request[ed] and encourage[d] public comments on all matters addressed in the[] interim final rules," thus serving as a notice of proposed rulemaking with respect to final rules." U.S. Br. 37 (quoting 82 Fed. Reg. 47,792, 47,813 (Oct. 13, 2017), and 82 Fed. Reg. 47,838, 47,854 (Oct. 13, 2017)) (internal citations omitted). The terseness of this "request," however, supports the inference that the agencies regarded public comment as an afterthought to the interim final rule rather than necessary step to promulgating procedurally valid regulations. Moreover, the three agencies responsible for the rules took insufficient steps to "to ensure that the public [was] notified of the request for comment." ACUS Rec. 95-4, 60 Fed. Reg. at 43,112. Two of the three agencies did not publish even a cross-reference to their request for comment in the "Proposed Rules" section of the Federal Register, while the Internal Revenue Service's cross-reference did not speak for the other two agencies and did not invite comment on the rules as a whole, but instead focused on "two sets of temporary [tax] regulations" contained within the overall regulatory package. *See* 82 Fed. Reg. 47,656 (Oct. 13, 2017); 82 Fed. Reg. 47,658 (Oct. 13, 2017). Even assuming a cross-reference is ever sufficient to constitute a notice of proposed rulemaking under the APA, the circumstances here suggests that the agencies did not act in good faith to make the interim final rules an adequate substitute for notices of proposed rulemaking, but, rather, sought to avoid the

delay and public accountability associated with the APA's rulemaking process.

The government argues that the final rules are nonetheless "procedurally valid" because the agencies "consider[ed] and explain[ed] [their] response to comments" in the final rules. U.S. Br. 37. But considering and explaining comments are just two of the requirements that the APA imposes on *every* notice-and-comment rulemaking. Another requirement is prior issuance of a notice of proposed rulemaking. 5 U.S.C. § 553(b) & (c). The government's test, which focuses solely on the quality of the agency's response to comments, writes the prior notice requirement out of the APA.

The government also contends that this Court need not take any action to enforce the prior notice requirement because "rational agencies have no incentive to make bad-faith claims of good cause." U.S. Br. 38. The standard proposed above, *supra* pp. 14–16, takes account of the reasonableness of an agency's invocation of good cause. Furthermore, an agency responsive to political pressures will not always behave rationally, and the standard of review must take into account that possibility. The government also argues that agencies will be deterred from improperly invoking good cause by the prospect of "burdensome litigation" and because circumvention of APA procedures would "complicate [their] defense of the final rule." *Id*. But agencies are well aware that neither industry nor the public has the resources to litigate every agency action circumventing notice-and-comment procedures, especially if the agency can easily moot such challenges by issuing a final rule. And if the government prevails here, an agency need not be concerned about litigation over circumvention of notice-and-comment proce-

dures, so long as it satisfies its separate APA obligation to "consider[] and explain[] its response to comments." *Id.* at 37.

In sum, to rule that the agencies complied with the APA in the circumstances presented here—or that their failure to comply was harmless—would hand federal agencies a roadmap for adopting legislative rules through means other than notice-and-comment rulemaking. Such an outcome would enable agencies to issue regulations that have the "force and effect of law" without regard to the "procedural requirements imposed by Congress" to "assure fairness and mature consideration of rules of general application." *Chrysler Corp.*, 441 U.S. at 303 (internal quotation marks omitted). Especially when coupled with the government's argument that reviewing courts cannot issue nationwide injunctions against improperly promulgated regulations (*see* Part II, *infra*), the end result would be to aggrandize agency power and diminish the ability of reviewing courts or the public to hold agencies to account for their actions, contrary to the intent of Congress when it enacted the APA.

II. Courts engaged in pre-enforcement review of agency rulemaking have authority to grant relief with nationwide effect.

Although the government asks this Court to reverse the "nationwide preliminary injunction" in this case, U.S. Br. I, it acknowledges that an injunction can be as broad as "necessary to provide complete relief to plaintiffs." *Id.* at 44 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)). The court of appeals and the district court applied the "complete relief" standard in deciding that the rules under review should be enjoined nationwide. *See* Pet. App. 43a; 175a–76a. The

lower courts recognized that an injunction limited to the geographic area of Pennsylvania and New Jersey would not afford complete relief because many of respondents' residents work or attend school out of state, *id.* at 44a–45a, 181a–82a, and the government does not contend that an injunction limited to the geographic boundaries of those two states would completely relieve the harm that respondents suffer. *See* U.S. Br. 47–48. In the end, the government rests on the argument that the nationwide injunction "is outweighed by the government's interest in protecting rights of conscience." *Id.* at 48. But the questions whether a court has authority to issue a nationwide injunction and whether such an injunction is necessary to afford complete relief are separate from the question whether the injunction should be narrowed to accommodate countervailing interests. *Cf. Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008) ("An injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course."). For these reasons, this case does not present a suitable vehicle for addressing broader questions about the propriety of nationwide injunctions in other contexts. The Court should reject the government's invitation to do so.

If the Court does address the use of injunctions against agencies more generally, the Court should conclude that nationwide relief is the ordinary remedy in cases where the APA or another statute authorizes judicial review of challenges to agency rules, subject to reviewing courts' equitable authority to grant narrower relief in appropriate circumstances. The government's position—under which a reviewing court's decision can benefit only the parties challenging the rule

in court—would sow confusion and disrupt the orderly administration of agency regulatory regimes.

A. The APA authorizes courts to take two actions with respect to agency actions that are under review. First, a reviewing court may "postpone the effective date of an agency action" pending review. 5 U.S.C. § 705. Second, the reviewing court may "set aside agency action" found to be unlawful. *Id.* § 706(2). When the agency action under review is a rule, a court's exercise of these authorities often will benefit third parties not before the court: If a court postpones the effective date of a rule pending review, *see id.* § 705, then the rule will not go into effect while judicial review is underway. If a court "sets aside" a rule after review, *id.* § 706, the rule is "annul[led]" or "vacate[d]," and therefore without effect. Black's Law Dictionary (11th ed. 2019) (defining "set aside"); *United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019) ("The ordinary practice is to vacate unlawful agency action."). Accordingly, a reviewing court's action in granting relief to a party bringing a facial challenge to an agency rule will typically have nationwide effect as a matter of course.

The nationwide effect of court decisions is an inherent aspect of the APA's regulation of the rulemaking process. For example, the APA provides that a person may ask a court to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). Such relief "carrie[s] forward" the traditional judicial remedy of a writ of mandamus to compel an agency to perform a legally required action. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004). When the agency action being unlawfully withheld or unreasonably delayed is a rule, a successful challenge to the agency's failure to act will necessarily benefit

both the challenger before the court and all other persons with an interest in the rule. In much the same way, when a party successfully obtains preliminary or final relief in a challenge to an agency's final rule, the court's decision implicates the interests of all persons affected by the rule, not just the litigants in the case. Indeed, if an agency issues a new proposed rule with opportunity for comment in response to a court decision or revises its rule to conform to a court's decision, those actions necessarily affect litigants and non-litigants alike.

Despite the APA's seemingly mandatory language stating that a reviewing court "shall … set aside" unlawful agency action, 5 U.S.C. § 706(2), the APA permits the reviewing court to issue relief that is narrower in scope than the statutory default remedy. The APA preserves the court's "power [to] deny relief on any … appropriate legal or equitable ground." 5 U.S.C. § 702. A reviewing court, for example, has equitable discretion to leave an unlawfully promulgated rule in place pending remand to the agency. *See*, *e.g.*, *United Steel*, 925 F.3d at 1287 (discussing remedy of remand without vacatur). In appropriate circumstances, a court may also decide to limit relief only to the party challenging the rule. For example, in *Sharon Steel Corp. v. EPA*, 597 F.2d 377 (3d Cir. 1979), the court, in a case challenging air quality standards issued without prior notice and comment, "le[ft] the challenged rule in effect except as to the specific designations contested in this case and as applied to these two petitioners alone," because broader relief would "endanger the Congressional scheme for the control of air pollution." *Id*. at 381. The courts' "ordinary practice" when a rule is successfully challenged, however, "is to vacate" the rule. *United Steel*, 925 F.3d at 1287.

B. Courts have good reason for applying the APA's default remedies to unlawfully promulgated rules in the typical case: to preserve uniform application of agency rules and avoid confusion and uncertainty among the regulated industry and the public.

The government's contrary position would raise difficult questions about how to identify the parties entitled to benefit from the court's decision. The government appears to invite greater use of class actions in APA cases as a means of securing comprehensive relief. U.S. Br. 45. But class actions in the context of an APA rulemaking challenge would divide the regulatory world into persons who are class members and those who are not, thus requiring agencies to implement a system for identifying class members and (as discussed below) potentially to maintain different regulatory regimes for class members and non-class members. The problem would be even more acute when an association brings a successful challenge on behalf of its members. *See*, *e.g.*, *Chesapeake Climate Action Network v. EPA*, 952 F.3d 310, 318 (D.C. Cir. 2020). In that situation, distinguishing between those who could benefit from the court's injunction and those who could not would be nigh impossible, especially for large associations and associations whose membership changes over time.

In this case, the government's call for party-specific relief appears administrable because respondents are states, state boundaries are readily ascertainable, and state-based regulation is familiar. In the lion's share of APA cases, however, the challengers are individuals, businesses (large or small), municipalities, tribal entities, or associations of any of these. Unlike states, these potential challengers are randomly scattered throughout the country, alongside similarly

situated persons who did not participate in litigation against the agency. Under the government's theory, the challengers would be governed by a regulatory regime shaped by the court's injunction, while the agency remained free to impose its preferred regime on those challengers' non-litigating neighbors and competitors. Such a patchwork regulatory system would necessarily be arbitrary and capricious.

In addition, the government's argument focuses exclusively on APA proceedings in district courts; it ignores entirely the problem of petitions to review agency action filed directly in the courts of appeals. *See* U.S. Br. 45–46. The courts of appeals have exclusive jurisdiction to hear facial challenges to certain rules adopted by certain agencies. *See*, *e.g.*, 28 U.S.C. § 2342; 33 U.S.C. § 1369(b)(1); *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2053 (2019) (describing review of Federal Communications Commission rules); *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 626–27 (2018) (describing review of Environmental Protection Agency (EPA) rules under section 1369(b)(1)). Congress has directed that petitions for review filed in multiple courts of appeals be consolidated in a single circuit, 28 U.S.C. § 2112, which has the power to stay an agency's rule pending review and "enjoin[], set[] aside, or suspend[]" an agency rule found to be invalid, 28 U.S.C. § 2349. For certain rules, Congress has designated a single circuit to hear APA challenges. *See*, *e.g.*, 42 U.S.C. § 7607(b)(1) (requiring certain EPA decisions to be reviewed in the D.C. Circuit). But under the government's current view of judicial power, direct review in the court of appeals can produce no greater relief than district court review—only the parties before the court may benefit from the court's decision and the agency

remains free to apply its rules to third parties who have not secured an injunction for themselves. This view is incompatible with Congress's goal in enacting these review provisions: fostering national uniformity in the application of various regulatory systems.[3]

C. The government offers several arguments why courts reviewing agency rules under the APA cannot grant relief that benefits non-litigants. None has merit.

The government argues that the Constitution and traditional equitable principles prohibit "nationwide injunction[s]" that "extend[] relief" to non-litigants. U.S. Br. 43–44. Court judgments, however, commonly benefit persons who are not parties to the litigation. For example, when a court issues a consent decree in a government enforcement action, the decree often "extends relief" to members of the public, even though the public typically cannot enforce the decree directly (*e.g.*, through contempt proceedings). *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 750 (1975) ("[A] consent decree is not enforceable directly or in collateral proceedings by those who are not parties to it even though they were intended to be benefited by it."). Likewise, a court decision striking down legislative districts as unconstitutional racial gerrymanders affects all the voters of those districts, even voters who are not parties to the lawsuit. *See, e.g.*, *Cooper v. Harris*, 137 S. Ct. 1455, 1466 (2017). And

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[3] At one time, the government itself expressed a preference for "initial review in a court of appeals" because it would "promote[] national uniformity, an important goal in dealing with broad regulations." *Nat'l Ass'n of Mfrs.*, 138 S. Ct. at 634 (quoting government's brief) (internal quotation marks and original brackets omitted).

when a court orders an owner of a public accommodation to comply with the Americans with Disabilities Act, the benefits accrue to both the plaintiff and to all other disabled users of the accommodation. *See*, *e.g.*, *Fortyune v. Am. Multi-Cinema, Inc.*, 364 F.3d 1075, 1078 (9th Cir. 2004) (upholding injunction requiring modification to theater's companion-seating policy). Indeed, the government recognizes that "some plaintiffs' injuries can be remedied only in ways that incidentally benefit non-parties." U.S. Br. 44.

Moreover, the government's concern about courts issuing decisions that affect the interests of non-parties makes little sense in the context of an APA challenge to an agency rule. For example, if trade groups challenge an agency regulation designed to benefit consumers, a court decision will necessarily affect the rights of consumers who are not parties to the litigation. Likewise, if the government prevails here, the rights of potentially millions of contraception users will be affected notwithstanding their absence from this litigation. Those outcomes arise from the nature of APA challenges to agency rules; they do not signify a departure from traditional equitable principles or constitutional constraints on Article III courts.

The government's brief discussion of the text of the APA adds little to its argument. First, the government observes that section 705 authorizes relief pending review as "necessary to prevent irreparable injury." U.S. Br. 49 (quoting 5 U.S.C. § 705). As the district court found, however, "anything short of a nation-wide injunction would likely fail to provide the States 'complete relief'" because, "[w]hile a nation-wide injunction may prove overbroad, there is no more geographically limited injunction that protects the States from potential harm." Pet. App. 183a. The government may

disagree with the lower courts' judgment on the specific facts of this case, but that disagreement does not warrant the blanket prohibition on nationwide injunctions that the government espouses here. Second, the government argues that section 706(2)'s command that courts "'set aside'" unlawful agency regulations "does not mandate that 'agency action' shall be set aside globally, rather than as applied to the plaintiffs who brought the suit." U.S. Br. 49 (quoting 5 U.S.C. § 706(2)). It is true that section 706(2) does not "mandate" setting aside an unlawful rule in that the APA permits courts to exercise their equitable discretion to issue a narrower remedy. Consistent with the statutory text, however, vacatur of an unlawful rule—which is necessarily "global[]," U.S. Br. 49, in scope—is the "ordinary practice." *United Steel*, 925 F.3d at 1287.

D. The remedies authorized by the APA provide a particularly important check on the modern administrative state. Judicial review of agencies' promulgation of new rules has have become a common mechanism of administrative accountability since *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), recognized that judicial review is "ripe" when a rule has a "sufficiently direct and immediate" impact on the challenger. *Id*. at 152; Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 Harv. L. Rev. 1285, 1337 (2014) ("Preenforcement review … is today widely accepted as an essential feature of the administrative law landscape."); *see also PDR Network*, 139 S. Ct. at 2060 (Kavanaugh, J., dissenting) (recognizing that *Abbott Labs* "revolutionized administrative law by *also* allowing facial, pre-enforcement challenges to agency orders").

The government's position that reviewing courts may not take action that precludes an agency from enforcing its rules against non-litigants threatens to undermine the efficacy of facial challenges as a tool for agency accountability. If the government were correct, agencies would have virtually unfettered discretion to decide whether to revise their rules to respond to court decisions or, instead, to press forward with the rules after they have been held unlawful, applying them to persons without the resources to challenge them. In such a world, a successful facial challenge would provide certainty about the enforceability of a rule only to the parties to the challenge; all other affected persons would need to bring separate lawsuits to protect themselves from the rule, or wait until the rule were enforced against them to raise their claims, as in the pre-*Abbott Labs* days. What's more, because the agency is always the losing party when an injunction is issued, the agency would also retain unchecked discretion over whether to appeal an adverse decision (and risk establishing adverse binding precedent) or, instead, to continue enforcing its rules against non-parties. In many situations, non-parties—particularly individuals and small businesses who lack the resources and access to counsel needed to engage in complex litigation against the federal government—would simply acquiesce to what the agency wants, notwithstanding that a reviewing court had already concluded that the rule was unlawful.

CONCLUSION

For the foregoing reasons and the reasons stated in respondents' brief, the decision below should be affirmed.

Respectfully submitted,

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