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 UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

REPLY BRIEF OF PLAINTIFF-APPELLANT

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Decades of precedent establish that a "substantial risk" of harm is sufficient to satisfy the imminence component of Article III. *See, e.g.*, *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) ("*SBA List*"); *Reddy v. Foster*, 845 F.3d 493, 500 (1st Cir. 2017). And in this case, the Commonwealth has shown that it faces a substantial risk that the Final Rules creating expanded exemptions from the Affordable Care Act's ("ACA") contraceptive mandate will harm Massachusetts' economic, procedural, and quasi-sovereign interests. The Departments, however, ignore the controlling standard and instead ask this Court to impose on the Commonwealth a standard that demands certainty or near certainty of injury. No Court has adopted such a stringent test in a case involving likelihood of future injury. Indeed, three courts recently rejected the Departments' theory of standing in lawsuits challenging the same rules at issue in this case. *See California v. Azar*, 911 F.3d 558 (9th Cir. 2018) ("*California I*"); *Pennsylvania v. Trump*, --- F. Supp. 3d ---, 2019 WL 190324 (E.D. Pa. Jan. 14, 2019), *appeal pending*, No. 19-1189 (3d Cir.); *California v. Health & Human Servs.*, --- F. Supp. 3d ---, 2019 WL 178555 (N.D. Cal. Jan. 13, 2019), *appeal pending*, No. 19-15118 (9th Cir.) ("*California II*"). Where, as here, federal regulations threaten a State's economic, procedural, and quasi-sovereign interests, the State "is entitled to special solicitude in [the] standing analysis," not heightened skepticism. *Massachusetts v. EPA*, 549 U.S. 497, 520

(2007). This Court should reverse the District Court's judgment and confirm that the Commonwealth has standing under Article III to challenge the Final Rules.

ARGUMENT

I. This Appeal Is Not Moot Because the Final Rules Harm Massachusetts in the Same Fundamental Ways as the Interim Final Rules and Constitute a Continuation of the Same Unlawful Action.

On November 15, 2018, the Departments issued Final Rules that codified the Interim Final Rules ("IFRs")[1] challenged by the Commonwealth. *See* 83 Fed. Reg. 57536 (Nov. 15, 2018) (final religious exemption); 83 Fed. Reg. 57592 (Nov. 15, 2018) (final moral exemption). Those rules, which were to become effective on January 14, 2019, "finalize [the IFRs'] exemptions in substantially the same form." Br. of Defendants-Appellees ("Defts.' Br."), at 22. Substantively, the Final Rules maintain all the expanded exemptions adopted in the IFRs, and they continue to give employers with religious or moral objections to contraception a choice between using an expanded exemption or participating in the Accommodation. *See* 83 Fed. Reg. 57556-71; 83 Fed. Reg. 57614-24. The Final Rules' regulatory impact analysis adopts the same methodology and assumptions as the IFRs' regulatory impact analysis. *See* 83 Fed. Reg. 57575-81; 83 Fed. Reg. 57625-28.[2]

[1] *See* 82 Fed. Reg. 47792 (Oct. 13, 2017); 82 Fed. Reg. 47838 (Oct. 13, 2017).

[2] Specifically, as before, the "upper bound estimate" of women injured by the rules is based on nationwide survey data on the number of employers that excluded contraceptive coverage from their insurance plans before the ACA was enacted.

(footnote continued)

The Commonwealth agrees with the Departments that the issuance of the Final Rules did not render this appeal moot. As the Departments explain, and as is plain from the Final Rules, "the fundamental substance of the exemptions was finalized as set forth in the interim rules," and any changes are "immaterial to the scope of [the Commonwealth's] challenge." Defts.' Br. at 16, 17. This Court has made clear that an appeal does not become moot when "a challenged regulation continues to the extent that it is only superficially altered by a subsequent regulation." *Conservation Law Foundation v. Evans*, 360 F.3d 21, 25-26 (1st Cir. 2004). That is the case here: the parties agree that the minor clarifications made in the Final Rules have no bearing on the substance of the Commonwealth's challenge or the substance of the rules themselves.[3] The Final Rules harm the Commonwealth

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See 83 Fed. Reg. 57578-81; 82 Fed. Reg. 47821-24. As before, the "lower bound estimate" is based primarily on the number of employers that have previously asserted religious objections to providing contraceptive coverage under the ACA, either through litigation or by using the ACA's existing Accommodation. *See* 83 Fed. Reg. 57575-78; 82 Fed. Reg. 47815-21. And, as before, the analysis accounts for factors that could mitigate employers' use of the expanded exemptions. For example, the Departments take into account the fact that some objecting employers will continue to use the Accommodation rather than the expanded exemptions, *see*, *e.g.*, 83 Fed. Reg. 57575, 82 Fed. Reg. 47815; that some employers are covered by injunctions exempting them from the contraceptive mandate, 83 Fed. Reg. 57575-76, 82 Fed. Reg. 47818; and that some employers who choose to use the expanded exemptions will object to covering only a few contraceptive methods, 83 Fed. Reg. 57581, 82 Fed. Reg. 47823.

[3] This case is therefore unlike *Gulf of Maine Fishermen's Alliance v. Daley*, which became moot on appeal because the challenged regulatory framework had been "replaced by a series of subsequent Frameworks" that were based on "an

(footnote continued)

in "the same fundamental way" as the IFRs. *Ne. Fla. Chapter of Assoc. Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 & n. 3 (1993).

The structure and substance of the Commonwealth's argument on standing remains unchanged after issuance of the Final Rules. The Commonwealth contends that it has standing to challenge the rules based on interrelated economic, 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 wellbeing of those residents and their families and imposing direct financial costs on the Commonwealth. The Final Rules retain the expanded exemptions in the same form and constitute a continuation of the "same allegedly harmful scheme." *Evans*, 360 F.3d at 26. The agencies continue to expect that tens of thousands of women will lose contraceptive coverage as a result of the exemptions. *See* 83 Fed. Reg. 57551 n. 26, 57578-81. Indeed, the Departments have actually *increased* their estimate of the number of women nationwide likely to be harmed. *See* 83 Fed. Reg. 57578, 57580. Whereas they previously calculated that between 31,715 and 120,000 women would be injured by the rules,[4] they now

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entirely new analysis" of "new circumstances and new data." 292 F.3d 84, 88-90 (1st Cir. 2002).

[4] *See* 82 Fed. Reg. 47821, 47823; 82 Fed. Reg. 47858.

(footnote continued)

calculate that between 70,515 and 126,400 women will lose employer-based coverage for their chosen method of contraception if the rules go into effect. *See* 83 Fed. Reg. 57578, 57580; 83 Fed. Reg. 57627-28.[5] Under these circumstances, this Court can clearly conduct "meaningful review" of the Commonwealth's standing under Article III to challenge the rules, and the appeal should move forward. *Evans*, 360 F.3d at 26.

Nevertheless, if this Court were to determine that the Departments' 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*

[5] The increase is largely attributable to the fact that, in the IFRs, the Departments failed to account for nearly two-thirds of the people receiving contraceptive coverage through the Accommodation. *Compare* 82 Fed. Reg. 47821 (stating that 1,027,000 people "are covered in accommodated plans"), *with* 83 Fed. Reg. 57577 (stating that 2,907,000 people "were covered in plans using the accommodation under the previous regulations").

Am. Civil Liberties Union of Mass. v. U.S. Conference of Catholic Bishops, 705 F.3d 44, 57-58 (1st Cir. 2013).

II. The Substantial Risk That the Final Rules Will Inflict Financial Injury on the Commonwealth Gives Massachusetts Standing Under Article III to Challenge Those Rules.

Through eight declarations and detailed evidence from the administrative record, the Commonwealth has demonstrated that it faces a "substantial risk" of economic injury from the rules. *SBA List*, 573 U.S. at 158; *Reddy*, 845 F.3d at 500. In disputing the Commonwealth's standing, the Departments nowhere acknowledge that a substantial risk of injury satisfies the imminence component of Article III. Instead, their vision of standing would hold the Commonwealth to a much higher standard—one that would demand certainty or virtual certainty that the rules will inflict economic injury. That is not what Article III requires, and the Departments' attempt to ratchet up the imminence standard should be rejected. *See Clapper v. Amnesty Int'l, USA*, 568 U.S. 398, 414 n. 5 (2013) (plaintiffs are not required "to demonstrate that it is literally certain that the harms they identify will come about").

The Departments principally argue that Massachusetts lacks standing because it "cannot point to a single woman who will lose coverage" due to the rules. Defts.' Br. at 37; *see also id*. at 36, 38-39, 44. Their argument echoes the District Court's conclusion that Massachusetts lacks standing because it has not "demonstrated that any particular women in Massachusetts will likely lose contraceptive coverage

because of the expanded exemptions." Joint Appendix ("JA") 1416. A requirement that Massachusetts identify a "particular woman" who has lost or will lose coverage because of the rules is, however, tantamount to insisting that Massachusetts show that injury is certain to occur. Because Article III does not demand such a showing, the Ninth Circuit flatly rejected the Departments' theory that the plaintiff States had to identify a "specific woman likely to lose coverage." *California I*, 911 F.3d at 572. "Such identification," the court explained, "is not necessary to establish standing," when, as here, "[e]vidence supports that, with reasonable probability, some women residing in the plaintiff states will lose coverage due to the" rules. *Id.*; *accord Pennsylvania*, 2019 WL 190324, at *9; *California II*, 2019 WL 178555, at *10. It was enough that "[t]he agencies' own regulatory impact analysis" estimated that thousands of women nationwide would lose coverage because of the rules, and that the record "include[d] names of specific employers identified by the [analysis] as likely to use the expanded exemptions, including those operating in the plaintiff states like Hobby Lobby Stores, Inc." *California I*, 911 F.3d at 572; *see also California II*, 2019 WL 178555, at *10 ("Even if the States have not identified specific women who will be impacted by the Final Rules, Federal Defendants themselves have done much of the work to establish that Plaintiffs have standing.").

Indeed, the Departments' proposed "particular woman" requirement is incompatible with the body of Supreme Court and First Circuit precedent that

recognizes standing based on a substantial risk of future injury. In *Monsanto Co. v. Geertson Seed Farms*, for example, the conventional alfalfa farmers had standing even though they did not identify a particular alfalfa plant that had been pollinated by or was likely to be pollinated by bees carrying the genetically engineered gene. *See* 561 U.S. 139, 153-55 & n. 3 (2010); *see also Clapper*, 568 U.S. at 420 (describing *Monsanto*'s holding). In *Maine People's Alliance v. Mallinckrodt, Inc.*, the plaintiff organizations had standing without regard to whether they identified the particular contaminated shellfish that their members declined to eat or sell. *See* 471 F.3d 277, 284-85 (1st Cir. 2006). And in *Berner v. Delahanty*, the plaintiff lawyer had standing to sue even though he did not identify the particular hearings in which he would be barred from wearing a political button. *See* 129 F.3d 20, 24-25 (1st Cir. 1997).

The decisions in *Massachusetts v. EPA* and *Texas v. United States* further support standing in this case. *See* Defts.' Br. at 53-55. The Departments contend that the Commonwealth's evidentiary showing in *Massachusetts v. EPA* was stronger than it is here because in that case the Commonwealth submitted declarations stating that "rising seas ha[d] already begun to swallow Massachusetts' coastal land." 549 U.S. at 522; *see* Defts.' Br. at 54-55. But those declarations did not identify any *particular* parcels of land that had already been lost or that would be lost to rising sea levels. *See Massachusetts*, 549 U.S. at 541-42 (Roberts, C.J., dissenting)

(quoting the declarations). The majority opinion rejected the dissent's argument, like the one made by the Departments here, that this lack of specificity undermined standing. *See id.* at 523 n. 21. "[T]he likelihood that Massachusetts' coastline will recede has nothing to do with whether [Massachusetts] ha[s] determined the precise metes and bounds of [its] soon-to-be-flooded land," the Court explained. *Id.* In the same way, the likelihood that Massachusetts will be harmed by the Final Rules has nothing to do with whether it can identify a particular individual who will lose contraceptive coverage because of the rules. That is especially so in view of the fact that the Commonwealth challenges affirmative federal action in this case, whereas in *Massachusetts v. EPA* the Commonwealth challenged federal *non-action*, a context in which it is traditionally more difficult to establish standing. *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (noting the "presumption that judicial review is not available" in cases involving "[r]efusals to take enforcement steps").

The Departments' effort to distinguish the Fifth Circuit's decision in *Texas v. United States* fares no better. The federal DAPA program challenged by Texas in that case made certain noncitizen residents of Texas eligible to apply for driver's licenses, and if those noncitizens applied, Texas would have incurred costs. *See Texas v. United States*, 809 F.3d 134, 155-56 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016) (per curiam). Even though DAPA made the noncitizens eligible, Texas did not identify *particular* noncitizens who had applied,

or who would likely apply, for driver's licenses. *See id.* The Fifth Circuit accepted that, "because driving is a practical necessity in most of the state," there was a sufficient likelihood that "some DAPA beneficiaries would apply." *Id.* at 156, 162; *see also id.* at 162 (recognizing the difference between showing that "some DAPA beneficiaries would apply" and proving that "a particular alien would"). The Final Rules similarly enable Massachusetts employers to drop contraceptive coverage for their employees, and the evidence establishes a substantial risk that some will do so. This Court need not, and should not, demand evidence demonstrating that a particular individual will lose contraceptive coverage in order to conclude that Massachusetts, like Texas, has standing based on economic injury.

The Departments next claim that "Massachusetts provides no basis to conclude that any of the employers it has identified will use the expanded exemption under the challenged rules, rather than the accommodation." Defts.' Br. at 30; *see also id.* at 45. But the Departments' regulatory impact analysis—and the spreadsheet containing the data necessary for that analysis—provide ample basis to conclude that Massachusetts employers will likely use the Final Rules' expanded exemptions. That spreadsheet lists each employer that, through litigation, has challenged the contraceptive mandate or the Accommodation. *See* JA 1348-54; 83 Fed. Reg. 57575-76. In column H of that spreadsheet, the Departments calculate for each employer the number of employees likely to be injured by the expanded exemptions. *See id.*

Many of those employers have a "0" listed in column H because, for reasons listed in column G, the employees there are not likely to be affected by the rules. *See id.* The remaining employers—those likely to have employees injured by the rules—have a number greater than 0 listed in column H. *See id.* Two of those employers with self-insured plans and employees counted in column H—Hobby Lobby Stores, Inc. and Autocam Medical Devices, LLC—are in Massachusetts. *See* JA 1348, 1352; Br. of Plaintiff-Appellant ("Commonwealth Br."), at 29-30.[6]

The Departments attempt to disclaim their own analysis now, arguing that it is not *certain* that Hobby Lobby and Autocam Medical will use an expanded exemption, which would deprive employees of contraceptive coverage, as opposed to the Accommodation, which would not. *See* Defts.' Br. at 31-32. But, again, the test is not *certainty* of injury; it is *substantial risk* of injury. And the Departments' data amply make that case. In performing their regulatory impact analysis, the Departments were required "to use the best available techniques to quantify anticipated present and future benefits and costs [of the rules] *as accurately as possible*." Executive Order 13563, § 1(c), 76 Fed. Reg. 3821 (Jan. 18, 2011)

[6] Together, Autocam Medical and Hobby Lobby likely employ hundreds of Massachusetts residents. *See* JA 1348, 1352 (counting 183 employees for Autocam Medical and 13,250 for Hobby Lobby nationwide); Br. of National Women's Law Ctr. et al. as Amici Curiae Supporting Plaintiff-Appellant, at 7 & nn. 14-15 (noting that Autocam Medical employs over 100 employees in its manufacturing facility in Plymouth and that Hobby Lobby has four retail stores in Massachusetts).

(footnote continued)

(emphasis added). The Departments concluded that Hobby Lobby and Autocam Medical are among the employers likely to use the expanded exemptions—based, sensibly, on those employers' years-long efforts to challenge the contraceptive mandate through litigation.[7] That conclusion surely establishes a substantial risk that some employers in Massachusetts will drop contraceptive coverage for their employees. Indeed, the Ninth Circuit has already identified Hobby Lobby as an employer likely to use an expanded exemption. *See California I*, 911 F.3d at 572.

The Departments next claim that it is speculative that any of the Massachusetts women affected by the Final Rules will choose a method of contraception that is not covered by their employers' plans. *See* Defts.' Br. at 36. The Departments note that Hobby Lobby objects to some forms of contraception—intrauterine devices ("IUDs") and emergency contraception—but not to the other FDA-approved forms of contraception. *See id.*; *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 701-02, 703 (2014). But as the Departments are aware, other employers—including Autocam Medical—object to most, or all, forms of contraception covered by the ACA. *See* Verified Compl., *Autocam Corp. et al. v. Sebelius*, ¶¶ 31, 37-39, Case No. 1:12-cv-01096-RJJ (W.D. Mich.) (ECF No. 1) (explaining that, due to its religious beliefs, Autocam Medical "cannot provide, fund, or participate in health care

[7] While the record affirmatively identifies Hobby Lobby and Autocam Medical as likely to make use of the expanded exemptions, they are unlikely to be the only employers that do so. *See* Commonwealth Br. at 26-31.

insurance that covers artificial contraception, including abortifacient contraception, sterilization, and related education and counseling"). Moreover, the Commonwealth's undisputed evidence establishes that, in Massachusetts, women have been increasingly turning to IUDs, the principal form of long-acting reversible contraception, as their preferred form of contraception, especially after the ACA eliminated cost-sharing requirements. Dr. Jennifer Childs-Roshak, President of Planned Parenthood League of Massachusetts ("PPLM"), testified that in "FY 2011, nearly 91% of all PPLM patients receiving contraceptive care sought hormonal treatment (birth control pills, mostly). Five years later, in FY 2016, that figure was reduced to 55%, with Long-Acting Reversible Contraception services rising five-fold to 45%." JA 51 (¶ 24). Given the surging usage of IUDs in Massachusetts, it requires no speculation to conclude that a Massachusetts employer that makes use of the expanded exemptions—even an employer like Hobby Lobby—will employ women who choose a form of contraception excluded from coverage.

Finally, the Departments nitpick the declarations submitted by the Commonwealth that establish that some Massachusetts women who lose coverage because of the rules will be eligible for state-funded contraceptive or prenatal care and services. *See* Defts.' Br. at 40-43. But because the Departments offered no evidence in the District Court to contest those declarations, the evidence in the declarations must "be taken to be true." *Lujan v. Defenders of Wildlife*, 504 U.S.

555, 561 (1992). And in any event, the declarations provide an ample basis to conclude that the Commonwealth faces a substantial risk of fiscal injury from the Final Rules. The Departments do not contest that Massachusetts guarantees state-funded contraceptive services through MassHealth, the Department of Public Health, and UMass, and that women with incomes up to 300% of the federal poverty line generally qualify for replacement contraceptive care through those programs. *See* JA 39 (¶ 4); 41-42 (¶¶ 4-7); 45 (¶¶ 5-9); 48-49 (¶¶ 7, 14). Nor do they contest that, on average, about a quarter of Massachusetts women with employer-sponsored insurance would be eligible for replacement contraceptive coverage if they lost coverage because of the Final Rules. *See* JA 56-57 (¶¶ 6-8). Nor do they contest that if even one woman seeks replacement contraceptive care from a state-funded program, the Commonwealth will pay a portion, if not all, of the $584 required annually for her care. *See* 83 Fed. Reg. 57581. Nor do they grapple with their own admission that "state and local governments will bear additional economic costs" because of the rules. *California I*, 911 F.3d at 572; *see* 82 Fed. Reg. 47803, 47807, 47820. At most, the Departments reprise their argument that Massachusetts' fiscal injury is not certain because "Massachusetts has not pointed to a particular woman who will lose coverage" or identified the wages of the employees likely to be harmed by the expanded exemptions. Defts.' Br. at 38, 42-43. This argument, as discussed, would require the Commonwealth to demonstrate virtual certainty of fiscal injury, a

higher evidentiary burden than the "substantial risk" test requires. *See SBA List*, 573 U.S. at 158; *Clapper*, 568 U.S. at 414 n. 5, 420; *Reddy*, 845 F.3d at 500.

The Departments' constrained view of standing suffers from another basic flaw: it is inconsistent with this Court's repeated exhortation that "'it could hardly be thought that [governmental] action likely to cause harm cannot be challenged until it is too late.'" *Adams v. Watson*, 10 F.3d 915, 924 (1st Cir. 1993) (quoting *Rental Housing Ass'n of Greater Lynn, Inc. v. Hills*, 548 F.2d 388, 389 (1st Cir. 1977)). Should the Final Rules go into effect, the Commonwealth will not know when employers start claiming expanded exemptions and dropping coverage, or when Massachusetts residents start seeking state-funded replacement contraceptive or prenatal care as a result. The Final Rules do not require employers to provide Massachusetts notice before or after they drop coverage. *See* 83 Fed. Reg. 57558; 83 Fed. Reg. 57614. Nor are women required to provide the Commonwealth notice of their intent to seek care from a state-funded program. And there is nothing in existing laws, regulations, or reporting structures that would ever result in a "particular woman" being identified to the Commonwealth as having received a specific treatment from a specific program because of the Final Rules, particularly in light of privacy protections for patients who seek treatment at state-funded clinics or who receive benefits from MassHealth. Nor does the Commonwealth have access to self-insured entities' plan documents, which would note that contraceptive care

and services are not covered. Thus, under the Departments' theory of standing, the Commonwealth may never be able to challenge the rules, despite the strong likelihood that Massachusetts women will lose coverage and receive replacement contraceptive or prenatal care from state-funded programs.

Moreover, even if a particular woman were to publicly self-identify as someone harmed by the rules who has sought state-funded contraceptive or prenatal services, the Commonwealth would not be able to recover the money expended for that woman's care. The APA only permits relief "other than money damages," 5 U.S.C. § 702, and Massachusetts would not have another mechanism to recoup monetary damages from the Departments, should the District Court or this Court ultimately rule that the Final Rules are unlawful. *See California I*, 911 F.3d at 581 ("the states will not be able to recover monetary damages connected to the" rules). As the court in the *Pennsylvania* case explained, "the States need not sit idly by and wait for fiscal harm to befall them" before they may invoke the jurisdiction of the federal courts to challenge the rules. 2019 WL 190324, at *9. The substantial risk that the Commonwealth will incur economic injury from the Final Rules is sufficient to establish injury-in-fact under Article III.

III. The Commonwealth Has Standing to Challenge the Final Rules Based on the Deprivation of Its Right to Notice of and an Opportunity to Comment on the Rules.

In addition to the economic injury, the Departments' failure to provide notice of and an opportunity to comment on the rules constitutes a separate, ongoing injury to the Commonwealth. The Departments' issuance of the Final Rules did not moot the Commonwealth's procedural challenge to the rules, because the Final Rules are tainted by the same procedural deficiency as the interim rules challenged in the Commonwealth's complaint. The Commonwealth has standing to seek redress for the Departments' failure to follow the notice-and-comment rulemaking requirements of the APA.

A. The Commonwealth's Procedural Injury Is Not Moot.

The Commonwealth's claim challenging the rules as procedurally defective remains justiciable. The APA requires agencies to provide advance notice and an opportunity to comment on proposed regulatory action "in the formulative stage, before implementation, when the agenc[ies] [are] more likely to be receptive to argument." *Kollett v. Harris*, 619 F.2d 134, 145 (1st Cir. 1980). The Departments did not comply with this requirement. Instead, they implemented the religious and moral exemptions through interim final rules issued without advance notice, then solicited post-implementation comments on whether the exemptions should be kept in place, before predictably finalizing the exemptions without substantive change. *See Pennsylvania*, 2019 WL 190324, at *12-*16.

The Departments' failure to engage in notice-and-comment rulemaking, as required by the APA, not only invalidates the IFRs, *see California I*, 911 F.3d at 574-81, but it also renders the Final Rules presumptively invalid. *See Levesque v. Block*, 723 F.2d 175, 187-88 (1st Cir. 1983) (noting that "it has generally been held that a rule found invalid for failure to provide for notice and comment cannot be saved by providing for comment after promulgation"). The post-implementation comment period provided by the Departments was "no substitute" for the prior notice-and-comment required by the APA. *Id.* at 188 (the APA requires prior notice-and-comment because "[t]he agency at that time has no stake in any particular rule; it will not have to worry about . . . amending a rule only recently implemented"). The Departments "cannot . . . sav[e]" rules unlawfully implemented without prior notice-and-comment simply by reissuing them following a post-implementation comment period.[8] *Id.* at 187; *see also Natural Resources Defense Council, Inc. v. EPA*, 683 F.2d 752, 768 (3d Cir. 1982) (agencies may not take regulatory "action

[8] The "presumption against a [post-implementation] comment period" may be overcome if the agency proves that it engaged in a "real public reconsideration of the issued rule." *Levesque*, 723 F.2d at 188 (internal quotation marks omitted). Although not relevant to the limited question of whether the Commonwealth's procedural injury is moot, the Departments cannot make the required showing in this case. *See Pennsylvania*, 2019 WL 190324, at *13-*16, n. 19 ("[T]he Final Rules and the preambles that accompany them demonstrate a single-minded commitment to the substantive result reached [in the interim final rules]—to wit, expanding the exemption and accommodation.") (internal quotation marks and citations omitted).

without complying with the APA, and then establis[h] a notice and comment procedure on the question of whether that action should be continued"); *cf. Sierra Club v. Marsh*, 872 F.2d 497, 500 (1st Cir. 1989) ("Once large bureaucracies are committed to a course of action, it is difficult to change that course—even if new or more thorough [information is] prepared and the agency is told to 'redecide.'"). For that reason, the promulgation of the Final Rules did not moot the Commonwealth's procedural APA claim or its procedural injury.

B. The Commonwealth Has Standing Based on Its Procedural Injury.

The Commonwealth has standing to assert its procedural claim. "Where, as here, a party alleges a deprivation of its procedural rights, courts relax the normal standards of redressability and imminence." *American Rivers v. Federal Energy Regulatory Comm'n*, 895 F.3d 32, 42 (D.C. Cir. 2018); *accord Nulankeyutmonen Nkihtaqmikon v. Impson*, 503 F.3d 18, 27 (1st Cir. 2007). Thus, to establish standing the Commonwealth need only show that the religious and moral exemptions "could impair" a concrete interest. *Lujan*, 504 U.S. at 572; *see also Town of Winthrop v. FAA*, 535 F.3d 1, 6 (1st Cir. 2008) (plaintiff alleging a procedural injury must show a "distinct risk to a particularized interest"). The Commonwealth easily meets this standard: there is not just a risk, but there is a substantial risk, that the exemptions will cause financial harm to the Commonwealth. *See supra*, at 6-16; *see also California I*, 911 F.3d at 571-73 (finding a "reasonably probable" threat of economic

harm). The Final Rules additionally threaten Massachusetts' quasi-sovereign interest in protecting the health and wellbeing of its residents. *See infra*, at 21-25.

The Departments deny that the Commonwealth has standing to challenge the rules as procedurally invalid, but again base their position on the wrong standard. *See* Defts.' Br. at 56-59. There is no dispute that, to establish standing, a litigant asserting a procedural right must demonstrate an injury-in-fact that is both "actual or imminent" and "concrete and particularized." *Lujan*, 504 U.S. at 560. The Departments contend that this means that Massachusetts must show that the Rules "will cause" an injury to its concrete interests separate and in addition to its procedural injury. Defts.' Br. at 57. But in fact, "[t]here is no requirement that a plaintiff prove that an injury to his or her concrete interest *will* occur." *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1355 n. 14 (9th Cir. 1994) (emphasis in original). In procedural standing cases, a plaintiff establishes injury-in-fact through the combination of the deprivation of a procedural right—an injury that "has already occurred"—and a risk of harm to a concrete and particularized interest. *Nulankeyutmonen*, 503 F.3d at 28; *see also United States v. AVX Corp.*, 962 F.2d 108, 119-20 (1st Cir. 1992) (plaintiff lacked procedural standing because it failed to allege a "risk . . . [of] a distinct and palpable injury").[9] By identifying the denial of

[9] The Departments' reliance on *AVX Corp.* is misplaced. *See* Defts.' Br. at 56-57. *AVX Corp.* stands for the unexceptional proposition that an organization lacks
(footnote continued)

notice and an opportunity to comment as a procedural injury, and by establishing that the rules pose a distinct risk of harm, Massachusetts has met that standard.

IV. The Commonwealth Has Standing to Challenge the Rules Because They Threaten Its Quasi-Sovereign Interests.

The Final Rules also threaten the Commonwealth's "quasi-sovereign interest in the health and well-being . . . of its residents." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982). Not only does this injury entitle Massachusetts to "special solicitude in [the] standing analysis," *Massachusetts*, 549 U.S. at 520, it also provides an alternative basis for the Commonwealth to assert standing to challenge the rules. *See Alfred L. Snapp*, 458 U.S. at 607.[10]

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standing to assert procedural claims absent a risk of harm to its members' particularized, concrete interests. *See* 962 F.2d at 119-120. The case involved a procedural challenge by the National Wildlife Foundation ("NWF") to the cleanup of New Bedford Harbor. This Court held that NWF "failed to allege with the requisite particularity that any of its members *risked* a distinct and palpable injury *if* the cleanup of the harbor fared poorly." *Id.* (emphasis added). At no point did the Court require a showing that the cleanup *would* fare poorly, or that an NWF member *would* be injured if it did. *See id.* at 119 ("Here, the actual injury, if there is any, can stem only from the potential for an inadequate cleanup of the New Bedford Harbor area.").

[10] As *Amici* point out, the rules injure Massachusetts' quasi-sovereign interests regardless of whether they result in any financial injury to the Commonwealth. *See* Br. of Pennsylvania et al. as Amici Curiae Supporting Plaintiff-Appellant, at 22-26; Br. of Professor Ernest A. Young as Amicus Curiae Supporting Plaintiff-Appellant, at 13-14 ("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.").

The Departments disagree, erroneously claiming that the Commonwealth may not assert an injury to its quasi-sovereign interests in a suit against the federal government. Defts.' Br. at 59-61. The Supreme Court rejected this position in *Massachusetts v. EPA*. In that case, the dissenting opinion argued that "our cases cast significant doubt on a State's standing to assert a quasi-sovereign interest—as opposed to a direct injury—against the Federal Government." *Massachusetts*, 549 U.S. at 539 (Roberts, C.J., dissenting). The opinion for the Court answered directly: "Not so." *Id.* at 520 n. 17. While a State may not assert *parens patriae* standing to "*protect* her citizens from the operation of federal statutes," the Court explained, that is not what the Commonwealth sought to accomplish in *Massachusetts v. EPA*, and it is not what the Commonwealth seeks to accomplish here. *Id.* (emphasis added); *see also id.* ("Massachusetts does not here dispute that the Clean Air Act *applies* to its citizens; it rather seeks to assert its rights under the Act."). As in *Massachusetts v. EPA*, the Commonwealth here "seeks to *assert* its rights under" federal law—those rights guaranteed by the APA and ACA—to challenge the unlawful and unauthorized actions of an administrative agency that threaten harm to its quasi-sovereign interests. *Id.* at 518-19, 520 n. 17 (emphasis added); *see also* Br. of Professor Ernest A. Young as Amicus Curiae Supporting Plaintiff-Appellant, at 20-24.

The Departments' attempt to distinguish *Massachusetts v. EPA* from this case based upon the nature of the interests involved is unavailing. *See* Defts.' Br. at 60-62. First, the Departments contend that whereas *Massachusetts v. EPA* concerned an injury to the Commonwealth's "own interests" (in protecting its territory), this case involves an injury only to Massachusetts' "*parens patriae* interests" (in protecting the health and wellbeing of its residents). Defts.' Br. at 60. But there is no such distinction. As with this case, *Massachusetts v. EPA* involved an injury to the Commonwealth's quasi-sovereign interests: specifically, its interest in protecting all the territory within its borders—not only the land that it owned—from harm. *See* 549 U.S. at 520 (discussing "Massachusetts' stake in protecting its quasi-sovereign interests"); *see also Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907) (a suit brought by a State to protect its interest in "all the earth and air within it its domain" is a "suit by a state for an injury to it in its capacity of quasi-sovereign"); *New Mexico v. Bureau of Land Mgmt.*, 565 F.3d 683, 696 n. 13 (10th Cir. 2009) (States have a "quasi-sovereign interest in lands within their borders"). The Commonwealth's interest in protecting the territory within its borders—at issue in *Massachusetts v. EPA*—and its interest in protecting its residents' health and wellbeing—at issue here—are both quasi-sovereign interests that *belong to the Commonwealth*. An injury to either is, by definition, and injury to "Massachusetts' own interests." Defts.' Br. at 60; *see also Alfred L. Snapp*, 458 U.S. at 607, 609. And

when a State brings suit to address an injury to its quasi-sovereign (as opposed to proprietary) interests, it necessarily acts in its capacity as *parens patriae*. *See Alfred L. Snapp*, 458 U.S. at 601 ("To have [*parens patriae*] standing the State must assert an injury to what has been characterized as a 'quasi-sovereign interest'"); *see also Massachusetts*, 549 U.S. at 520 n. 17 (noting "the long development of cases permitting States to litigate as *parens patriae* to protect quasi-sovereign interests—i.e., public or governmental interests that concern the state as a whole," and quoting *Missouri v. Illinois*, 180 U.S. 208, 240-41 (1901), for the proposition that federal jurisdiction may exist "when the 'substantial impairment of the health and prosperity of the towns and cities of the state' are at stake") (citation omitted).

Second, the Departments ask this Court to decide, as a matter of policy, that the Commonwealth's interest in protecting the health and wellbeing of its residents is not sufficiently important to support standing or warrant special solicitude. *See* Defts.' Br. at 62-63. This invitation—to construct a hierarchy of State interests—lacks any support in precedent or logic. *See Alfred L. Snapp*, 458 U.S. at 611-12 (Brennan, J., concurring) ("As a sovereign entity, a State is entitled to assess its needs, and decide which concerns of its citizens warrant its protection . . . I know of nothing—except the Constitution or overriding federal law—that might lead a federal court to superimpose its judgment for that of a State."). There is no question that the Commonwealth's interest in the health and wellbeing of its residents will

support *parens patriae* standing. *See Alfred L. Snapp*, 458 U.S. at 607 (describing the interest as one of the archetypical quasi-sovereign interests that will support *parens patriae* standing). And the Supreme Court's decision in *Massachusetts v. EPA* to afford Massachusetts special solicitude was not predicated upon the particular interest it asserted, but upon the fact that "States are not normal litigants for the purposes of invoking federal jurisdiction." 549 U.S. at 518. The Commonwealth is entitled to special solicitude in this case, as in *Massachusetts v. EPA*, because it is a sovereign State that has been forced to turn to the federal courts to protect its quasi-sovereign interests. *Id*.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Commonwealth's opening brief, this Court should reverse the District Court's entry of judgment and remand for further proceedings on the merits of the Commonwealth's claims.

Respectfully submitted,

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Dated: 2/25/2019

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