No. 18-1514

United States Court of Appeals
for the First Circuit

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff-Appellant,

v.

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; ALEX MICHAEL AZAR, II, IN HIS OFFICIAL CAPACITY AS SECRETARY OF HEALTH AND HUMAN SERVICES; U.S. DEPARTMENT OF THE TREASURY; STEVEN T. MNUCHIN, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE TREASURY; U.S. DEPARTMENT OF LABOR; AND R. ALEXANDER ACOSTA, IN HIS OFFICIAL CAPACITY AS SECRETARY OF LABOR,
Defendants-Appellees.

ON APPEAL FROM A FINAL JUDGMENT OF THE DISTRICT COURT

BRIEF OF PROFESSOR ERNEST A. YOUNG AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT URGING REVERSAL

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Interest of Amicus

Amicus Ernest A. Young is the Alston & Bird Professor at Duke Law School.[1] He teaches and writes in the fields of Federal Courts and Constitutional Law. He has previously filed *amicus* briefs in support of the State of Texas's standing to challenge the Obama Administration's immigration policy in *United States v. Texas*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court,* 136 S. Ct. 2271 (2016). He and a colleague have recently completed an article considering the role of public law litigation by state attorneys general in the modern federal system. (A copy of that article, which will be published in November 2018 and is presently available on SSRN, has been submitted to this court with an accompanying motion.) *Amicus*'s purpose is to support the Commonwealth's claim to standing in this case while remaining agnostic as to the merits issues in the case. This brief is submitted solely in Professor Young's individual capacity.

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[1] All parties have consented to the filing of this brief in letters on file with the Clerk of Court. No counsel for a party has authored this brief in whole or in part, and no person other than *amicus curiae* has made any monetary contribution to the preparation or submission of this brief.

Argument

I. Massachusetts has demonstrated a sufficiently probable concrete injury in fact to its proprietary interests.

The Commonwealth's most straightforward basis for standing is that "the IFRs . . . will inflict an imminent financial injury on Massachusetts." Brief of Plaintiff-Appellant at 18. Under the complex of state and federal rules governing insurance coverage for contraceptives, Massachusetts will end up having to foot some of the bill if (a) any Massachusetts employers avail themselves of the opt-outs created by the IFRs, and (b) some of those employers have female employees of childbearing age who are currently using affected contraceptive methods. Although the District Court found this injury too probabilistic to support standing, the Commonwealth's injury is sufficient under well-established principles.

A. The Commonwealth's injury is not "probabilistic."

Probabilistic standing problems arise when, as in *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013), it is uncertain whether the plaintiff will become subject to a challenged government policy.[2] In *Clapper*, the plaintiffs

[2] Judgments about probability may also come into play when evaluating whether a plaintiff's injury is traceable to the challenged conduct or redressable by the requested relief. *See, e.g.*, *Allen v. Wright*, 468 U.S. 737,

were attorneys and non-governmental organizations who wished to communicate with persons abroad who might become subject to surveillance under the Foreign Intelligence Surveillance Act. They lacked standing to challenge the FISA because, among other difficulties, they could not establish whether the foreign persons they wished to communicate with were actually being targeted for surveillance; whether (if those persons were targeted) the surveillance would be conducted pursuant to the challenged FISA provision; whether (if it were) the FISA court would approve the surveillance; or (if it did) whether the surveillance would succeed in capturing their communications. *Id*. at 411-14. These multiple layers of speculation made *Clapper*—to put it mildly—an unusual case.

No uncertainty exists, however, that the new IFRs will become operative in Massachusetts if not enjoined by the federal courts. Likewise, no uncertainty exists concerning Massachusetts' obligations to treat the IFRs as binding federal law. This obligation alone is sufficient to establish several concrete injuries in fact. The Commonwealth must alter its own law and practices to comply with the IFRs. And its preferred policy of access to

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757-59 (1984). But the United States has focused its argument in this case on the prior question of Massachusetts' concrete injury in fact.

contraceptives, embodied in the Access Act, will necessarily be constricted, particularly with respect to self-insured employer plans covered by ERISA. To be sure, federal law would bind the Commonwealth in these areas with or without the new IFRs. But this case—especially the Commonwealth's statutory and APA claims—are precisely about the Commonwealth's right to have input into the statutory and administrative processes that shape the content of federal law.

In any event, there is also no probabilistic standing problem with the Commonwealth's financial injury. Neither the United States nor the District Court seriously disputes that *some* Massachusetts employers will seek exemptions under the IFRs, that *some* of their employees will be denied contraceptive coverage accordingly, or that in *some* of these cases the Commonwealth will be called upon to fill the gap. Serious disputes may exist about the relevant numbers (although Massachusetts relies primarily on the Departments' own estimates, *see* Brief of Plaintiff-Appellant at 26-32) but standing to sue has never depended upon the *magnitude* of the plaintiff's injury. *See, e.g.*, *Avery v. Heckler*, 584 F. Supp. 312, 316 (D. Mass. 1984) ("One of the few settled principles of the law of standing is that the magnitude

of a party's injury is irrelevant.") (citing *United States v. SCRAP*, 412 U.S. 669, 689 n.14 (1972)).

The District Court hung its hat entirely on Massachusetts' inability to identify specific employers who would seek exemptions, or specific employees who would lose coverage and seek funding from the Commonwealth. *See, e.g.*, ADD035. Indeed, the District Court went so far as to identify particular private plaintiffs that were "profoundly absent" from the case, D.Ct. Op. at 30—as if the fact that another plaintiff might have sued in itself undermined Massachusetts' own standing. In any event, the Commonwealth is not a membership organization that seeks to establish associational standing by way of showing that a particular *member* would have standing based on a specific injury to that member. *See, e.g.*, *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 342-44 (1977). Rather, Massachusetts asserts standing based on injury to itself. The likelihood that Massachusetts employers will seek exemptions under the new IFRs and that Massachusetts employees will seek contraceptive coverage through the Commonwealth goes to the likelihood or imminence of the Commonwealth's injury. If the fraction of employers eligible to seek exemption were very, very low, then one might doubt whether the

Commonwealth would incur any injury at all. But the Departments' own estimates foreclose that conclusion. *See* Brief of Plaintiff-Appellant at 26-32. And there is no requirement that the Commonwealth identify particular persons whose actions under the IFRs are going to bring about its injury.

In *United States v. Texas*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court,* 136 S. Ct. 2271 (2016), the Fifth Circuit found that Texas had standing to challenge the Obama Administration's Deferred Action for Parents of Americans (DAPA) policy, which would have increased the total number of aliens considered to be lawfully present in the United States by an estimated four million persons. Texas's standing rested primarily on the fact that anyone lawfully present in Texas would be eligible to apply for a Texas driver's license, and that the state incurred costs of approximately $100 to process each license. *See id.* at 155. Critically, neither the district court nor the Fifth Circuit required Texas to show how many persons made lawfully present under DAPA were in Texas, or how many such persons would apply for licenses—let alone *which particular individuals* would do so. *See, e.g.*, *id.* at 162 (noting that standing to challenge the overall program was easier to establish than standing to challenge to individual grants of asylum, because "it is easier to demonstrate that some DAPA beneficiaries would apply for

licenses than it is to establish that a particular alien would"). It was sufficient that Texas showed a likelihood that a non-trivial number of persons would apply for licenses, causing Texas to incur non-trivial costs attributable to the DAPA policy.

The United States' position here relies on the improbable assumption that the new IFRs will make no difference, because no one will opt out of the contraceptive mandate. That, of course, would make it hard to understand why the Administration undertook such a major revision of the rules.

B. The U.S.'s "self-inflicted" injury argument lacks any merit.

In the District Court, the United States suggested that Massachusetts injury was "self-inflicted" because it arises from the Commonwealth's policy choice to provide reimbursement where federal law does not. *See* Memorandum in Support of Defendants' Cross-Motion to Dismiss at 12-13. But there is simply no such thing as a "self-inflicted injury" rule of the sort that the United States invokes.

The United States' argument rests entirely on *Pennsylvania v. New Jersey*, 426 U.S. 660 (1976) (per curiam). That case considered two separate motions for leave to file complaints in the Supreme Court's original jurisdiction concerning taxation by one state that allegedly injured other

states. The Court said—entirely without explanation—that "[n]o State can be heard to complain about damage inflicted by its own hand." *Id.* at 664. But the Court did not describe this as a rule of "standing."[3] *Pennsylvania*'s discussion is best read as not concerning Article III standing at all, but rather as an application of the Supreme Court's standard for exercising its original jurisdiction. *See, e.g.*, *Mississippi v. Louisiana*, 506 U.S. 73, 76 (1992) ("Recognizing the delicate and grave character of our original jurisdiction, we have interpreted the Constitution and 28 U.S.C. § 1251(a) as making our original jurisdiction obligatory only in appropriate cases, and as providing us with substantial discretion to make case-by-case judgments as to the practical necessity of an original forum in this Court.") (internal quotation marks and citations omitted). One criterion for the exercise of jurisdiction is that "it must appear that the complaining State has suffered a wrong through the action of the other State," *Massachusetts v. Missouri*, 308 U.S. 1, 15 (1939), and it is evidently this requirement that concerned the Court in *Pennsylvania*. The

[3] The only use of the term "standing" in the opinion occurs in the Court's later discussion of Pennsylvania's additional *parens patriae* claim on behalf of its citizens. *See* 426 U.S. at 665. The Court rejected that claim based on other grounds having nothing to do with self-inflicted injury.

original jurisdiction cases do not invoke Article III and there is no reason to believe that the standards are the same.[4]

In any event, the novel requirement proposed by the United States would have radical implications for standing doctrine. Most injuries can be avoided by some action or other. Certainly the justiciability rules do not categorically require the States to take evasive action at all costs to avoid injury at the hands of federal law. When a state law has been held invalid on federal constitutional grounds, for example, the state has standing to appeal that judgment based on the injury that inheres in not being able to enforce its law;[5] no one says that this injury is "self-inflicted" because the state did not have to enact its law in the first place. Massachusetts was not required here to alter its legal regime to accommodate a change in federal law that injured it, without first having the opportunity to challenge the validity of that federal change. *See, e.g.*, *Alfred*

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[4] *See also* Richard D. Freer & Edward H. Cooper, 13B Federal Practice & Procedure § 3531.11.1 (3d ed.), Westlaw (database updated April 2015) ("The special concerns that have guided the Court in this area [original jurisdiction] are unique to its own jurisdictional problems, and do not provide a sure basis for analogous reasoning in other areas of state standing.").

[5] *See Maine v. Taylor*, 477 U.S. 131, 137 (1986) (permitting a state government intervenor to appeal a judgment invalidating a state law because "a State clearly has a legitimate interest in the continued enforceability of its own statutes").

L. Snapp & Sons, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592, 601 (1982) (recognizing a State's "sovereign interest" in "the power to create and enforce a legal code").

C. The Massachusetts Access Act demonstrates, rather than undermines, the Commonwealth's standing in this case.

The Departments' own estimates confirm that many employers will seek exemptions under the IFRs, and that many women will be forced to look elsewhere for contraceptive coverage. The only reason given by the District Court for rejecting the Commonwealth's argument that it would be proportionately affected was the passage of Massachusetts' ACCESS Act which "requires essentially the same coverage as the ACA mandate." ADD025. That Court concluded that "[i]t is clear that, given the new ACCESS Act, Massachusetts will be affected differently by the IFRs than other states but it is not at all clear how the coverage of the Access Act will impact employers who may have intended to utilize the expanded exemptions." ADD027. That much is no doubt true. But the District Court erred when it leaped from the observation that "the ACCESS Act affects the 'metes and bounds' of the Commonwealth's injury"—which the Court conceded was "irrelevant"—to a decision to discount "the likelihood that the

Commonwealth will be injured" at all. *Id.* After all, the magnitude of the plaintiff's injury is irrelevant to standing. And no one claimed below that the ACCESS Act would eliminate the IFRs' impact altogether.

Even if the Access Act *did* ensure that every employer who seeks an exemption under the IFRs would nonetheless be bound to provide contraceptive coverage under the ACCESS Act, the IFRs would nonetheless have transformed the legal regime in ways that injure the Commonwealth. Specifically, the IFRs would still have shifted responsibility for enforcement of the contraceptive mandate from federal to state authorities. The costs of enforcing that state mandate, in terms of budgetary outlays, diversion of enforcement officials from other priorities, and even political backlash, would count as injury attributable to the federal IFRs.[6]

This point simply underscores that a state does not undermine its own standing to challenge a federal law by passing a state law seeking to mitigate

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[6] Nor does the temporal sequence matter. To the extent that the Commonwealth suggests that Massachusetts employers were already subject to a contraceptive mandate prior to the ACA under the 2002 Contraceptive Equity Law, Brief of Plaintiff-Appellant at 43, the ACA and its accompanying rules would have eased that enforcement burden. The re-allocation of enforcement costs to the Commonwealth as a result of the new IFRs would still constitute an injury.

its injury. Massachusetts has made a judgment that its ultimate costs will be lessened by deploying its own resources to enforce broader access to contraceptives than by leaving a broad class of employers without coverage obligations. But if an unlawful change in federal policy has made this step necessary, that imposed necessity is itself an injury supporting standing.[7]

D. Arguments about the speculative nature of the Commonwealth's injury raise questions of ripeness, not standing.

To the extent that Massachusetts' injuries are thought to be prospective and uncertain, that concern goes to the timing of judicial review rather than to its appropriateness. Any uncertainties, in other words, arise from the fact that Massachusetts seeks pre-enforcement review of the IFRs. The availability of such review is governed by the ripeness framework established in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). That framework assesses "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 149. Under that framework, judicial review is plainly appropriate here.

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[7] Neither party has argued that the IFRs *preempt* the Access Act or similar statutes. If they did, then the Commonwealth would plainly have standing to challenge them.

As in *Abbott Laboratories*, the Commonwealth challenges administrative action as not only procedurally flawed but inconsistent with the underlying statutory mandate. This is a "purely legal" question that can be resolved by recourse to the underlying statute and precedents about the scope of executive enforcement discretion; it does not turn on factual suppositions about events yet to occur. And the hardship of denying pre-enforcement review arises from the difficulty and potential unfairness and complexity involved in unwinding grants of exemptions once they have been made pursuant to the challenged IFRs. This case is ripe for review, and the United States cannot evade that conclusion by repackaging its argument as one of standing.

II. Massachusetts has *parens patriae* standing.

A State has an acknowledged "set of interests . . . in the well being of its populace." *Snapp*, 458 U.S. at 602. *Snapp* recognized two kinds of "quasi-sovereign" interests sufficient to support Article III standing: "First, a State has a quasi-sovereign interest in the health and well-being-both physical and economic-of its residents in general. Second, a State has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the

federal system." *Id.* at 607. Massachusetts has both sorts of interests at stake in this case.

A. This case implicates Massachusetts' quasi-sovereign interest in its citizens' welfare.

The Commonwealth's most obvious quasi-sovereign interest is simply the harm to Massachusetts citizens who will lose contraceptive coverage under the new IFRs. The District Court misunderstood this interest by treating it as identical to Massachusetts' proprietary interests in avoiding becoming responsible for contraceptive coverage in the absence of federal coverage. When asserting its quasi-sovereign interest in its *citizens'* well-being, Massachusetts need not show that any costs will be passed through to the Commonwealth; for the same reason, there is no ground to argue that the harm to Massachusetts citizens, as opposed to the Commonwealth itself, is "self-inflicted."

Moreover, *Snapp* makes clear that the substantiality of a state's interest is measured not quantitatively but rather from the standpoint of the state's own policy priorities. Hence, "[o]ne helpful indication in determining whether an alleged injury to the health and welfare of its citizens suffices to give the State standing to sue as *parens patriae* is whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking

powers." 458 U.S. at 607. The Commonwealth *has* addressed the issue of contraceptive coverage in employer health plans through its Contraceptive Equity Law in 2002 and in the more recent ACCESS Act. *See Massachusetts v. EPA*, 549 U.S. 497, 519-20 (2007) (holding that Massachusetts' quasi-sovereign interests were implicated where federal law partially preempted the Commonwealth's ability to protect its citizens directly). These examples of Massachusetts' concern with contraceptive access meet the central purpose of *Snapp*'s test, which is to confine quasi-sovereign interests to areas of state legislative policy interest—as opposed to cases in which the state is a "nominal party." 458 U.S. at 607 ("[T]he State must articulate an interest apart from the interests of particular private parties, *i.e.*, the State must be more than a nominal party."). The quantitative standard applied by the District Court, by contrast, invites federal courts to sit in judgment of state policy priorities.

The District Court held that "Plaintiff's quasi-sovereign interest theory of standing is wanting for the same reason as its financial harm theory"—that is, the failure to "identify any particular woman who is likely to lose contraceptive coverage" or "any Massachusetts employer" likely to seek an exemption. ADD039. This was error. In effect, the District Court treated the Commonwealth as if it were a membership organization asserting

associational standing. A membership association, like the Sierra Club, would be obliged to identify at least one particular member who would have standing, and thus to show a concrete injury in fact to a particular person. *See Sierra Club v. Morton*, 405 U.S. 727, 738-40 (1972). But states have a quite different obligation. The *parens patriae* doctrine requires them "articulate an interest *apart from the interests of particular private parties*." *See Snapp*, 458 U.S. at 607 (emphasis added). No authority holds that states must *both* articulate their own quasi-sovereign interest *and* identify particular citizens who are harmed. *See, e.g.*, *id.* ("[A] State has a quasi-sovereign interest in the health and well-being-both physical and economic-of its residents *in general*."). Given *Massachusetts v. EPA*'s statement that states are entitled to "special solicitude" in the standing analysis, 549 U.S. at 520, the District Court was wrong to set the standing bar higher for state governments than for private associations.

B. Massachusetts also has a quasi-sovereign interest in its equal participation in the federal system

Snapp recognized a quasi-sovereign interest in "a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system." 458 U.S. at 607. This is not simply an interest in being denied, say, sovereign rights protected by the "equal footing" doctrine.

Rather, it includes "securing observance of the terms under which [the state] participates in the federal system." *Id.* at 607-08. Ever since the New Deal, those terms have been *cooperative*—that is, the old "dual federalism" regime of separate state and federal spheres has been replaced by cooperative federalism structures in which state governments pervasively participate in the implementation of federal law.[8] Even where states play no direct enforcement role, the operation of state law is typically structured around, and crucially affected by, the operation of federal legal regimes.[9] Because states no longer enjoy significant zones of exclusive regulatory authority, and because they are intimately involved in the federal regulatory process, some of the most important "terms under which the state participates in the federal

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[8] *See, e.g.*, Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. Rev. 663, 665 (2001); Morton Grodzins, *The American Federal System*, in *A Nation of States: Essays on the American Federal System* 1-2 (Robert A. Goldwin, ed., 1961).

[9] *Cf. Texas v. United States*, 809 F.3d at 163 (holding that Texas fell within the zone of interests of the Immigration & Naturalization Act because "Texas seeks to participate in notice and comment before the Secretary changes the immigration classification of millions of illegal aliens in a way that forces the state to the Hobson's choice of spending millions of dollars to subsidize driver's licenses or changing its statutes.").

system" involve the states' opportunities to participate in debates about federal policy.

Most obviously, states participate in federal policy debates through their congressional representatives.[10] The trouble is that, as Justice White observed 35 year ago, "[f]or some time, the sheer amount of law . . . made by the agencies has far outnumbered the lawmaking engaged in by Congress through the traditional process." *INS v. Chadha*, 462 U.S. 919, 985-86 (1983) (White, J., dissenting). That law, however, is legitimate only to the extent that it can be tied back to some decision by Congress.[11] This is so not only because the agencies lack any constitutionally-conferred lawmaking power of their own, but—more importantly from the states' perspective—congressional deliberation remains the primary arena in which they are represented. Hence, it is critical that states remain able to assert precisely the sort of statutory claim that Massachusetts asserts here: that the agency has exceeded the scope of its

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[10] *See Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 550-54 (1985); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543 (1954).

[11] *See, e.g.*, Stuart Minor Benjamin & Ernest A. Young, *Tennis with the Net Down: Administrative Federalism without Congress*, 57 Duke L.J. 2111, 2130-41 (2008).

mandate under the law that Congress wrote.[12] Without this safeguard, states would be critically "excluded from the benefits that are to flow from participation in the federal system." *Snapp*, 458 U.S. at 608.

Substantive review under the Administrative Procedure Act, however, is an incomplete protection for states in contemporary American policymaking. Given the broad terms of modern federal statutes, the most important "legislative" battles involve the sorts of rulemaking proceedings at issue here. In that setting, the APA's notice and comment requirement—as well as the opportunity to sue when that right is denied—affords state governments their own independent voice in federal policymaking analogous to their constitutionally-mandated representation in national legislation. As Daniel Francis has observed, this "independence of voice may be particularly useful when the levels of government exhibit significant *inter*dependence of *action*. In modern America, state institutions and officials are deeply enmeshed in federal programs: state officials administer federal programs, enforce federal law, and interpret federal norms, formally subject in all cases

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[12] *See generally* Comment, *State Standing to Challenge Federal Administrative Action: A Re-Examination of the* Parens Patriae *Doctrine*, 125 U. Pa. L. Rev. 1069, 1094-1103 (1977).

to federal decision-makers."[13] Given the cooperative structure of most federal regulatory programs, it would be difficult to identify any class of entities more pervasively enmeshed in and affected by changes in federal regulations than state governments. States must have a voice in that process *before* rules become finalized.

C. *Massachusetts v. Mellon* does not bar the Commonwealth's suit.

Below, the United States argued for a categorical rule that "a State cannot sue the federal government 'to protect citizens of the United States from the operation' of federal law." Memorandum in Support of Defendants' Cross-Motion to Dismiss at 13 (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 485 (1923)). The District Court wisely did not rely on this construction of *Mellon*. That decision does not apply to this case by its own terms, and the Supreme Court narrowed it considerably in *Massachusetts v. EPA*.

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[13] Daniel Francis, *Litigation as a Political Safeguard of Federalism*, 49 Ariz. St. L. J. 1023, 1050 (2017). Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond,* 121 Yale L.J. 534, 536 (2011) ("[E]very branch of state government is squarely in the midst of creating, implementing, and interpreting federal statutory law.").

First, *Mellon* involved *parens patriae* suits based on the welfare of a state's citizens. *See id.* at 485-86. In such situations, the United States can plausibly claim that it likewise has a *parens patriae* interest; American citizens, after all, are citizens of both the state and the nation. But as discussed in Section B, *supra*, this case also implicates the Commonwealth's interest in equal participation in the federal system. The United States has never claimed the exclusive right to vindicate *that* interest, and *Mellon* did not discuss it.

Second, the *Massachusetts v. EPA* Court read *Mellon* far more narrowly than does the United States. Chief Justice Roberts' dissent in *Massachusetts v. EPA* cited *Mellon* for the proposition that "our cases cast significant doubt on a State's standing to assert a quasi-sovereign interest . . . against the Federal Government." 549 U.S. at 539 (Roberts, CJ, dissenting) (citing *Mellon*, 262 U.S. at 485-86). "Not so," responded Justice Stevens for the majority:

> *Mellon* itself disavowed any such broad reading when it noted that the Court had been "called upon to adjudicate, not rights of person or property, not rights of dominion over physical domain, [and] *not quasi-sovereign rights actually invaded or threatened*." 262 U.S., at 484–485 (emphasis added). In any event, we held in *Georgia v. Pennsylvania R. Co.,* 324 U.S. 439, 447 (1945), that there is a critical difference between allowing a State "to protect her citizens from the operation of federal statutes" (which is what *Mellon* prohibits) and allowing a State to assert its rights under federal law (which it has standing to do). 549 U.S. at 520 n. 17.

As in *Massachusetts v. EPA*, the Commonwealth "does not here dispute that [the ACA or the APA] *applies* to its citizens; it rather seeks to assert its rights under the Act[s]." *Id.* Specifically, Massachusetts argues that the new IFRs injure its citizens by denying them coverage guaranteed by the ACA, and that implementing those IFRs without notice and comment denies the Commonwealth's right to participate in federal rulemaking under the APA. Hence *both* Massachusetts' quasi-sovereign interests—its interest in participating in the federal system *and* its interest in protecting its citizens' welfare—provide valid and independent bases for *parens patriae* standing here. To the extent that the Government reads *Mellon* for a more restrictive rule, that reading did not survive *Massachusetts v. EPA*.

The Court's construction of *parens patriae* standing in *Massachusetts v. EPA* confers broad standing on states to vindicate rights under federal law. That reading is far more consistent with the design of our federal system than the Government's over-reading of *Mellon*. Two bedrock elements of that system are relevant here: the dual capacity of American citizenship and the basic integration of state and federal law. As Justice Kennedy pointed out in *U.S. Term Limits, Inc. v. Thornton*, "[t]he Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two

political capacities, one state and one federal. . . .” 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). Alexander Hamilton explained how these capacities facilitate individual liberty in Federalist 28:

> Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate. *If their rights are invaded by either, they can make use of the other as the instrument of redress.* Federalist No. 28, at 181 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (italics added).

To say that only the national government may protect citizens from violations of national law, as the United States suggests, would turn this dynamic on its head.

The integration of federal and state law confirms this conclusion. In *Testa v. Katt*, 330 U.S. 386 (1947), for example, the Court rejected the notion that Rhode Island courts could refuse to hear a federal claim because the federal statute was contrary to state public policy. Quoting an earlier case arising in Connecticut, the Court insisted that

> When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the states, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in

> the courts of the state. 330 U.S. at 392 (quoting *Mondou v.New York, N.H. &H.R. Co.*, 223 U.S. 1, 57 (1912)).

Testa illustrates that "'[t]he laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are.... The two together form one system of jurisprudence, which constitutes the law of the land for the State.'" *Tafflin v. Levitt*, 493 U.S. 455, 469-70 (1990) (Scalia, J., concurring in the judgment) (quoting *Claflin v. Houseman*, 93 U.S. 130, 136-37 (1876)). That means, on the one hand, that the state courts must be open to federal claims. But it also means that rights under federal law are not somehow alien or beyond the states' purview. Rather, as *Massachusetts v. EPA* confirmed, they are appropriately enforced by state governments when violations of federal law implicate a state's quasi-sovereign interests.

III. Massachusetts has standing to raise its Religious Establishment and Equal Protection claims.

The District Court did not separately address the Commonwealth's standing to pursue claims that the IFRs violate the Establishment Clause or the equal protection component of the Fifth Amendment's Due Process Clause. But the United States has, albeit in passing, challenged Massachusetts' standing to raise any claim under those provisions. *See*

Memorandum in Support of Defendants' Cross-Motion to Dismiss at 10 n. 5. These provisions do raise distinct issues that deserve separate attention. But if anything, the Commonwealth's constitutional claims offer an even more direct path to standing than its statutory ones do.

Massachusetts has alleged that the IFRs violate the Establishment Clause because they give a preferred position to religious belief, and that they deny equal protection of the laws by imposing burdens uniquely on women. *See* Memorandum in Support of Motion for Summary Judgment at 33-40. Both these claims implicate the Commonwealth's quasi-sovereign interest in the welfare of its citizens, and hence they are appropriate instances of *parens patriae* standing.[14] Nothing turns, as the Government suggested below, on whether a state is the sort of entity that can experience "spiritual" harm.

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[14] These claims do come closer to the circumstances of *Massachusetts v. Mellon* than do the Commonwealth's statutory claims. *Mellon* rejected a Tenth Amendment challenge to a federal appropriations measure creating a conditional spending regime meant to encourage states to protect maternal health. *See* 262 U.S. at 479. The result was over-determined: the Court suggested variously, without much explanation, that the challenge was invalid on the merits because the law involved the offer of a benefit rather than the imposition of an obligation, *see id.* at 480, 482, that it was a nonjusticiable political question, *see id.* at 481, 483-85, and that Massachusetts lacked standing to sue *parens patriae*. But *Massachusetts v. EPA* denied any broad reading of *Mellon*'s principle. *See supra* Section II.C. Moreover, *Mellon* declined "to say that a state may never intervene by suit to protect its citizens

Importantly, neither the establishment nor the equal protection claim depends on whether any Massachusetts employers avail themselves of their option under the new IFRs. The Commonwealth claims that the IFRs "endorse" religion simply by *creating* this broad option and making it available only to religious objectors. *See id.* at 35. That violation—and whatever injury a reasonable observer would feel as a result—occurs as soon as the policy goes into effect.

Likewise, the Commonwealth's equal protection theory is that the legal regime created by the IFRs, which fails to guarantee contraceptive access to women, inherently fails to provide the "equal protection of the laws." If a state's law forbidding assault criminalized only attacks on men, that law would be recognized as a denial of equal *protection* whether or not any woman were actually assaulted. Here too, the constitutional violation as framed in Massachusetts' lawsuit is complete when the IFRs go into effect. *See id.* at 38.

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against any form of enforcement of unconstitutional acts of Congress," 262 U.S. at 485, and the effort in *Mellon* to assert *citizens*' welfare under the Tenth Amendment raises quite different questions than a state's *parens patriae* enforcement of individual rights provisions like the First and Fifth Amendments. In any event, *Mellon*'s suggestion that the national government is the judge of its own constitutional power is inconsistent with much contemporary jurisprudence and should not be read expansively.

Amici take no position on whether either of these constitutional theories is valid on the merits; for jurisdictional purposes, however, the question is whether the plaintiff has standing to raise the claim that it has pled.

IV. States have a legitimate role to play in challenging unlawful federal policies because they provide an effective mechanism for vindicating diffuse interests.

Massachusetts v. EPA's "special solicitude" for States' standing makes sound functional sense, because States will often be uniquely appropriate litigants for bringing certain sorts of claims. One of the most difficult problems in federal practice and procedure concerns the appropriate mechanisms for aggregating claims that affect large numbers of people but that individual litigants lack the incentives or the wherewithal to pursue.[15] Our law has adopted a number of solutions—such as class actions or organizational standing—as means of aggregating claims that are impracticable to bring on an individual basis. But these mechanisms all have their problems, and none addresses the lack of individual standing when injuries occur to diffuse public interests. States, however, are empowered by

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[15] *See, e.g.*, Margaret H. Lemos & Ernest A. Young, *State Public Law Litigation in an Age of Polarization*, 97 Tex. L. Rev. __ [draft at 50-56] (forthcoming Nov. 2018).

state constitutions and the Tenth Amendment to represent the diffuse public interest of their citizens.

One significant advantage that States have over private organizations and class actions is that they have built-in mechanisms of democratic accountability for their conduct of litigation on behalf of their citizens.[16] Justices of the Supreme Court have complained that the use of "private attorneys general" to enforce federal law raises significant problems of public accountability, and similar concerns have been raised about the accountability of class counsel in class actions.[17] State officials who sue on behalf of their citizens *are* politically accountable for their actions, however. A recent re-election campaign by the Texas Attorney General, for example, featured

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[16] *See, e.g.*, Lemos & Young, *supra*, at 56-60; Bradford Mank, *Should States Have Greater Standing Rights than Ordinary Citizens?:* Massachusetts v. EPA's *New Standing Test for States*, 49 Wm. & Mary L. Rev. 1701, 1784 (2008) (discussing checks on state litigation).

[17] *See, e.g.*, *FEC v. Akins*, 524 U.S. 11, 36 (1998) (Scalia, J., dissenting) (criticizing private attorneys general); *In re GMC Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 788 (3d Cir. 1995) (noting concern about lack of accountability of class counsel).

public debate about the appropriateness of the State's participation in litigation challenging the Affordable Care Act.[18]

More generally, litigation by States fits well into a constitutional system predicated on the notion that no one person or institution can lay a unique claim to the public interest. Our system of both vertical and horizontal checks and balances recognizes that the public benefits when multiple institutions can step in if a particular officer or agency fails to pursue the public welfare or respect legal constraints. Even in an area of strong national interest like climate change, immigration, or healthcare, the national Executive is not, and cannot be, judge in its own case. By according "special solicitude" to States' standing, *Massachusetts v. EPA* facilitated States' valuable role in the process by which every political institution is held accountable to the rule of law.

Conclusion

The decision of the District Court that Massachusetts lacks standing to pursue its claims in this case should be reversed.

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[18] *See* Chuck Lindell, *Texas Attorney General Greg Abbott Opposes Federal Government on Many Fronts*, Austin American-Statesman, Aug. 7, 2010, *available at* http://www.statesman.com/news/texaspolitics/texas-attorney-general-greg-abbott-opposes-federal-government-847623.html?printArticle=y.

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