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 AND STATE OF NEW JERSEY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Affordable Care Act guarantees women access, free of cost-sharing, to preventive health services defined by the Health Resources and Service Administration. These preventive services include all contraception methods and counseling approved by the Food and Drug Administration. In 2017, the Departments of Health and Human Services, Labor, and Treasury issued interim final rules, without notice or the opportunity for public comment, that created broad religious and moral exemptions from this contraceptive care guarantee. Without ever withdrawing the interim final rules, the same agencies later issued materially identical final rules. The questions presented are:

1. Whether an agency that improperly forgoes the notice-and-comment procedures of the Administrative Procedure Act before issuing an interim rule can cure its failure by simply accepting post-promulgation public comment.

2. Whether the agencies here had statutory authority under the Women's Health Amendment to the ACA or under the Religious Freedom Restoration Act to issue the religious and moral exemptions.

3. Whether it was an abuse of discretion to find, based on the record, that a nationwide injunction is necessary to provide the States complete relief for their injuries.

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STATEMENT

1. a. Women have traditionally borne disproportionately high costs for medical care. See 155 Cong. Reg. S11987 (Nov. 30, 2009) (statement of Sen. Mikulski). Those costs keep many from lifesaving services. *Id.* To address this problem, Congress enacted in 2010 the Women's Health Amendment as part of the Patient Protection and Affordable Care Act (ACA), 42 U.S.C. § 18001 *et seq*.; S. Amdt. 2791, 111th Congress (2009–2010).

The centerpiece of the Women's Health Amendment directs health insurance providers to cover without cost-sharing "preventive care and screenings" for women "as provided for in comprehensive guidelines supported by the Health Resources and Services Administration [HRSA]." 42 U.S.C. § 300gg-13(a)(4). Congressional supporters of the amendment expected that HRSA would include family planning services in the guidelines. See 155 Cong. Rec. S12025–28, S12059 (Dec. 1, 2009) (reporting statements of Senators supporting the Women's Health Amendment).

After the ACA was enacted, HRSA commissioned the Institute of Medicine[1] to recommend services the Women's Health Amendment should cover. The Institute convened a committee of specialists in women's health, disease prevention, adolescent health, and evidence-based guidelines. C.A. App. 1001. That

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[1] The Institute was renamed the National Academy of Medicine in 2015. It operates under the 1863 congressional charter of the National Academy of Sciences and is a private, nonprofit institution providing objective advice on matters of science, health, and technology. Nat'l Acad. of Med., *About the National Academy of Medicine* (2019), https://nam.edu/about-the-nam/.

committee's report proposed eight evidence-based health services to be covered, including "the full range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education." C.A. App. 1009, 1034–35.

The Institute's recommendation reflected a series of considerations. *First*, unintended pregnancies are common and disproportionally impact young and low-income women. *Second*, women with unintended pregnancies are less likely to receive prenatal care; more likely to receive substandard care; more likely to smoke and consume alcohol; more likely to suffer from depression; and more likely to be a victim of domestic violence. Each jeopardizes the health of women and their babies. *Third*, contraception promotes healthy inter-pregnancy intervals. Insufficient spacing threatens adverse outcomes such as low birth weight and premature birth. *Fourth*, for women with certain health conditions, any pregnancy is dangerous. *Fifth*, contraception reduces unintended pregnancies, and thus the rate of abortion. *Sixth*, contraception can treat menstrual disorders, acne, hirsutism, and pelvic pain, and can reduce the risk of endometrial cancer, pelvic inflammatory disease, and some benign breast diseases. *Seventh*, elevated costs impede access to contraception. *Eighth*, reducing costs increases effective uses of contraception. C.A. App. 1027–34.

b. In August 2011, HRSA issued the "Women's Preventive Services Guidelines," adopting the Institute's recommendations. C.A. App. 984–86. As of 2015, at least 56 million women working for employers covered by the Women's Health Amendment were guaranteed access, free of cost-sharing, to "[a]ll Food and Drug Administration approved contraceptive

methods, sterilization procedures, and patient education and counselling for all women with reproductive capacity," as prescribed by a doctor. C.A. App. 985; 83 Fed. Reg. 57,578 (Nov. 15, 2018).[2]

Soon after adopting the HRSA guidelines, the Departments of Health and Human Services, Labor, and Treasury (collectively, "the agencies") exempted certain religious employers from complying with the contraceptive coverage guarantee. 76 Fed. Reg. 46,623 (Aug. 3, 2011); 77 Fed. Reg. 8725 (Feb. 15, 2012); 78 Fed. Reg. 39,896 (July 2, 2013). The agencies also created an accommodation for nonprofit employers with religious objections to contraception that were not exempted as religious employers. 77 Fed. Reg. 16,501 (Mar. 21, 2012); 78 Fed. Reg. 8456 (Feb. 6, 2013); 78 Fed. Reg. 39,874 (July 2, 2013). The rule relieved an employer from the duty to "contract, arrange, pay, or refer for contraceptive coverage" once it self-certified its religious objections to its insurance company or third-party administrator via a standardized form. Female employees would then receive access to contraceptive care directly from the insurer or third-party administrator. 78 Fed. Reg. at 39,875–81.

2. In response to several challenges that employers brought under the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000b *et seq*., this Court held

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[2] Contrary to petitioners' characterization (at 5), the number of workers enrolled in grandfathered plans has been consistently decreasing over time. Kaiser Family Foundation, *Percentage of Covered Workers Enrolled in Plans Grandfathered Under the Affordable Care Act (ACA), by Firm Size, 2011–2019* (Sept. 25, 2019), https://www.kff.org/report-section/ehbs-2019-section-13-grandfathered-health-plans/attachment/figure-13-3-5/.

that the accommodation offered a less burdensome means of enforcing the contraceptive care guarantee for closely held for-profit employers with sincere religious objections to contraception. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). The Court subsequently extended the accommodation to any nonprofit employer that notified HHS of its religious objection. *Wheaton College v. Burwell*, 573 U.S. 958 (2014). The agencies issued rules to effectuate these decisions. 79 Fed. Reg. 51,092 (Aug. 27, 2014); 79 Fed. Reg. 51,118 (Aug, 27, 2014); 80 Fed. Reg. 41,323–24 (July 14, 2015).

A different group of employers brought RFRA challenges to the accommodation itself. *Zubik v. Burwell*, 136 S. Ct. 1557 (2016). Rather than resolving the issue, in *Zubik* the Court vacated all relevant lower court judgments and permitted the parties to negotiate a solution that accommodated religious exercise while also "ensuring that women covered by petitioners' health plans receive full and equal health coverage, including contraceptive coverage." *Id.* at 1560 (internal quotations marks omitted). In doing so, the Court noted that nothing in its opinion was to "affect the ability of the Government to ensure that women covered by petitioners' health plans 'obtain, without cost, the full range of FDA approved contraceptives.'" *Id.* at 1560–61 (quoting *Wheaton College*, 573 U.S. 958).

Following *Zubik*, the agencies published a request for information. After reviewing the comments received, the agencies concluded that any alternative to the accommodation short of an exemption would "not be acceptable to those with religious objections to the contraceptive-coverage requirement." Dep't of Labor, *FAQs About Affordable Care Act Implementation*

Part 36 ("2017 FAQs") at 4, 5–11 (Jan. 9, 2017).[3] And any alternative to the accommodation also would create "administrative and operational challenges" that would "undermine women's access to full and equal coverage." *Id.* at 4. The Labor Department determined that the accommodation would remain because it is "the least restrictive means of furthering the government's compelling interest in ensuring that women receive full and equal health coverage, including contraceptive coverage." *Id.* at 5.

3. a. The agencies reversed course in October 2017, releasing—without prior notice or opportunity for public comment—two interim final rules that upended the contraceptive care guarantee. 82 Fed. Reg. 47,792 (Oct. 13, 2017) (religious exemption); 82 Fed. Reg. 47,838 (Oct. 13, 2017) (moral exemption). Among the changes, the religious exemption permitted private employers of every sort to opt out of the contraceptive guarantee, without specific notice, if the exmployer holds a sincere religious objection to contraception. 82 Fed. Reg. at 47,808–11. The accommodation, which enabled women to continue accessing contraceptive care, became optional. *Id.* at 47,812–13. Similarly, the moral exemption allowed any privately held entity to avoid complying with the contraceptive guarantee, without specific notice, because of a moral conviction. 82 Fed. Reg. at 47,850–51. Each rule was immediately effective and gave the public 60 days to comment. 82 Fed. Reg. at 47,792; 82 Fed. Reg. at 47,838.

Pennsylvania sued to block enforcement of the interim final rules for violating the Administrative

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

Procedure Act (APA) and the ACA, among other claims. The district court granted Pennsylvania's motion for a preliminary injunction. After rejecting a challenge to the Commonwealth's standing, the court concluded that Pennsylvania is likely correct that the agencies had neither independent statutory authority nor good cause under the APA to escape their notice-and-comment obligations. App. 70a–81a. Independently, the interim final rules likely exceed the agencies' authority under the ACA and RFRA. App. 82a–91a. Finally, Pennsylvania would suffer irreparable harm under the interim final rules and both the balance of equities and public interest favored a nationwide injunction. App. 91a–100a.[4]

b. The agencies did not withdraw the interim final rules. Instead, while an appeal was pending, the agencies replaced the interim final rules with nearly identical final rules. See 83 Fed. Reg. 57,536 (Nov. 15, 2018) (religious exemption); 83 Fed. Reg. 57,592 (Nov. 15, 2018) (moral exemption). Like the interim versions, the final rules authorize all private entities to opt out of the contraceptive guarantee for religious

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[4] A suit by separate states resulted in a similar injunction. See *California v. Dep't of Health & Human Servs.*, 281 F. Supp. 3d 806 (N.D. Cal. 2017). As below, the district court there concluded that the agencies lacked statutory authority or good cause to promulgate the interim final rules without first subjecting them to public notice and comment, that the plaintiffs would suffer irreparable harm absent an injunction, and that both the equities and public interest favored injunctive relief. *Id.* at 825–32. The district court enjoined the interim final rules nationally. *Id.* at 832–33. The Ninth Circuit affirmed the injunction, but limited its reach to the plaintiff states because "[o]n the present record, an injunction that applies only to the plaintiff states would provide complete relief to them." *California v. Azar*, 911 F.3d 558, 584 (9th Cir. 2018).

reasons; allow all but publicly traded corporations to do so for moral reasons; reiterate that compliance with the accommodation is voluntary; and affirm that the rules do not impose any notice requirement on employers that opt out. 83 Fed. Reg. at 57,558–65; 83 Fed. Reg. at 57,614, 57,617–18.

Following publication of the final rules, Pennsylvania, joined by New Jersey (collectively, "the States"), filed an amended complaint and again moved for a preliminary injunction, which the district court granted. The court concluded that the States are likely right that the final rules fail to comply with the APA's procedural requirements. App. 137a–145a. Separately, the court resolved, the final rules exceed the agencies' statutory authority under the ACA and RFRA does not furnish an independent basis for the religious exemption. App. 147a–68a. Irreparable harm to the States, the balance of equities, and the public interest all counseled for an injunction, the court decided. App. 168a–74a. This injunction, the court specified, operates nationally to protect the States from costs that would be incurred if, for example, a State resident's out-of-state employer dropped contraceptive coverage or if a student attending an in-State school lost contraceptive coverage through her out-of-state plan. App. 174a–84a.

c. The Third Circuit unanimously affirmed. First, the court of appeals rejected the agencies' assertion that they had specific statutory authorization or good cause to forgo notice-and-comment rulemaking. App. 23a–28a.

Second, although the agencies received comments between the interim final rules and the final rules,

the court concluded that the final rules are procedurally improper as the agencies did not review the comments with an open mind. App. 29a–30a. Indeed, by the agencies' account, the two sets of rules are materially indistinguishable and each relied on the same rationale. App. 29a–30a. Beyond closed-mindedness, the agencies' process impermissibly moved the goalposts. App. 30a–31a. Rather than commenting on possible implementation of new rules, the public was invited to comment on whether the agencies should abandon existing rules. App. 30a–31a.

Third, the court found that the final rules exceed the agencies' authority under the ACA, which assigns HRSA authority only to identify covered services, not authority to decide who must provide them. App. 32a–36a. Likewise, RFRA is not a basis for the religious exemption. (The agencies have never claimed that RFRA authorizes the moral exemption. App. 36a n.27). The Third Circuit assumed without deciding that RFRA might supply all agencies with affirmative rulemaking authority. App. 36a–37a. But even if so, the accommodation does not place a burden on religious exercise and therefore the religious exemption is not required by RFRA. App. 38a–41a.

After confirming that the district court had not abused its discretion as to the remaining preliminary injunction considerations, the Third Circuit affirmed the injunction. App. 42a–43a. The court of appeals also found that the district court acted within its discretion entering the injunction nationwide. The court reasoned that a nationwide preliminary injunction is a fitting remedy because the likely final remedy for an APA violation is vacatur of the challenged rules. App. 43a–44a. Additionally, the record established

that without a nationwide injunction the States would not be completely protected from costs associated with providing contraceptive coverage to employees and students living in state, but covered by an exempted out-of-state plan. App. 44a–46a.[5]

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[5] Like the interim rules, the final rules are subject to a second injunction. In the parallel California litigation, the district court determined that the final rules likely are not permitted by the ACA and that RFRA does not supply an alternative substantive basis for the final religious exemption. *California v. Dep't of Health & Human Servs.*, 351 F. Supp. 3d 1267, 1284–97 (N.D. Cal. 2019). "On the present record," the district court ruled, the plaintiffs had not shown a nationwide injunction was needed for complete relief from the final rules, so the injunction applied in only the plaintiff states. *Id.* at 1300–01.

Since the petition was filed, the Ninth Circuit affirmed that injunction. See *California v. Dep't of Health & Human Servs.*, 941 F.3d 410 (9th Cir. 2019). The court of appeals agreed the final rules exceed the agencies' authority under the ACA. *Id.* at 424–26. And like the Third Circuit, the Ninth Circuit assumed, but did not resolve, that RFRA delegates rulemaking authority to agencies. *Id.* at 427. Even under that broad understanding of RFRA, it concluded that the statute does not support the final rules, for three reasons: First, the final rules undermine women's access to preventive care, contrary to the Women's Health Amendment. *Id.* Second, the final rules do not depend on an individualized determination of the government's interests at stake or the burden on religious exercise, an inquiry RFRA demands. *Id.* at 427–28. Third, the accommodation does not substantially burden religion. *Id.* at 428–30.

The First Circuit, for its part, recently reversed a district court decision dismissing on jurisdictional grounds a third challenge to the final rules. See *Massachusetts v. Dep't of Health & Human Servs.*, 923 F.3d 209 (1st Cir. 2019). That challenge to the final rules remains pending. *Massachusetts v. Dep't of Health & Human Servs.*, No. 17-11930 (D. Mass.)

REASONS FOR DENYING THE PETITION

The Third Circuit's decision below rests on two independent, unremarkable conclusions: (1) under the circumstances here, petitioners flouted the Administrative Procedure Act's procedural requirements by unlawfully promulgating interim final rules without public notice or opportunity for comment, trying to cure the deficiency with a perfunctory post-promulgation comment period, and then republishing materially identical final rules; and (2) petitioners lacked statutory authority to issue broad regulations exempting classes of employers from their obligations under the Women's Health Amendment.

Each decision is a sufficient basis for the Third Circuit to have affirmed the injunction below and no court of appeals has reached a different conclusion as to either question.

Nevertheless, to ensure this case comes under a spotlight, petitioners cast it as necessary to resolve uncertainty about the question left unresolved after *Zubik v. Burwell*: Does the Affordable Care Act's contraceptive guarantee and its accommodation violate the Religious Freedom Restoration Act? But the uncertainty here is overplayed. Both courts of appeals to have reviewed the only rules implicated in this case have reached the same conclusion: The rules are unlawful

In any event, this case is not a suitable vehicle for this Court to resolve the question presented in *Zubik*. To reach that issue, this Court would first have to reverse the court of appeals' determination that the agencies violated the notice-and-comment requirements of the APA, which would effectively make

those requirements toothless. It would then need to accept petitioners' theory that RFRA silently operates as a universal delegation to agencies of rulemaking authority, an issue which has received scant attention in the lower courts. And to grant petitioners the full relief they seek, the Court would need to accept petitioners' sweeping view of their own authority under the ACA, which finds no support in the text of that act.

Nor is there any basis for this Court to review the scope of the preliminary injunction entered below. The Third Circuit faithfully applied this Court's established precedent to the record before it. Indeed, the record compiled below establishes that a nationwide remedy is necessary to provide the States with complete relief. That decision does not cause tension, let alone conflict, with that of any other court of appeals. Insofar as the petitioners ask this Court to review nationwide inunctions more generally, this is neither the case nor time to do so.

The petition should be denied.

I. The court of appeals' decision that the rules are likely unlawful is correct and does not warrant this Court's review.

The court of appeals concluded that the States are likely to succeed in establishing that the rules are unlawful for two independent reasons: First, it found that the agencies had improperly failed to follow the notice-and-comment procedures set forth in the APA. Second, it found that the agencies lacked statutory authority to issue them, either under the Affordable Care Act or, with respect to the religious exemption, under RFRA. Neither of these independent conclusions warrants review.

A. The court of appeals' decision that the agencies likely violated the APA when promulgating the rules is correct and does not warrant this Court's review.

The court of appeals found that the agencies acted unlawfully in dispensing with the APA's notice-and-comment requirement before issuing the interim final rules and that the perfunctory post-promulgation comment period did not render the final rules procedurally valid. Petitioners seek review of the second determination, arguing that the court of appeals' decision was erroneous and that tension among the circuits on the question and the importance of the issue argue for this Court's review. Petitioners are wrong on all counts.

1. Petitioners assert that their failure to comply with the APA before issuing the interim rules is "irrelevant," because they accepted comment on those rules before finalizing them. Pet. 28. According to petitioners, the Third Circuit was mistaken in taking into account this prior failure in its assessment of the procedural validity of the final rules, and therefore engaged in a faulty analysis of whether the final rules complied with the APA.

Petitioners specifically criticize the Third Circuit for reaching the conclusion that the final rules do not "reflect any real open-mindedness," App. 30a, arguing that the APA requires no such thing. Pet. 29–30. But in the very next paragraph, petitioners claim that the decision warrants this Court's review because it "is in significant tension" with those of two other court of appeals—both of which turn on precisely the same question. See *Levesque v. Block*, 723 F.2d 175, 188 (1st Cir. 1983) ("When the response

suggests that the agency has been open-minded, the presumption against a late comment period can be overcome and a rule upheld."); *Fed. Express Corp. v. Mineta*, 373 F.3d 112, 120 (D.C. Cir. 2004) (Response to comments and changes to final regulations "show the agency had a 'flexible and open-minded attitude towards its own rules,' notwithstanding the 'final' label it had attached to them.") (both quoted in Pet. 30–31). Petitioners' argument contradicts itself.

In fact, the two cases relied on by petitioners do not demonstrate any meaningful division among the circuits, much less one warranting this Court's attention. Both affirm that an agency that improperly forgoes notice-and-comment procedures before issuing an interim rule cannot cure its failure by simply accepting post-promulgation public comment—just as the Third Circuit concluded. *Levesque*, 723 F.2d at 187–89; *Fed. Express*, 373 F.3d at 120; App. 29a. No court of appeals has held, as petitioner argues, Pet. 28, that the belated acceptance of comments renders a prior violation "irrelevant."

As the First Circuit explained, "at times an agency may be able to present evidence of a level of public participation and a degree of agency receptivity [during a post-promulgation comment period] that demonstrate that a real public reconsideration of the issued rule has taken place." *Levesque*, 723 F.2d at 188 (internal quotation marks omitted). That was true of the record under review in *Levesque*. The First Circuit held that the Department of Agriculture, despite engaging in a rulemaking pattern similar to the one followed here, had not violated the APA because the record demonstrated that the agency had maintained a sufficiently open mind to overcome "the presumption against a late comment peri-

od." *Levesque*, 723 F.2d at 188. Likewise, in *Federal Express*, the D.C. Circuit concluded that the record "show[ed] the agency had a 'flexible and open-minded attitude towards its own rules,' notwithstanding the 'final' label it had attached to them," and that "the agency has made a compelling showing, that it provided a meaningful opportunity to comment before the [final rule] became effective." 373 F. 3d at 120 (internal quotation marks and citations omitted). Here, the Third Circuit similarly examined the record but concluded that "[t]he notice and comment exercise surrounding the Final Rules does not reflect any real open-mindedness toward the position set forth in the [interim final rules]." App. 30a (emphasis added).

2. There is good reason courts of appeals are hesitant to sanction petitioners' "regulate first, ask questions later" approach. Categorically allowing post-promulgation comment periods to suffice would contravene both the text and the purpose of the APA. Section 553 requires that an agency publish a "[g]eneral notice of proposed rule making," give "interested persons an opportunity to participate in the rule making," and issue a final rule containing "a concise general statement of [the rule's] basis and purpose," all *before* a rule goes into effect. 5 U.S.C. § 553(b)–(d).

Agency consideration of comments submitted after the agency has issued a binding rule is a fundamentally different exercise from the APA's required process. As the D.C. Circuit has recognized, "the concern is that an agency is not likely to be receptive to suggested changes once the agency puts its credibility on the line in the form of final rules." *Advocates for Highway & Auto Safety v. Fed. Highway Admin.*,

28 F.3d 1288, 1292 (D.C. Cir. 1994) (internal quotation marks omitted). Thus, in this case, the court of appeals rightly concluded that issuance of the immediately-effective interim final rules "changed the question presented concerning the Final Rules from whether they should create the exemptions to whether they should depart from them." App. 31a.

If petitioners' approach were permissible, agencies would have no reason to comply with their obligation to seek comments prior to issuing final rules. Rather, an agency could regulate exclusively through interim rules, claim good cause in each instance, and hope for the best—knowing that, at worst, it will be in the same position as if it had properly allowed for comment at the outset. *Levesque* recognized this danger, observing, "[w]hen pre-promulgation comment is possible . . . one does not want to encourage the circumvention of section 553 [of the APA] by accepting post-promulgation procedures." 723 F.2d at 188.

Petitioners' suggestion that the APA requires nothing more than that "'the agency considered' comments" confuses two different issues. Pet. 29–30 (citing *Nazareth Hosp. v. Secretary, HHS*, 747 F.3d 172, 185 (3d Cir. 2014)). Whether an agency properly responded to significant comments in a final rule is distinct from whether post-promulgation comments cure an improper interim final rule.[6] Answering the

[6] Contrary to petitioners' assertion (at 30) the Third Circuit recognized this distinction; it held that petitioners' failure to maintain an open mind rendered post-promulgation comment not meaningful, App. 30a, but expressed no opinion on whether petitioners appropriately responded to significant comments in the final Rules, App. 30a n.24.

latter question, the D.C. Circuit in *Federal Express* upheld the final rule only after shifting the burden to the agency to make a "'compelling showing' that it provided 'a meaningful opportunity to comment.'" 373 F.3d at 120 (internal quotations marks and citations omitted). This is well above what an agency must do to respond to significant comments.

Similarly, petitioners' assertion (at 29) that "it is unclear whether, when, or how an agency whose interim rule is declared procedurally invalid could ever cure the defect through further rulemaking" is meritless. An agency found to have improperly issued an interim final rule can withdraw the rule, issue a new notice of proposed rulemaking, seek comment, and then issue a final rule, as the APA requires. Here, despite the decisions of two courts finding that they lacked any basis to forgo notice and comment, the agencies did not do so, and instead ask this Court to save them from the foreseeable consequences of that decision. The Court should decline to do so.

3. Petitioners argue this issue's importance warrants review, relying on a Government Accountability Office study finding that "between 2003 and 2010, federal agencies issued dozens of 'major' interim rules, which were frequently followed by finalized rules." Pet. 31 (citing U.S. GAO, GAO-13-21, Federal Rulemaking: Agencies Could Take Additional Steps

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Also contrary to petitioners' characterization (at 30), the district court's holding concerned the adequacy of responses to significant comments and was based on a motion for preliminary injunction filed without access to the full administrative record. App. 135a–37a; compare States' Motion for Preliminary Inj. (E.D. Pa. Dec. 17, 2018), with Supplemental Admin. Rec. (E.D. Pa. Jan. 7, 2019).

to Respond to Public Comments 24–26, 41–44 (2012)). This statistic is either irrelevant or troubling. On the one hand, the referenced interim rules may been justified by either good cause or statutory authorization for dispensing with notice-and-comment procedures. If so, the statistic has no bearing here. On the other hand, if the referenced interim final rules were issued without any basis for disregarding notice-and-comment procedures, then petitioners are suggesting their disregard for the APA's procedural requirements should be ignored here because agencies are already blithely disregarding their obligations elsewhere. The Court should not indulge that argument.

Of course, if agencies routinely promulgated improper interim final rules, one would expect this issue to arise with some frequency in the courts. The fact that petitioners must rely on decisions from 36 and 15 years ago in claiming tension among the circuits suggests that the decision in this case (which relied on a decision from 1982) is not the threat to the administrative state they make it out to be.

B. The court of appeals' decision that the agencies likely lacked statutory authority for the rules is correct and does not warrant this Court's review.

The second independent basis for the court of appeals' finding that the states are likely to succeed on the merits of their claim—that the agencies lack statutory authority for the rules—likewise does not warrant this Court's review.

Although reduced to a single question presented in the petition, this issue implicates multiple conclusions of law. As an initial matter, the court of ap-

peals rejected the agencies' argument that the ACA gives them the authority to issue the rules. App. 32a–36a. The only other circuit to consider this question reached the same conclusion. Because petitioners rely solely on the ACA for the authority to issue the moral exemption, this Court would necessarily need to revisit that holding to grant petitioners the complete relief they seek.[7]

Next, the court of appeals assumed without deciding that RFRA grants agencies rulemaking authority. This question has been subject to little analysis in the lower courts, requiring this Court to decide it in the first instance. Additionally, if this Court disagrees with the court of appeals' actual conclusion that RFRA does not require the religious exemption because the accommodation does not substantially burden religious exercise, it still must address multi-

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[7] Petitioners suggest (at 19–20) that the lower court decision could threaten the prior exemption for churches. The court of appeals addressed this argument: "Though the Church Exemption may seem facially at odds with § 300gg-13(a), Supreme Court precedent dictates a narrow form of exemption for houses of worship." App. 33a–34a n.26; see 76 Fed. Reg. 46,623 (Aug. 3, 2011) (recognizing need for exemption to "respect[] the unique relationship between a house of worship and its employees in ministerial positions"). Moreover, the agencies' authority to issue the prior church exemption has never been at issue in this litigation, as the States have never challenged it. App. 33a–34a n.26 ("In any event, the Agencies' authority to issue the Church Exemption and Accommodation is not before us."). Petitioners argue (at 20) that the church exemption is "not tailored" to the concerns underlying this Court's cases recognizing exemptions for houses of worship, and seem to suggest that this fact somehow compels accepting their expansive reading of their own authority under the Women's Health Amendment. It does not.

ple legal questions not reached below to rule in the petitioners' favor.

In any event, on its own terms, the Third Circuit correctly decided that the final rules are not a proper exercise of rulemaking authority under RFRA.

1. There is no basis for reviewing the Third Circuit's decision that the final rules are not authorized by the Women's Health Amendment.

The agencies relied exclusively on the Women's Health Amendment in claiming authority to issue the moral exemption. As the Third Circuit noted, "[n]o party argues that RFRA authorizes or requires the Moral Exemption." App. 36a n.27. So the agencies' authority cannot be determined on the basis of RFRA alone; rather, the Court would also need to address petitioners' claim that the Women's Health Amendment authorizes the rules. But such review is not warranted because petitioners present no conflict among the lower courts nor persuasive reasons to overturn the Third Circuit's straightforward textual analysis.

1. Petitioners have identified no division among the lower courts as to whether the Women's Health Amendment grants agencies the authority they claim. To the contrary, the only two courts of appeals to examine it both reached the same conclusion: the Women's Health Amendment authorized HRSA to determine *which* preventive services must be covered, but it did not give the agency the discretion to determine *who* is required to cover those services. App. 32a–36a; *California v. Dep't of Health & Human Servs.* ("*California IV*"), 941 F.3d 410, 424–46 (9th Cir. 2019).

2. The court of appeals' conclusion reflects the only reasonable reading of the statute. The ACA imposes a mandatory obligation:

> **(a) In general** A group health plan and a health insurance issuer offering group or individual health insurance coverage *shall*, at a minimum provide coverage for and *shall not* impose any cost sharing requirements for—
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> …
>
> (4) with respect to women, *such additional preventive care and screenings* not described in paragraph (1) *as provided for* in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.

42 U.S.C. § 300gg-13(a)(4) (emphasis added). Congress has instructed that "[a] group health plan and a health insurance issuer offering group or individual health insurance coverage," 42 U.S.C. § 300gg-13(a), will provide covered services. The Third Circuit rightly concluded that nothing in the plain language "gives HRSA the discretion to wholly exempt actors of its choosing from providing the guidelines services." App. 33a.

Petitioners argue that paragraph (4)'s requirement "that services be covered '*as provided for* in comprehensive guidelines *supported by* [HRSA]' . . . indicates that the agency may determine the manner and circumstances in which services are covered." Pet. 18 (emphasis in original). But this assertion

omits the phrase "such additional preventive care and screenings" from the beginning of paragraph (4), and in so doing distorts its meaning. When paragraph (4) is read in its entirety, it is clear that "as provided for" and all that follows refers to the "care and screenings" and does not modify the mandatory language from subsection (a). Otherwise, the use of the word "such" (here meaning "[o]f a kind specified or implied"[8]) before "additional preventive care and screenings" would be nonsensical.[9]

3. Petitioners spend considerable effort (at 18–19) identifying differences in the language between paragraph (4) and the three that precede it, each of which also defines a category of services insurance providers must cover without cost sharing. As petitioners note, "[n]one of those [preceding] paragraphs employs the 'as provided for' or 'for purposes of this paragraph' language that appears in paragraph (4), an omission that courts should presume is purposeful." Pet. 18.

The word choice *is* purposeful—and in the very next paragraph petitioners explain why Congress chose those words: The guidelines referenced in paragraph (4), in contrast to those from the preceding paragraphs, "did not yet exist." Pet. 19. So paragraph (3), for example, requires coverage for "infants, chil-

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[8] *Such*, American Heritage Dictionary (5th ed. 2011).

[9] Before the district court and the court of appeals, petitioners argued that their interpretation of the ACA was entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837 (1984). See, *e.g.*, Tr. of Oral Argument (3d Cir. May 21, 2019) at 8:8 (petitioners' counsel asserting, "[T]his is important. This is a *Chevron* case."). They have abandoned that argument before this Court.

dren, and adolescents" of "evidence-informed preventive care and screenings *provided for in the comprehensive guidelines supported by the Health Resources and Services Administration*" (emphasis added)—omitting "as," as petitioners point out, but also "such," which they do not. Those omissions—as well as the addition of "the" before "comprehensive" in paragraph (3)—make it clear, as the court of appeals recognized, that the differences in language between the two paragraphs entirely reflect that the guidelines referenced in paragraph (4) needed to be created.[10]

Each court to have considered petitioners' sweeping interpretation of section 300gg-13(a)(4) has rejected it. The court of appeals' decision on this point was correct, and petitioners have identified no justification for this Court to review it.

2. It is premature to address whether RFRA grants agencies regulatory authority.

Alternatively, petitioners claim (at 20) that the contraceptive guarantee and the accommodation violate RFRA, and so RFRA, in turn, supports the religious exemption. See also Pet. 23 ("'[E]ven if RFRA does not compel' the exemption, RFRA at least permits them to adopt it." (quoting 83 Fed. Reg. at 57,544)). Yet before determining whether the religious exemption remedies a RFRA violation for em-

[10] Petitioners also make too much out of the absence of the words "evidence-based" or "evidence-informed" in paragraph (4). Pet. 19. Paragraph (4) explicitly incorporates paragraph (1), which does refer to "evidence-based items or services." § 300gg-13(a)(4) ("with respect to women, such additional preventive care and screenings *not described in paragraph (1)* . . . ." (emphasis added)).

ployers with religious objections, the Court would have to accept that RFRA broadly delegates rulemaking power to executive branch agencies. After all, the religious exemption, like all rules, "must be promulgated pursuant to authority Congress has delegated to the official." *Gonzales v. Oregon*, 546 U.S. 243, 258–59 (2006); see also *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 357 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it."). But petitioner agencies point to no provision of RFRA providing them independent rulemaking authority and identify no prior regulation promulgated solely in reliance on RFRA.[11]

This threshold question has been acknowledged, but not decided, by courts of appeals. The Third Circuit "assum[ed] that RFRA provides statutory authority for the Agencies to issue regulations to address religious burdens," App. 36a–37a, but concluded that, even if its assumption were true, RFRA did not justify the religious exemption, App. 37a–41a. Similarly, the Ninth Circuit "question[ed] whether RFRA delegates to any government agency the authority to determine violations and to issue rules addressing alleged violations," noting that Congress charged courts, not agencies, with determining RFRA violations. *California IV*, 941 F.3d at 427. But the Ninth Circuit also declined to resolve the question, instead assuming that "agencies are authorized

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[11] Petitioners' invocation (at 22) of *Ricci v. DeStefano*, 557 U.S. 557 (2009), is entirely misplaced. *Ricci* had nothing to do with an executive agency's rulemaking authority. And ultimately, the Women's Health Amendment and RFRA do not impose conflicting obligations.

to provide a mechanism for resolving perceived RFRA violations." *Id.*

To conclude that the final rules alleviate a RFRA violation, the Court first must accept that RFRA delegates rulemaking authority absent an explicit statement from Congress. That decision would be made without the benefit of any meaningful lower court analysis, much less a circuit split. The Court should decline to address this matter of first impression.

3. Resolving whether the accommodation violates RFRA requires answering additional legal issues not addressed below.

For additional reasons, this case is a poor vehicle to determine whether the accommodation violates RFRA for all employers with religious objections. A federal law violates RFRA only if it fails a three-part test: it (a) "substantially burdens a person's exercise of religion" and is (b) not "in furtherance of a compelling government interest," or (c) not "the least restrictive means of furthering that compelling government interest." 42 U.S.C. § 2000bb-1(a)–(b). The Third Circuit enjoined the religious exemption because the accommodation does not run afoul of the first part. App. 36a–41a. But to uphold the religious exemption, the Court must also address the other two parts, raising legal issues that have received little to no consideration in the lower courts.

First, the Court would have to accept that executive branch agencies can unilaterally disclaim a compelling government interest established by statute. Prior to issuing the interim final rules, petitioners consistently articulated their "compelling interest in ensuring that all women have access to all FDA-

approved contraceptives without cost sharing." *Hobby Lobby*, 573 U.S. at 727; see also, *e.g.*, 78 Fed. Reg. at 39,872–73; 2017 FAQs at 4–5. In *Hobby Lobby*, the Court assumed this interest was compelling, even as applied to employers with religious objections. 573 U.S. at 728; see also *Priests for Life v. Dep't of Health & Human Servs.*, 808 F.3d 1, 21–23 (2015) (Kavanaugh, J., dissenting from denial of rehearing en banc) ("*Hobby Lobby* at least strongly suggests that the Government has a compelling interest in facilitating access to contraception for the employees of these religious organizations."). In the final rule, however, the petitioner agencies abruptly reversed position, disclaiming a compelling government interest in the contraceptive guarantee. 83 Fed. Reg. at 57,546–48; see also Pet. 23. That change transpired despite no subsequent change in the Women's Health Amendment, the HRSA guidelines, or the documented need for women to freely access preventive health services.

Second, the Court would have to accept petitioners' claim (at 20) that RFRA allows executive branch agencies to stop enforcing a federal law determined to substantially burden religion rather than to enforce the law through less restrictive means. As this Court's decisions show, RFRA does not require the resolution of all religious objections, just that the government must employ the least burdensome method of furthering its compelling interest. In *Hobby Lobby*, this Court ruled that the contraceptive guarantee violated RFRA in some applications because the accommodation offered a "less restrictive approach" that "accommodates the religious beliefs asserted in these cases" while "serv[ing] HHS's stated interests equally well." 573 U.S. at 731, 731 n.40.

When different plaintiffs articulated a claim about the standardized form necessary to invoke the accommodation, the Court again recognized that a less restrictive means existed. *Wheaton College*, 573 U.S. at 2807. Petitioners have never explained why the accommodation is not the least restrictive way of fulfilling the compelling government interest. Instead, they simply claim (at 24) that nothing "short of an exemption [] would resolve all religious objections." Yet, an exemption—that is, the absence of enforcement—would exclude women from access to contraceptive coverage as mandated by Congress. See *Zubik*, 136 S. Ct. at 1560 (remanding so agencies can identify a solution "ensuring that women covered by petitioners' health plans receive full and equal health coverage, including contraceptive coverage") (internal quotation marks omitted).

To grant petitioners full relief, therefore, this Court must consider whether executive agencies can unilaterally disclaim a compelling government interest and decline to enforce generally applicable law, even if there may exist a means of enforcement that is less restrictive. This Court would be the first to resolve those issues. And, in any event, there remain other cases currently working their way through the courts that raise some of the same issues relating to RFRA and the contraceptive care guarantee. See, *e.g.*, *California IV*, 941 F.3d 410 (challenge to final rules); *Massachusetts v. Dep't of Health & Human Servs.*, No. 17-11930 (D. Mass.) (same); see also *DeOtte v. Azar*, 393 F. Supp. 3d 490, 499, 514–15 (N.D. Tex. 2019), appeal docketed, 19-10754 (5th Cir. July 5, 2019) (class action challenge filed by employer with religious objections to contraceptive care guarantee).

4. The Third Circuit's decision is correct.

The Third Circuit correctly determined that "the status quo prior to the new Rule, with the accommodation, did not infringe on the religious exercise of covered employers, nor is there a basis to conclude the accommodation process infringes on the religious exercise of any employer." App. 41a. Petitioners' arguments to the contrary are incorrect.

First, the Third Circuit rightly noted that while courts must "defer to the reasonableness of an objector's religious beliefs," they must also engage in an "objective evaluation of the nature of the claimed burden and the substantiality of that burden on the objector's religious exercise." App. 38a n.28 (internal quotation marks omitted). Petitioners' assertion to the contrary (at 24–25) would render RFRA's first part pro forma: every sincere belief about the operation of federal law would automatically qualify as a "substantial[] burden" on that "person's exercise of religion," 42 U.S.C. § 2000bb-1(a). *Hobby Lobby* does not endorse such a judicial abdication; to the contrary, the Court affirmed that courts must determine whether a given law "imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with their religious beliefs." Compare 573 U.S. at 723, with Pet. 25.

Second, the Third Circuit rightly concluded that the accommodation does not impose such a burden: it "does not trigger or facilitate the provision of contraceptive coverage because coverage is mandated to be otherwise provided by federal law." App. 39a (citation omitted). Unlike the contraceptive coverage guarantee itself, which requires employers to pay for health insurance coverage, the accommodation al-

lows employers to opt out of providing coverage while still enabling "women to receive statutorily mandated health care coverage." App. 39a. That women may still receive insurance coverage to which some employers object does not transform the accommodation into a RFRA violation. App. 40a.

Finally, the Third Circuit correctly held that the Rule "would impose an undue burden on nonbeneficiaries—the female employees who will lose coverage for contraceptive care." App. 41a. In *Hobby Lobby*, this Court reaffirmed the importance of courts "tak[ing] adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." 573 U.S. at 729 n.37 (citation omitted). Petitioners' characterization (at 26) of *Hobby Lobby* omits the Court's full reasoning:

> [I]t could not reasonably be maintained that any burden on religious exercise, no matter how onerous and *no matter how readily the government interest could be achieved through alternative means*, is permissible under RFRA so long as the relevant legal obligation requires the religious adherent to confer a benefit on third parties.

573 U.S. at 729 n.37 (emphasis added).

Here, petitioners' proposed RFRA remedy *eliminates* contraceptive coverage—the antithesis of enforcing the guaranteed contraceptive coverage via alternative means. See *Priests for Life*, 808 F.3d at 26 n.12 (Kavanaugh, J., dissenting from denial of rehearing en banc) ("A means that is not a reasonably feasible way of furthering the Government's interest

cannot be deemed a less restrictive means of furthering that interest.").

II. The scope of the preliminary injunction does not warrant this Court's review.

Finally, this Court should not review the fact-bound determination that the district court reasonably concluded the final rules should be preliminarily enjoined nationwide to provide the States complete relief. Insofar as petitioners ask the Court to consider more broadly the propriety of nationwide injunctions, this is not the case to do so.

1. The courts below applied the well-established rule that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamaski*, 442 U.S. 682, 702 (1979); see also *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994). Application of that rule is fact-specific, calling on district court judges to exercise "discretion and judgment." *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017).

The courts below entered and affirmed, respectively, the contested injunction because the record demonstrates that nationwide relief is the least burdensome way to completely relieve the States of their injuries. App. 43a–44a, 175a–76a. As the district court found, "[h]undreds of thousands of the States' citizens travel across state lines—to New York, Ohio, Delaware, Maryland, West Virginia and even further afield—to work for out-of-state entities," and there is an annual influx of "tens of thousands of out-of-state students" into each of the States. App. 180a–81a. Without nationwide relief, the States would bear the cost of contraceptive care for citizens covered under

an out-of-state employer's exempted plan and for any student attending school in one of the States but covered under an exempted out-of-state plan. App. 181a. The Third Circuit appropriately deferred to the district court's analysis of these facts and affirmed the injunction. App. 44a–46a.

Petitioners do not suggest that the lower court applied the wrong standard, but instead (at 33–34) argue it simply reached the wrong result. But the only facts petitioners conjure (at 33–34) against the scope of the injunction are that "many New Jersey residents who work out of state do so in Pennsylvania, and vice versa," and that all but one state abutting the States require insurance plans to provide contraceptive coverage. Neither assertion undermines the need for nationwide relief. Citizens of the States do not work exclusively in immediately adjacent states, and students arrive from states beyond those bordering the States. App. 182a. Given that, the district court reasonably concluded that an injunction without nationwide reach risked depriving the States of complete relief. App. 183a. That is precisely the sort of discretion and judgment district courts must exercise to craft a preliminary injunction.

Petitioners allude (at 34) to "tension" between the Third Circuit's decision and one from the Ninth Circuit. There is no tension; each decision turns on the record before the court. Reviewing a nationwide injunction of the interim final rules, the Ninth Circuit explained that injunctions must be "no broader and no narrower than necessary to redress the injury shown by the plaintiff states." *California v. Azar* ("*California II*"), 911 F.3d 558, 584 (9th Cir. 2018). Guided by that principle, the Ninth Circuit conclud-

ed that "[o]n the present record, an injunction that applies only to the plaintiff states would provide complete relief to them." *Id.* But, as the Third Circuit appreciated, the record before it was "substantially more developed than the record before [the Ninth Circuit]." App. 44a n. 32. Thus, the two decisions, based on distinct records, are compatible.

2. If petitioners seek certiorari for the Court to address more broadly the propriety of nationwide injunctions, this is not the proper case or time to explore that issue.

First, petitioners suggest that national injunctions impede the federal judiciary's proper functioning—and thus present an issue meriting this Court's review—by "preventing legal questions from percolating through the federal courts, encouraging forum shopping, and making every case a national emergency." Pet. 33 (quoting *Trump v. Hawai'i*, '138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring)). Both courts took account of these concerns, concluding that they did not necessitate limiting the scope of the injunction. The preliminary injunction below has not stalled separate federal courts from considering similar legal questions: Challenges to the final rules are ongoing in two additional circuits. See *California IV*, 941 F.3d 410; *Massachusetts v. Dep't of Health & Human Servs.*, No. 17-11930 (D. Mass.). And the Ninth Circuit has rejected the argument that a nationwide preliminary injunction entered in Pennsylvania moots the parallel proceeding in California. *California IV*, 941 F.3d at 421–23.

Second, the States allege violations of the APA, in which Congress provided statutory remedies of nationwide scope. *E.g.*, 5 U.S.C. § 705 (authorizing

courts, during judicial review of challenged agency action, to "issue all necessary and appropriate process to postpone the effective date of agency action or to preserve status or rights pending conclusion of the review proceedings"); 5 U.S.C. § 706(2) (allowing courts to "hold unlawful and set aside agency action, findings, and conclusions found" to violate the APA's requirements). This case is therefore a poor vehicle to address the propriety of nationwide injunctive relief generally.

Third, petitioners' representation (at 34) of a "concerning trend among lower courts of issuing categorical, absent-party injunctions that bar any enforcement of federal laws or policies against any person," mischaracterizes the state of affairs. To the contrary, the current trend is toward more exacting scrutiny of requests for nationwide remedies and careful crafting of fact-based relief, as lower courts "recognize a growing uncertainty about the propriety of universal injunctions," *E. Bay Sanctuary Covenant v. Trump* ("*E. Bay I*"), 932 F.3d 742, 779, 779 n.17 (9th Cir. 2018) (citing *Hawai'i*, 138 S. Ct. at 2425–29 (Thomas, J., concurring)). Thus, as *Califano* requires, courts are more careful to provide nationwide remedies only when plaintiffs demonstrate the necessity.[12]

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[12] For recent examples of courts refusing nationwide injunctions, see, *e.g.*, *E. Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1029–31 (9th Cir. 2019); *California II*, 911 F.3d at 584; *San Francisco v. Trump*, 897 F.3d 1225, 1244–45 (9th Cir. 2018); *San Francisco v. Citizenship & Imm. Servs.*, No. 19-4717, 2019 WL 5100718, at *51–53 (N.D. Cal. Oct. 11, 2019); *Baltimore v. Azar*, 392 F. Supp. 3d 602, 619–20, 619 n.20 (D. Md. 2019); *States v. Dep't of Justice*, 343 F. Supp. 3d 213, 244–45 (S.D.N.Y 2018).

And even when granting nationwide relief, some courts have stayed their own orders to permit appellate review. See, *e.g.*, *Chicago v. Barr*, No. 18-6859, 2019 WL 4511546, at *17 (N.D. Ill. Sept. 19, 2019); *San Francisco v. Sessions*, 372 F. Supp. 3d 928, 954 (N.D. Cal. 2019). Thus, lower courts are applying this Court's rule and designing injunctions tailored to particular facts. The district court did so here, and the Third Circuit properly affirmed.

For recent examples of courts granting nationwide injunctions, see *E. Bay I*, 932 F.3d at 779–80; *Doe v. Trump*, No. 19-1743, 2019 WL 6324560, at *21–22 (D. Or. Nov. 26, 2019); *Casa de Md., Inc. v. Trump*, No. 19-2715, 2019 WL 5190689, at *16–18 (D. Md. Oct. 14, 2019); *Make the Road N.Y. v. McAleenan*, No. 19-2369, 2019 WL 4738070, at *44–49 (D.D.C. Sept. 27, 2019); *Roe v. Shanahan*, 359 F. Supp. 3d 382, 421–22, 422 n.47 (E.D. Va. 2019); *S.C. Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d 959, 968–69 (D.S.C. 2018).

CONCLUSION

The petition for a writ of certiorari should be denied.

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