IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS, Plaintiff, v. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES *et al.*,[1] Defendants.	:	Case No. 1:17-cv-11930-NMG

DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR CROSS-MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

[1] Pursuant to Federal Rule of Civil Procedure 25(d), Alex M. Azar II is substituted as a defendant in his official capacity as Secretary of Health and Human Services.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

INTRODUCTION

After years of litigation, multiple rounds of public comment, and tens of thousands of individual comments on different iterations of the exemption and accommodation at issue here, the U.S. Departments of Health and Human Services ("HHS"), Labor, and the Treasury (collectively, "the Agencies") could not find a way to resolve the litigation simply by amending the existing contraceptive coverage accommodation for employers with religious and moral objections. *See* FAQs About ACA Implementation Part 36 (Jan. 9, 2017). Accordingly, they chose to safeguard religious liberty by making the accommodation process optional and expanding the existing exemption from the contraceptive coverage mandate. The expanded exemption, in the form of the Religious Exemption Rule and the Moral Exemption Rule ("the Rules"), shield a narrow class of sincere religious and moral objectors from government-compelled facilitation of contraceptive coverage in conflict with their beliefs.

Plaintiff's challenge to these Rules has no merit. As an initial matter, there is no identified injury-in-fact from the Rules, which do not apply to the Commonwealth, and do not affect any identified state residents. Moreover, the Commonwealth cannot assert the rights of its citizens against the federal government. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 610 n.16 (1982).

But even if there were no jurisdictional bar, none of Plaintiff's claims would have any merit. The Agencies were not required to go through notice and comment under the Administrative Procedure Act before issuing the Rules. The Agencies reasonably exercised their rulemaking authority to guide the discretion of the Health Resources and Services Administration ("HRSA") to support preventive services guidelines and to craft a response to the problems that had been caused by the contraceptive coverage mandate ("Mandate") under the Affordable Care Act

("ACA"). The Rules neither discriminate on the basis of sex nor run afoul of the Establishment Clause. Indeed, the Rules place religious and moral objections on similar footing. Accordingly, the Complaint should be dismissed, or summary judgment should be entered for Defendants.

ARGUMENT

I. Plaintiff Lacks Standing.

Plaintiff's brief confirms that this case lacks "that concrete adverseness which sharpens the presentation of the issues," as required by Article III. *Baker v. Carr*, 369 U.S. 186, 204 (1962). Plaintiff has not alleged a financial injury that would create standing, because any purported injury from employers taking advantage of the new exemptions is not "actual or imminent." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Nor has Plaintiff identified a "quasi-sovereign" interest "apart from the interests of particular private parties" in obtaining contraceptive coverage. *Snapp*, 458 U.S. at 607. Instead, it urges reliance on recent district court decisions exercising jurisdiction over similar complaints. Pl. Opp. to Def. MSJ at 3, ECF No. 67 at 3 (citing *California v. HHS*, No. 17-cv-5783-HSG, __ F. Supp. 3d __, 2017 WL 6524627 (N.D. Cal. Dec. 21, 2017), *appeals filed*, Nos. 18-15144, 18-15166 (9th Cir. Jan. 29 and Feb. 1, 2018); *Pennsylvania v. Trump*, No. 17-4540, __ F. Supp. 3d __, 2017 WL 6398465 (E.D. Pa. Dec. 15, 2017), *appeal filed*, No. 17-3752 (3d Cir. Dec. 21, 2017)). Defendants have already explained why the Court should reject these decisions, *see* Def. Supp. Mem, ECF No. 56. and Plaintiff provides no sound response to those arguments. Without a true "case or controversy," this Court risks entering judgment based on abstractions in a context where careful attention to the concrete interests of particular regulated parties is required. *See* 42 U.S.C. § 2000bb-1(b) (the application of a substantial burden to a

person's exercise of religion must satisfy strict scrutiny).[1]

Plaintiff first asserts that it has "a procedural injury" sufficient for standing. Pl. Opp. at 3. But it cannot "allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016). Aware that it "must show … the Rules threaten concrete state interests," Plaintiff relies on purported injuries to its "economic and quasi-sovereign interests." Pl. Opp. at 3. Plaintiff has not adequately alleged either injury for standing purposes.

Plaintiff's speculative allegations of financial harm are, as Defendants explained in their opening brief, insufficient to establish plausible harm from the Rules on its finances. To begin with, Plaintiff fails to identify a single institution within Massachusetts that is availing itself of the Rules or plans to do so soon. *See* Def. MSJ at 11-13. Plaintiff responds that it "need not" do so because "a litigant suing to prevent prospective harm … does not need to allege an injury with 'exactitude'" and "must only establish the likelihood that an injury will occur." Pl. Opp. at 4. That assertion contradicts the Supreme Court's decision in *Clapper*, which rejected standing based on an "objectively reasonable likelihood" of injury as "inconsistent with [the] requirement that 'threatened injury must be certainly impending to constitute injury in fact.'" *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)).

[1] Plaintiff's reliance on the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(B), to assert First and Fifth Amendment claims misses the point. Pl. Opp. at 3 n.4, 23 n.21. As Defendants have explained, these constitutional protections do not extend to States. Mem. Supp. Def. MSJ at 10 n.5 (citing authority) (ECF No. 48) ("Def. MSJ"). Plaintiff's response cites no authority recognizing a State as a "person" for due process purposes. And the "zone of interest test" cases cited by Plaintiff are inapposite: that test does not pertain to Article III standing, and the mere existence of the APA does not provide Plaintiff with standing to assert a First Amendment claim.

Plaintiff's allegation that thousands of "Massachusetts women will *likely* lose coverage" if the Rules are not enjoined cannot satisfy Article III as a matter of law. Pl. Opp. at 6 (emphasis added).[2]

Even if Plaintiff had identified an employer who would use the exemption, it fails to show that such use would lead the objecting employer's employees to impose significant costs on the public health system. Plaintiff asserts that (1) many employed women in Massachusetts qualify for state-funded programs, (2) fewer women relied upon state-funded programs after the ACA mandated coverage, and (3) women who lose coverage from employers can be expected to seek state benefits. But those general observations do not establish that anyone who loses contraceptive coverage as a result of these Rules would in fact seek state benefits. Because the exemption only applies to employers with sincere religious or moral objections, the vast majority of employers in the Commonwealth will provide this coverage. A woman who lost coverage through her own employer might be able to obtain coverage through a family member's plan, might not be eligible for state benefits, or might share her employer's objections to contraception and elect not to seek it out. Without more concrete allegations, it is impossible to know whether any employees in the Commonwealth would lose coverage and be eligible for state benefits, much less seek them out.

Nor should Plaintiff's assertions of harm be taken at face value. For instance, its fear that it "will also incur costs associated with the increase in unintended pregnancies" wrongly assumes that objecting employers would not provide coverage for expenses related to an unintended pregnancy. Pl. Opp. at 4. The Rules do not allow employers to opt out of such coverage.

[2] Plaintiff's declarants use similarly speculative language to echo these allegations. Dutton Decl. ¶ 27 (ECF No. 67-2) ("I anticipate that some women in Massachusetts will lose coverage for contraceptive services as a result of their employer's exercise of one of the Rules' exemptions"); Childs-Roshack Decl. ¶ 18 (ECF No. 21-4) ("I anticipate that additional women who lose coverage for contraceptive services because of the Rules, either as the primary insured or as a dependent, will seek care at our health centers.").

Moreover, the Rules may *reduce* the burden on the public health system by encouraging institutions whose religious or moral objections did not previously permit them to abide by the now-optional accommodation now to participate in the insurance market. *See* 82 Fed. Reg. 47,792, 47,803 n.21 (Oct. 13, 2017) (citing two examples of institutions of higher learning dropping student health coverage in light of concerns that the accommodation violated their religious beliefs). Without more concrete allegations of harm, no true "case or controversy" exists.

The last link in Plaintiff's chain of economic conjecture is its assertion that its alleged injury arises as a result of federal compulsion. This link is equally tenuous. Massachusetts' longstanding policy of enhancing "access to contraceptive care and services" through its Department of Public Health ("DPH") predates the federal mandate by nearly thirty years and is not a result of any federal action.[3] Am. Compl. ¶ 56 (ECF No. 17). Any financial harm to the Plaintiff arising from these programs is thus caused by its longstanding policy choice.[4] This case is therefore unlike *United States v. Texas*, 809 F.3d 134 (5th Cir. 2015), in which the court found that the federal government's Deferred Action for Parents of Americans ("DAPA") policy had compelled Texas to incur costs it had never incurred before by issuing and subsidizing drivers' licenses for individuals who had not previously been eligible. No similar federal compulsion on the Commonwealth exists here. And, absent an allegation that some entity is actually taking the

[3] *See also* Mass. Gen. Laws Ann. ch. 111, § 24E (authorizing "a program for comprehensive family planning services" within DPH) (enacted at 1990 Mass. Legis. Serv. 442 (Dec. 28, 1990)).

[4] Unlike DPH's programs, which cover a much broader eligible population, Massachusetts' contribution of 10% of the cost of "family planning services" for MassHealth patients does operate by federal law. 42 U.S.C. § 1396d(a)(4)(C). However, Plaintiff's allegations – which have not identified any Massachusetts citizen who will lose coverage as a result of the Rules – certainly do not establish that any MassHealth-eligible woman who is also currently receiving health insurance through a religious employer has sought, or will imminently seek, such benefits through MassHealth, rather than a DPH-funded program or another source.

exemption, it is impossible to conclude whether or not any impact on the state fisc would be a result of the Rules, or of Plaintiff's voluntary policies. That is why the absence of such an allegation defeats standing based on a claim of economic injury.

Plaintiff's assertion of standing based on quasi-sovereign interests is also unavailing. A quasi-sovereign interest must stand "*apart from* the interests of particular private parties." *Snapp*, 458 U.S. at 607 (emphasis added). That is to say, the state's asserted interest must be "independent of the benefits that might accrue to any particular individual." *Id*. at 608. For instance, in *Massachusetts v. EPA*, 549 U.S. 497 (2007), the state's quasi-sovereign interest in protecting its sovereign territory from environmental damage was distinct from the concrete interests of any particular citizen in the environment. *Id.* at 519. In *Texas*, the harm to the state's fisc due to the subsidization of driver's licenses was separate from the interest of any individual Texan in DAPA beneficiaries in obtaining a license. 809 F.3d at 155-56. Unlike federal policy on global warming or immigration, the new Rules do not have an impact on "the health and well-being . . . of [Massachusetts] residents *in general*," or even on the interests of women of child-bearing age in general.[5] *Snapp*, 498 U.S. at 607 (emphasis added). Any impact within Massachusetts would fall on a discrete group of private individuals: women of childbearing age who use contraceptives to prevent pregnancy and who receive health coverage through an employer with a religious or moral objection to providing certain contraceptives that chooses to make use of an exemption. Plaintiff does not (and cannot) assert an interest in these women obtaining contraceptive coverage that is

[5] Plaintiff's social science arguments, *see* Pl. Opp. at 8 & nn. 9-10, would not establish "quasi-sovereign" standing even if they were completely accepted. These studies may serve as evidence as to why women have an interest in contraceptive access, but they cannot show that Plaintiff has an interest in contraceptive access for, at most, a small subset of Massachusetts women that is distinct from the interest of women potentially impacted by the Rules.

separate from their personal interest in being covered.[6] As such, it is not entitled to "special solicitude" in the standing analysis, and its claims against Defendants should be dismissed for lack of standing.

II. Plaintiff's Procedural Administrative Procedure Act Claim Has No Merit.

A. The Agencies Have Express Statutory Authority to Issue the Rules.

Plaintiff asserts that the APA required the Agencies to go through notice and comment before issuing the Rules. But an agency may bypass that requirement where a subsequent statute "expresses a Congressional intent to depart from normal APA procedures." *Methodist Hosp. of Sacramento v. Shalala*, 38 F.3d 1225, 1237 (D.C. Cir. 1994); *Asiana Airlines v. FAA*, 134 F.3d 393, 398 (D.C. Cir. 1998). Here there is such a statute. The Agencies may issue "*any* interim final rules *as the Secretar[ies] determine[]* are appropriate" in this area. 26 U.S.C. § 9833; 29 U.S.C. § 1191c; 42 U.S.C. § 300gg-92 (emphasis added). By giving the Secretary broad discretion to determine when to issue interim final rules, Congress clearly intended a departure from the APA.

Plaintiff attempts to distinguish *Methodist Hospital* and *Asiana Airlines* by claiming that the statutes in those cases used mandatory rather than permissive language to find that those statutes overrode the APA. *See* Pl. Opp. at 11; *Asiana Airlines*, 134 F.3d at 397. But Plaintiff's reading would render the statutory provision here entirely superfluous; if the provision here allowed a departure from the normal APA procedures only as authorized by the APA, then it would have no effect. This conclusion should not be countenanced – courts "must give effect, if possible,

[6] Both the *California* and *Pennsylvania* district courts noted the "significant health benefits" of contraceptives. But, because the Rules apply only to a narrow subset of the States' citizenry, any quasi-sovereign interest the States might have in the health of their citizenry as a whole was not at issue. Accordingly, the States do not state an interest separate from the health of the particular subset of women impacted by the Rules (other than their own speculative financial injury). *Pennsylvania*, 2017 WL 6398465, at *7; *California*, 2017 WL 6524627, at *8.

to every clause and word of a statute." *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (citation omitted); *United States v. Gray*, 780 F.3d 458, 466 (1st Cir. 2015). Just as the Agencies correctly relied on this authority to issue interim final rules in 2010, 2011, and 2014, they permissibly relied on that authority to issue these Rules.

B. The Agencies Had Good Cause to Issue the Interim Final Rules.

Regardless, the Agencies also had good cause under the APA to issue the Rules before notice and comment. The APA authorizes an agency to dispense with notice and comment rulemaking when such procedures are "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(3)(B). Any one of these factors can support a finding of good cause, but Plaintiff attacks only the last of these three disjunctive factors, suggesting that notice-and-comment rulemaking cannot be contrary to the public interest wherever "one can expect real interest from the public." Pl. Opp. at 11 (citing *Levesque v. Block*'s invocation of legislative history to equate the "public interest" with "interest from the public," 723 F.2d 175, 184-85 (1st Cir. 1983)). Plaintiff ignores the Agencies' finding that notice and comment would be "impracticable," 82 Fed. Reg. at 47,813, a finding amply supported by the record, given the importance of the religious liberty interests at stake, the pendency of court deadlines, and the need to provide assurance to entities that desired to extend health coverage to their employees but had been deterred from doing so as a result of the Mandate. *See id.* at 47,813-15. Thus impracticability alone justified the Agencies' decision to issue these Rules as IFRs, just as they did in 2010, 2011, and 2014 without any procedural objection from Plaintiff. *See Long Term Care Pharm. All. v. Ferguson*, 362 F.3d 50, 54 n.3 (1st Cir. 2004) (rulemaking is "impracticable 'when an agency finds that due and timely execution of its functions would be impeded by the notice otherwise required'") (quoting *Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749, 754 (D.C. Cir. 2001)).

In any event, Plaintiff's attack on the Agencies' assessment of the public interest fails as well. *Levesque* stands for the proposition that "lack of public interest in a rule-making warrants an agency to dispense with public procedure." 723 F.2d at 184 (quoting S. Rep. No. 79-752, at 14 (1945)). But a declaration that notice and comment is in the public *interest* whenever the public is *interested* would upend the statutory text, and cannot be correct. *See Shannon v. United States*, 512 U.S. 573, 583 (1994) (rejecting the invocation of legislative history where it would contravene the text of the statute). It would also be inconsistent with the legislative history cited in *Levesque*, which made clear that cases in "which the public is not particularly interested" in notice and comment are already captured by the word "unnecessary." S. Rep. No. 79-752, at 14. "'Public interest' supplements" that term to make clear that rulemaking procedures should "not prevent an agency from operating" and that, "where authority beneficial to the public does not become operative until a rule is issued, the agency may promulgate the necessary rule immediately." *Id*. Here, consistent with the ordinary understanding of "public interest" and the legislative history, the Agencies determined that the public interest in curing ongoing violations of the Religious Freedom Restoration Act ("RFRA"), accommodating sincere religious and moral objectors, and resolving pressure from ongoing litigation over the Mandate justified issuance of the Rules on an interim final basis. *See* 82 Fed. Reg. at 47,813-15; *Levesque*, 723 F.2d at 185 n.5 (recognizing that good cause may exist to dispense with notice and comment where the agency is in violation of an immediately effective statutory mandate). Deference is owed to the Agencies' assessment of the public interest as a statutory factor. *See, e.g.*, *Town of Norfolk v. U.S. Army Corps of Eng'rs*, 968 F.2d 1438, 1454 (1st Cir. 1992).

Contrary to Plaintiff's suggestion, Pl. Opp. at 12, deference is also owed to the Agencies' consideration of additional factors in finding good cause, including their willingness to consider

public comment before and after issuing the Rules, the Rules' interim nature, and the combined effect of these factors. *See, e.g.*, *Conservation Law Found. v. Evans*, 360 F.3d 21, 29–30 (1st Cir. 2004); *Priests for Life v. HHS*, 772 F.3d 229, 276 (D.C. Cir. 2014), *vacated and remanded by Zubik v. Burwell*, 136 S. Ct. 1557 (2016); *Petry v. Block*, 737 F.2d 1193, 1203 (D.C. Cir. 1984); *Nat'l Women, Infants, & Children Grocers Ass'n v. Food & Nutrition Serv.* 416 F. Supp. 2d 92, 107 (D.D.C. 2006); *Mid-Tex Elec. Co-op., Inc. v. FERC*, 822 F. 2d 1123, 1132 (D.C. Cir. 1987).

C. If Lack of Notice-and-Comment Was an Error, It Was Harmless.

Plaintiff argues that forgoing notice-and-comment was not harmless error because there is uncertainty as to the effect of refraining from such procedures in this case. *See* Pl. Opp. at 13–14. But it admits that it was not hampered from commenting, asserting only that its comments were received after the promulgation of the Rules. *See id*. at 14. It also had the opportunity to comment on the issue during any of the multiple previous comment periods, each of which provided a forum to discuss the scope of exemptions to the Mandate. *See* 75 Fed. Reg. 41,726 (July 19, 2010); 77 Fed. Reg. 16,501 (Mar. 21, 2012); 81 Fed. Reg. 47,741 (July 22, 2016). There is no dispute that the previous comment periods generated comments that raised the exact legal concerns at issue now. *See* Def. MSJ at 19. Any error was, therefore, harmless.

III. The Rules Are Valid Under the APA Because They Are in Accordance with Law, and Are Not in Excess of Statutory Authority.

A. The Agencies May Create Exemptions to the Contraceptive Coverage Mandate Under the ACA.

Plaintiff contends that HRSA has authority to determine only what kinds of preventive care services are mandated, not the extent of those services. But from the statute's text, it is apparent that this argument makes a false distinction – HRSA's support of "comprehensive guidelines" requires determining both the types of coverage and scope of that coverage. 42 U.S.C. § 300gg-

13(a)(3). Although Plaintiff places great weight on the statute's use of the mandatory term "shall," it offers scant discussion of what, in particular, the statute directs that HRSA "shall" do. In fact, the statute requires coverage for preventive services only "*as provided for in comprehensive guidelines supported by [HRSA]*." *Id*. (emphasis added). That is, services "shall" be mandated only to the extent that the Guidelines supported by HRSA provide for them.

The statute therefore does not simply authorize HRSA to support Guidelines listing additional women's preventive care services – through use of the word "as" in the phrase "as provided for," it requires that HRSA support *how* those services apply. *See id.* Plaintiff dismisses this contention by quoting the *Pennsylvania* court, which incorrectly construed "as" to mean "that something happens during the time when something else is taking place." *Pennsylvania*, 2017 WL 6398465, at *17 (citing *As*, Oxford English Dictionary Online, June 2017); *see also* Pl. Opp. at 18. But this is the wrong usage of the word "as" in this context – the *Pennsylvania* court and Plaintiff read "as" to mean "at the *time* that X happens," whereas the statute uses it to mean "in the *manner* that X happens." *See As* (usage 2), Oxford English Dictionary Online (Feb. 2018) ("[u]sed to indicate by comparison the way something happens or is done"). The "as" in the statute is not the "as" from the phrase "as the clock struck twelve." Instead, it is the "as" from "as you like it" – describing an adherence to the manner in which something happens or is done. When Congress means to prescribe a temporal requirement, it knows how to do so. *See, e.g.*, 42 U.S.C. § 1395x ("The Secretary shall establish procedures to make beneficiaries and providers aware of the requirement that a beneficiary complete a health risk assessment *prior to or at the same time as* receiving personalized prevention plan services.") (emphasis added). Thus, the inclusion of "as" in Section 300gg-13(a)(3), and its absence in similar neighboring provisions, shows that HRSA

has discretion whether to support how the preventive coverage mandate applies – it does not refer to the timing of the promulgation of the Guidelines.

Nor is it simply a textual aberration that the word "as" is missing from the other three provisions in Section 300gg-13. Rather, this difference mirrors other distinctions within that section that demonstrate that Congress intended HRSA to have the discretion the Agencies invoke. For example, sections (a)(1) and (a)(3) require "evidence-based" or "evidence-informed" coverage, while section (a)(4) does not. This difference suggests that the Agencies have the leeway to incorporate policy-based concerns into their decision-making. Plaintiff's only response to this argument is to admit that the statute could allow HRSA to consider non-evidence-based factors in determining the types of preventive services that it will support, but not the scope of coverage. *See* Pl. Opp. at 18-19. But this cramped reading hands the Agencies a sledgehammer where they deserve a scalpel – it would force the Agencies to ignore religious objections in violation of RFRA, or else eliminate the contraceptive coverage requirement altogether. The Agencies have never taken this position, and it cannot have been the intent of Congress.

The Agencies' reading of the statute is not novel – the previous Administration also relied on the ACA's statutory authority when it developed the church exemption in the first place. *See* 76 Fed. Reg. 46,621, 46,625 (Aug. 3, 2011). From the outset, the Agencies have consistently interpreted the ACA to provide the authority to create exemptions in order to balance the preventive-services requirement with sincerely-held religious objections of employers. *See, e.g.*, *id*.; 78 Fed. Reg. 39,870, 39,889 (July 2, 2013). Moreover, on three occasions, the Agencies have relied on the authority granted by the ACA to issue interim final rules like the ones at issue here. 75 Fed. Reg. 41,726; 76 Fed. Reg. 46,621; 79 Fed. Reg. 51,092 (Aug. 27, 2014).

The statute gives the Agencies clear authority. But, even if this Court disagrees, at the very least, the Agencies have interpreted the statute reasonably. An agency must be given interpretive deference under *Chevron* if it has reasonably interpreted an ambiguous statute. *See Chevron U.S.A. v. Nat. Res. Def. Council*, 467 U.S. 837 842-43 (1984). For this reason, even if the Court were to disagree that the statute is clear, it should defer to the Agencies' reasonable interpretation.

B. The Religious Exemption Rule Is Required by RFRA, or at a Minimum, Represents a Permissible Response to the Substantial Burden on Religious Exercise Imposed by the Mandate.

Massachusetts argues that the Religious Exemption Rule is impermissible because it is not required or authorized by RFRA. Not so. As an initial matter, both Rules are authorized by the ACA (as explained above). In any case, the Religious Exemption Rule is required by RFRA or, at least, authorized by it.

The Commonwealth argues that the Religious Exemption Rule is not required by RFRA because the accommodation suffices to alleviate religious objectors' concerns with facilitating the provision of contraceptive coverage. Pl. Opp. at 19-21. Recall, under the accommodation, an objector completes a form stating that it is an eligible organization with a religious objection to providing coverage for some or all contraceptive methods and provides a copy of that form to its issuer, third-party administrator, or the federal government. The issuer or third-party administrator then provides coverage. According to Massachusetts, the accommodation process "imposes *no* burden on religious exercise" and those who argue otherwise are really trying to "object to the independent activities of third parties" – the activities of the issuers or third-party administrators in providing the coverage. *Id*. at 21-22 (emphasis added).

The Commonwealth is wrong: the accommodation imposes a substantial burden on numerous religious objectors. Hundreds of plaintiffs challenged the accommodation because it

requires them, under pain of financial penalty, to engage in conduct that would make them complicit in the provision of contraceptive coverage in violation of their religious beliefs, thereby substantially burdening their exercise of religion. *See Zubik*, 136 S. Ct. 1557 (reviewing four sets of cases). Massachusetts may disagree with the religious judgment of these plaintiffs, but it may not – as it desires – secure an order from this Court blessing its view of religious doctrine, and rejecting the views of the many objectors who challenged the accommodation.

The Supreme Court has emphasized that, in cases involving religion, courts should not take it upon themselves to judge the correctness or reasonableness of religious beliefs. In *Hobby Lobby*, for example, the Court explained that the plaintiffs "believe that providing the insurance coverage demanded by the HHS regulations lies on the forbidden side of the line, and it is not for us to say that their religious beliefs are mistaken or insubstantial." *Burwell v. Hobby Lobby Stores, Inc*., 134 S. Ct. 2751, 2779 (2014); *see also Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 715 (1981) (holding that a Jehovah's Witness was entitled to unemployment benefits, even though he did not have a sophisticated theological explanation for his religious objection, because he "drew a line, and it is not for us to say that the line he drew was an unreasonable one"). Indeed, following this controlling precedent, the Eighth Circuit correctly concluded that the accommodation imposed a substantial burden on religious objectors: "As *Hobby Lobby* instructs, however, we must accept [plaintiffs'] assertion that self-certification under the accommodation process – using either Form 700 or HHS Notice – would violate their sincerely held religious beliefs." *Sharpe Holdings, Inc. v. HHS*, 801 F.3d 927, 941 (8th Cir. 2015), *cert. granted, judgment vacated sub nom. HHS v. CNS Int'l Ministries*, No. 15-775, 2016 WL 2842448 (May 16, 2016). This Court should follow suit and reject the Commonwealth's invitation to "second-guess . . . the honest assessment [by religious objectors] of a 'difficult and important question of religion and

moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another.'" *Id.* (quoting *Hobby Lobby*, 134 S. Ct. at 2778).

The Commonwealth's characterization of the religious objections to the accommodation as an objection to the conduct of third parties is simply wrong. As the objectors have repeatedly explained, their objection is not to the insurers' activities but to their own activity of providing the self-certification form because, in their view, providing that form renders them morally complicit in providing the coverage that it triggers. *See Sharpe Holdings*, 801 F.3d at 941 (explaining that the self-certification forms "will inform [plaintiffs' third-party administrator] of its obligations to facilitate contraceptive coverage for [plaintiffs'] employees and plan beneficiaries and thus will play a part in providing the objectionable contraceptives. . . [Plaintiffs] believe that the actions demanded by the regulations are connected to illicit conduct in a way that is sufficient to make it immoral for them to take those actions.") (internal punctuation omitted). The Eighth Circuit rejected the argument that the objectors were actually objecting to third-party conduct, recognizing the argument for what it is – an ill-fated effort to tell religious objectors that their "beliefs about complicity in the provision of contraceptive coverage [are] flawed, mistaken, or insubstantial." *Id.* at 942 (brackets and quotations omitted). The argument should fare no better in this Court.

The Commonwealth also assails Defendants' argument that the Religious Exemption Rule is authorized by RFRA even if not compelled by it. Pl. Opp. at 21-22. Crucially, the Commonwealth "does not contend that the Accommodation is the only means of satisfying this obligation [of harmonizing the ACA and RFRA], or that the Departments do not have leeway to take another approach . . . ." *Id.* at 21. Rather, its only objection is that the approach taken by Defendants is inappropriate because the accommodation satisfies RFRA and the ACA "requires"

health plans to provide coverage of contraceptive services. But both points are flawed: as described above, the accommodation did not satisfy RFRA, and the ACA does not require the coverage of contraceptive services, instead delegating to HRSA the ability to determine the scope of preventative services to be provided. Nothing remains of Massachusetts's opposition to the argument that the Religious Exemption Rule is authorized by RFRA.

With regard to RFRA, Massachusetts closes by "emphasizing" that it "does not challenge the validity of the Church Exemption" to the requirement to provide contraceptive coverage because RFRA compels the Church Exemption. *Id.* at 22. That is welcome news. But implicit in that concession is a recognition that both the Mandate and the accommodation pose a substantial burden on churches' exercise of religion necessitating an *exemption*, not just an accommodation. And if the accommodation substantially burdens churches, it also substantially burdens non-church religious objectors. The Commonwealth contends that churches are freed from the burden to provide contraceptive coverage only because of the "special solicitude" owed houses of worship, citing *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 189 (2012). Pl. Opp. at 22-23. But *Hosanna-Tabor* dealt with the First Amendment, not RFRA. It is the protection afforded by RFRA that is at issue here. And RFRA mandates that the same "solicitude" should be accorded to any religious objector; this suffices to establish that they need not facilitate the provision of contraceptive coverage when doing so amounts to a substantial burden on their practice of religion.

IV. The Rules Do Not Violate the Establishment Clause.

The Rules are consistent with the Establishment Clause because they promote the permissible secular purpose of alleviating significant governmental interference with the exercise of religious and moral convictions; moreover, the Rules do not advance religion, but only free

entities and persons with such convictions to practice as they would otherwise in the absence of government-imposed regulations. Def. MSJ at 38-42.

Plaintiff errs in both its premise that the accommodation sufficiently alleviates any religious or moral objections to facilitating the provision of contraceptive coverage, and that therefore, the decision to supplement the accommodation with the issuance of the Rules cannot be consistent with the Establishment Clause. Pl. Opp. at 23-27. As explained above, the accommodation imposes a substantial burden on numerous religious objectors. *See supra* III.B. Indeed, on January 9, 2017, the Agencies announced that, after reviewing comments and considering various options, they could not find a way to amend the accommodation to satisfy objecting organizations while also pursuing the Agencies' policy goals. Def. MSJ at 8.

Moreover, Plaintiff errs in alleging that alleviating significant government interference with the exercise of religion is tantamount to endorsing religion. Pl. Opp. at 25. This proposition is refuted by the simple point that the Agencies have extended the exemption both to entities with religious objections to the Mandate and to entities with moral objections to the Mandate. In any event, Plaintiffs' cited case law does not support its allegation. The sentence immediately following Plaintiff's quotation from *Lee v. Weisman*, 505 U.S. 577 (1992), Pl. Opp. at 25, states that "in sponsoring the graduation prayers at issue here, the State has crossed the line from permissible accommodation to unconstitutional establishment." *Lee*, 505 U.S. at 629 (Souter, J., concurring). Here, the Rules do not purport to "sponsor[]" any conduct. Nor, indeed, are cases such as *Lee*, *Wallace v. Jaffree*, 472 U.S. 38 (1985), or *Edwards v. Aguillard*, 482 U.S. 578 (1987), apposite here. This case does not involve an allegation of government-sponsored speech that allegedly endorses religion. And Plaintiff misses the mark in relying on *Wallace* and *Edwards* to advance its contention that the Rules have no secular purpose because their purpose is allegedly

fully served by existing law. *See* Pl. Opp. at 26. Here, the secular purpose – to alleviate significant governmental interference with the exercise of religious and moral convictions – was not fully served by the accommodation, given that the Agencies were unable to find any way to satisfy religious and more objections short of expanding the exemption. *See* Def. MSJ at 8. Plaintiff's mischaracterization, once again, of the religious objection to the accommodation as really an objection to the conduct of third parties, Pl. Opp. at 27, can no more fit this case into *Wallace* and *Edwards* than it can eliminate the RFRA problem discussed above.[7]

Finally, Plaintiff's hyperbolic concerns about the availability of the exemptions to employers "regardless of whether they have any religious objection to the Accommodation," *id*. at 25, ignores the most basic requirement of the Rules. The Rules expand the exemptions only to non-governmental plan sponsors that object to providing coverage for all or some contraceptive services based on sincerely-held religious or moral beliefs, and only to the extent of these entities' sincerely-held religious or moral beliefs. 45 C.F.R. §§ 147.132(a)(2), 147.133(a)(2).

V. The Rules Do Not Violate the Fifth Amendment's Equal Protection Principle.

The Commonwealth's equal protection challenge, Pl. Opp. at 27-29, fails because the Rules easily satisfy only rational basis review, and would satisfy intermediate scrutiny if it applied.

Rational basis applies because the Rules do not draw a sex-based distinction. The Rules do not require health plans to cover male contraceptives, because the provision of the ACA directing HRSA to develop the Guidelines is targeted only at services for women. *See* 42 U.S.C. § 300gg-13(a)(4). The Rules expand the previously available conscience exemptions to the

[7] Additionally, Plaintiff's reliance on *Larkin v. Grendel's Den*, 459 U.S. 116 (1982), is misplaced. *See* Pl. Opp. at 26. In *Larkin*, a state statute delegated "a power ordinarily vested in agencies of government" – the ability to veto applications for liquor licenses within a prescribed radius – to churches and schools. 459 U.S. at 122; *see id*. at 117-18. Because the Rules do not vest governmental functions in any entity, *Larkin* is inapposite.

mandated coverage of female contraceptives. The Rules therefore allow for distinctions in coverage *among women* – on the basis of the religious or moral objections of the employer, plan sponsor, institution of higher education, or issuer, and not on the basis of sex. Such distinctions among women already existed before the Rules were issued, given the prior religious exemption.

The Commonwealth resists this common-sense proposition by arguing that the contraceptive mandate for women was required to "equal" the coverage enjoyed by men, Pl. Opp. at 28. That position is illogical and would lead to absurd results. Prior to the issuance of the Rules, men and women were not "equally" covered for contraceptives because there was no requirement that health plans cover male contraceptives *at all*. *See* 42 U.S.C. § 300gg-13(a)(4) (requiring preventative services to be covered "with respect to women"). Such asymmetry is not unique to contraception – the Commonwealth itself notes that some non-contraceptive preventive services must be covered only for men. *See* Pl. Opp. at 29 n.25. Under the Commonwealth's logic, those provisions could also violate the equal protection component. But if that argument were accepted, anytime Congress wished to require coverage of additional services for women, it would be forced to scale back coverage for women in a different area to maintain "equal" benefits.

As the Commonwealth acknowledges, facially neutral policies receive rational basis review absent a showing of purposeful discrimination, which goes beyond merely showing a disparate impact. *See Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 274 (1979). The Commonwealth falls far short of establishing such purposeful discrimination. Although it professes suspicion of the Agencies' decision to promulgate religious exemptions concerning contraception, but not other provisions of the ACA, the Rules themselves explain why this is so: there had been a flood of litigation from entities asserting their particular religious and moral objections to being coerced into providing contraceptive services. 82 Fed. Reg. at 47,793, 47,839.

No similar flood of litigation has challenged coverage of any other services provided for in the Guidelines. Rational basis review accordingly applies, and the Commonwealth does not dispute that the Rules satisfy rational basis review.

Furthermore, even if – as the Commonwealth wrongly contends – intermediate scrutiny were to apply, the Rules would satisfy intermediate scrutiny. The Commonwealth does not dispute in its opposition that the accommodation of religious beliefs is an important government interest. *See* Def. MSJ at 44. Nor does the Commonwealth dispute that the accommodation of non-religious moral beliefs is an important government interest. *See* Def. MSJ at 44-45. Because the Agencies acted for both of these reasons, as well as for other reasons, 82 Fed. Reg. at 47,793, 47,839, the Rules are substantially related to important government interests.

CONCLUSION

For the foregoing reasons, and the reasons stated in Defendants' opening brief, Defendants respectfully request the Court to dismiss this action or enter summary judgment for Defendants.

Dated: February 8, 2018

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

ANDREW E. LELLING
United States Attorney

ETHAN P. DAVIS
Deputy Assistant Attorney General

JASON C. WEIDA
Assistant United States Attorney

JOEL McELVAIN
Assistant Branch Director

/s/ Daniel Riess
DANIEL RIESS (Texas Bar # 24037359)
Trial Attorney

U.S. Department of Justice
Civil Division, Rm. 6122
20 Massachusetts Avenue, NW
Washington, D.C. 20530
Telephone: (202) 353-3098
Fax: (202) 616-8460
Email: Daniel.Riess@usdoj.gov
Attorneys for Defendants

CERTIFICATE OF SERVICE

I certify that on February 8, 2018, I caused a copy of the foregoing to be filed electronically and that the document is available for viewing and downloading from the ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. If any counsel of record requires a paper copy, I will cause a paper copy to be served upon them by U.S. mail.

/s/ Daniel Riess
Daniel Riess