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; R. ALEXANDER ACOSTA, IN HIS OFFICIAL CAPACITY AS SECRETARY OF LABOR, Defendants-Appellees.	No. 18-1514

PLAINTIFF-APPELLANT'S RESPONSE TO DEFENDANTS-APPELLEES' MOTION TO GOVERN FURTHER PROCEEDINGS

The Commonwealth of Massachusetts agrees with the defendant federal agencies that this appeal from a final judgment is not moot and should move forward. This appeal concerns only whether the Commonwealth has Article III standing to challenge religious and moral exemptions to the Affordable Care Act's "contraceptive mandate" created by interim final rules promulgated by the agencies in October 2017. As the agencies explain in their Motion to Govern

Further Proceedings, they have now issued final rules "final[izing] the exemptions" that will supersede the interim final rules on January 14, 2019. The final rules are "sufficiently similar" to the interim final rules to allow this Court to decide the limited question before it. *Ne. Fla. Chapter of Assoc. Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 n. 3 (1993).

ARGUMENT

I. The Final Rules Do Not Moot This Appeal, Which Concerns Only the Commonwealth's Standing to Sue.

This appeal is not moot, because the final rules harm the Commonwealth in "the same fundamental way" as the interim final rules. *Ne. Fla. Chapter of Assoc. Gen. Contractors*, 508 U.S. at 662; *see also Conservation Law Foundation v. Evans*, 360 F.3d 21, 25-26 (1st Cir. 2004) (appeal does not become moot when "a challenged regulation continues to the extent that it is only superficially altered by a subsequent regulation"). The Commonwealth has argued that it has standing to challenge the interim rules based on interrelated proprietary, procedural, and quasi-sovereign injuries: as a result of the expanded exemptions, which were implemented through a procedurally defective rulemaking process, Massachusetts residents will lose insurance coverage for contraceptive care and services, harming the health and well-being of those residents and their families and imposing direct financial costs on the Commonwealth. The final rules retain the expanded

exemptions in substantially the same form, Def. Mot. 4, and constitute a continuation of the "same allegedly harmful scheme," *Evans*, 360 F.3d at 26.[1] Importantly, the agencies continue to acknowledge that tens of thousands of women will likely lose contraceptive coverage as a result of the exemptions; in fact, the regulatory impact analysis in the final rules estimates that even *more* women will be harmed by the expanded exemptions. *See, e.g.*, 83 Fed. Reg. 57536, 57551 n. 26, 57578 (Nov. 15, 2018). Under these circumstances, this Court can clearly conduct a "meaningful review" of the Commonwealth's standing under Article III—the only issue to be decided in this appeal from a final judgment—and the appeal should move forward. *Evans*, 369 F.3d at 26.

The Commonwealth further requests that this appeal proceed in a reasonably expeditious manner. The Commonwealth filed its opening brief on September 17, 2018, and it does not need to modify its brief in light of the final rules, which "remai[n] largely the same" as the interim final rules. Def. Mot. 4. Any issues

[1] The Commonwealth does not agree that the final rules render its procedural challenge—and injury—moot. *See* Def. Mot. 10 & n. 1. The agencies have not followed the notice-and-comment rulemaking procedures required by the Administrative Procedure Act ("APA"); they issued interim final rules creating the expanded exemptions without notice, then solicited post-promulgation comments, before predictably issuing final rules that simply "finalize[d] the exemptions provided in the interim rules." Def. Mot. 4. This backwards approach is no substitute for the "prior notice and comment" required by the APA, the purpose of which "is to afford persons an opportunity to influence agency action in the formulative stage, before implementation, when the agency is more likely to be receptive to argument." *Kollett v. Harris*, 619 F.2d 134, 145 (1st Cir. 1980).

concerning the final rules can be addressed by the federal agencies' responsive brief and the Commonwealth's reply brief.

II. If This Court Determines That This Appeal Is Moot, It Should Vacate the District Court's Judgment and Decision.

If this Court nevertheless determines that the agencies' promulgation of the final rules renders this appeal moot, it should follow the "established practice" of vacating the judgment and decision below. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). Vacatur is appropriate "when mootness results from unilateral action of the party [that] prevailed below." *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994). The Commonwealth, which "seeks review of the merits of an adverse ruling . . . ought not in fairness be forced to acquiesce in the judgment." *Id.* In such circumstances, vacatur eliminates the binding effect of the judgment below and preserves the rights of all parties. *See Am. Civil Liberties Union of Mass. v. U.S. Conference of Catholic Bishops*, 705 F.3d 44, 57-58 (1st Cir. 2013). In similar litigation pending before the United States Court of Appeals for the Ninth Circuit, the defendant agencies have taken the position that vacatur of the judgment and decision below would be proper. *See* Supplemental Brief for the Federal Appellants at 6-7 n.1, Dkt. No. 125, *California et al. v. Azar et al.*, Nos. 18-15144, 18-15166, 18-15255 (9th Cir. Nov. 16, 2018).

CONCLUSION

For the foregoing reasons, this Court should allow the appeal to move forward.

Respectfully submitted,

COMMONWEALTH OF MASSACHUSETTS,

By its attorney,

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Certificate of Compliance with Rule 32(g)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 856 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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Dated: 12/7/2018

CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2018 the foregoing motion will be filed and served electronically through the CM/ECF system on the following counsel, who are registered as ECF filers:

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