UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS, *Plaintiff*, v. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; ERIC D. HARGAN, in his official capacity as Acting Secretary of Health and Human Services; UNITED STATES DEPARTMENT OF THE TREASURY; STEVEN T. MNUCHIN, in his official capacity as Secretary of the Treasury; UNITED STATES DEPARTMENT OF LABOR; and R. ALEXANDER ACOSTA, in his official capacity as Secretary of Labor, *Defendants*.	CIVIL ACTION NO. 17-cv-11930-NMG

COMMONWEALTH OF MASSACHUSETTS' SUPPLEMENTAL MEMORANDUM

Pursuant to this Court's Order of December 18, 2017 (Dkt. No. 52), the Commonwealth of Massachusetts submits this supplemental memorandum to make two points about the effect of the preliminary injunction in *Pennsylvania v. Trump*, as well as a subsequent preliminary injunction in *California v. Health and Human Services*, on this case. First, the preliminary injunctions bar Defendants from implementing or enforcing the two Interim Final Rules challenged in this case (hereinafter, the "Religious IFR" and "Moral IFR") anywhere in the United States. Second, the decisions do not moot or require a stay of proceedings in this case because, while the District Courts in Pennsylvania and California granted preliminary relief, the Commonwealth of Massachusetts' pending Motion for Summary Judgment seeks permanent injunctive relief on the merits.

BACKGROUND

On December 15, 2017, the U.S. District Court for the Eastern District of Pennsylvania issued a preliminary injunction that barred the U.S. Departments of Health and Human Services, Labor, and the Treasury, and their respective Secretaries—the same Defendants in this case—from enforcing the two Interim Final Rules challenged by the Commonwealth of Massachusetts. *See Pennsylvania v. Trump et al.*, No. 2:17-cv-04540-WB, 2017 WL 6398465 (E.D. Pa. Dec. 15, 2017). Specifically, the court's Order stated that Defendants "and their officers, agents, servants, employees, attorneys, designees, and subordinates, as well as any person acting in concert or participation with them, are hereby ENJOINED from enforcing the following Interim Final Rules pending further order of this Court: (1) Religious Exemptions and Accommodations for Coverage of Certain Preventative Services Under the Affordable Care Act described at 82 Fed. Reg. 47792; and (2) Moral Exemptions and Accommodations for Coverage of Certain Preventative Services Under the Affordable Care Act described at 82 Fed. Reg. 47838." *See* Dkt. No. 60 in *Pennsylvania v. Trump*, No. 2:17-cv-04540-WB (E.D. Pa. Dec. 15, 2017).

In granting the preliminary injunction, the District Court first concluded that Pennsylvania has standing to challenge the Religious IFR and Moral IFR. 2017 WL 6398465, at *4–*8. Because "the Commonwealth will have to increase its expenditures for State and local programs providing contraception services," the court concluded, "[t]he [n]ew IFRs will likely inflict a direct injury upon the Commonwealth by imposing substantial financial burdens on State coffers." *Id.* at *7. That injury was "not a speculative harm," the court explained; indeed, the court noted that Defendants' IFRs themselves rely on the availability of state-funded programs to alleviate the harms to women caused by the IFRs. *Id.* The court also concluded that Pennsylvania, as a sovereign State, is "'entitled to special solicitude in [the] standing analysis.'" *Id.* at *5 (quoting

Massachusetts v. EPA, 549 U.S. 497, 520 (2007), and citing *Texas v. United States*, 809 F.3d 134, 151 (5th Cir. 2005), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016)).

Turning to the likelihood of success on the merits, the District Court concluded that Pennsylvania is likely to succeed on the merits of two of its claims. *Id.* at *9–*18.[1] First, the court determined that Defendants' failure to undertake notice-and-comment rulemaking before issuing the IFRs violated the Administrative Procedure Act ("APA"), 5 U.S.C. § 553, because Defendants had neither statutory authorization nor good cause to bypass notice-and-comment rulemaking. *Id.* at *9–*14. Second, the court ruled that the plain text of the Affordable Care Act mandates that employer-sponsored health plans include contraceptive coverage for women and affords Defendants no discretion to create exemptions from that requirement. *Id.* at *14–*17. Moreover, the court explained, the exemptions created by the Religious IFR are not compelled by the Religious Freedom Restoration Act. *Id.* at *17–*18. Finally, the court determined that Pennsylvania demonstrated that it will be irreparably harmed by the IFRs, and that the balance of the equities and public interest favored issuing a preliminary injunction. *Id.* at *18–*21.

Five days later, on December 21, 2017, the U.S. District Court for the Northern District of California issued another preliminary injunction that similarly barred Defendants from enforcing the Religious and Moral IFRs. *See California et al. v. Health and Human Services et al.*, No. 17-cv-05783-HSG, 2017 WL 6524627 (N.D. Cal. Dec. 21, 2017). The court first determined that the plaintiff States—California, Delaware, Maryland, New York, and Virginia—have standing to challenge the IFRs. *Id.* at *8–10. Their inability to participate in notice-and-comment rulemaking constituted procedural injury, the court explained, while their "economic obligations, either to

[1] The court did not address other claims advanced by Pennsylvania, including claims that the IFRs violate the Establishment Clause and equal protection guarantees of the U.S. Constitution.

cover contraceptive services necessary to fill in the gaps left by the 2017 IFRs or for expenses associated with unintended pregnancies" constituted fiscal injury. *Id.* at *9 (internal quotation marks omitted). Next, the court held that the plaintiff States were likely to succeed on the merits because "Defendants evaded their obligations under the APA by promulgating rules without proper notice and comment." *Id.* at *11–*15.[2] Finally, the court concluded that the plaintiff States had met their burden of showing that the IFRs will impose, and have already imposed, irreparable harm, and that the balance of the equities and public interest favor issuing the preliminary injunction. *Id.* at *15–*17. The court noted, among other things, that California and the other plaintiff States "face potentially dire public health and fiscal consequences as a result of a process as to which they had no input." *Id.* at *16.

EFFECT OF THE PRELIMINARY INJUNCTIONS ON THIS CASE

I. <u>The Preliminary Injunctions Bar Defendants from Enforcing the Religious and Moral IFRs Pending Resolution of the Pennsylvania and California Cases on the Merits.</u>

The preliminary injunctions prevent Defendants from enforcing the Religious and Moral IFRs anywhere in the United States, not only as applied to employers in Pennsylvania, California, and the other State parties to the California lawsuit. It is settled law that "'[w]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed.'" *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (quoting *Harmon v. Thornburgh*, 878 F.2d 484, 495 n. 21 (D.C. Cir. 1989)); *see also Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 890 n. 2 (1990) (a successful challenge to a regulation by a single aggrieved plaintiff can affect an

[2] The court did not consider the other claims advanced by the plaintiff States. *See* 2017 WL 6524627, at *17 n. 18.

entire agency program); *accord id.* at 913 (Blackmun, J., dissenting) ("In some cases the 'agency action' will consist of a rule of broad applicability; and if the plaintiff prevails, the result is that the rule is invalidated, not simply that the court forbids its application to a particular individual."). That rule is consistent with the Administrative Procedure Act, which empowers courts to "set aside" any agency action found to be, among other things, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "without observance of procedure required by law." 5 U.S.C. §§ 706(2)(A), (D).

In accordance with that rule, the preliminary injunctions temporarily set aside the Religious and Moral IFRs in their entirety and have nationwide effect. Indeed, the U.S. District Court for the Northern District of California expressly found "it appropriate to issue a nationwide injunction." 2017 WL 6524627, at *17. And nothing in the Pennsylvania Order limits its application to Pennsylvania; to the contrary, it succinctly enjoins Defendants from "enforcing the . . . Interim Final Rules." *See* Dkt. No. 60 in *Pennsylvania v. Trump*, No. 2:17-cv-04540-WB (E.D. Pa. Dec. 15, 2017). The preliminary injunctions, therefore, prevent Defendants from enforcing the Religious IFR and the Moral IFR anywhere in the country, including in Massachusetts, until the U.S. District Courts for the Eastern District of Pennsylvania and Northern District of California have issued a subsequent orders resolving the cases on the merits.

II. The Preliminary Injunctions Do Not Moot or Require a Stay in This Case.

Even though the preliminary injunctions have nationwide effect, they do not moot the Commonwealth of Massachusetts' claims challenging the Religious IFR and the Moral IFR, nor should they stall the progress of the case brought by Massachusetts in this Court. The preliminary injunctions only afforded preliminary relief against the Religious and Moral IFRs, whereas the

Commonwealth of Massachusetts' Motion for Summary Judgment seeks permanent injunctive and declaratory relief against those IFRs.

"[T]he purpose of a preliminary injunction is to preserve the status quo *before* the merits have been resolved." *Francisco Sanchez v. Esso Standard Oil Co.*, 572 F.3d 1, 19 (1st Cir. 2009) (emphasis in original). Mindful of that purpose, the District Court in Pennsylvania explained that its preliminary injunction "maintains the status quo pending the outcome of a trial on the merits," 2017 WL 6398465, at *21, and the District Court in California similarly indicated that its preliminary injunction "maintains the status quo that existed before the implementation of the likely invalid 2017 IFRs," 2017 WL 6524627, at *17.

While the Commonwealth of Massachusetts challenges the same Interim Final Rules preliminarily enjoined by the Pennsylvania and California courts, it has not moved for a preliminary injunction barring enforcement of those rules. Instead, Massachusetts has filed a Motion for Summary Judgment and Defendants have filed a Cross-Motion to Dismiss or for Summary Judgment. *See* Doc. Nos. 21, 32. While the District Courts addressed the *likelihood* of California and Pennsylvania's success on the merits of one and two of their claims, respectively, the Cross-Motions for Summary Judgment filed by the parties in this case put the ultimate merits of all four of the Commonwealth of Massachusetts' claims squarely before this Court. Should this Court conclude that the Religious and Moral IFRs were issued in violation of the Administrative Procedure Act, or exceed Defendants' statutory authority, or violate the Establishment Clause or equal protection guarantees of the U.S. Constitution, the appropriate remedy is to vacate the IFRs and issue a permanent injunction barring Defendants from implementing or enforcing them.[3] *See*

[3] District courts often proceed with cases on the merits, even when a nationwide preliminary injunction issued by a different district court is in effect. *See, e.g., Philadelphia v. Sessions*, Case No. 2:17-cv-03894 (E.D. Pa.) (case challenging conditions imposed by the Department of Justice

Allina Health Servs. v. Sebelius, 746 F.3d 1102, 1110 (D.C. Cir. 2014) (explaining that vacatur is the "normal remedy" for violations of the APA).

Thus, while the Pennsylvania and California decisions issuing the preliminary injunctions should be consulted for their persuasive reasoning, they do not, and should not, delay this Court's consideration of the claims advanced by the Commonwealth of Massachusetts challenging the Religious IFR and Moral IFR. *See Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936) ("Only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both.").

Respectfully submitted,

COMMONWEALTH OF MASSACHUSETTS,

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on the receipt of federal funds under the Byrne Justice Assistance Grants Program proceeding on the merits, when nationwide preliminary injunction issued by a different district court currently enjoins enforcement of two of those conditions). Indeed, notwithstanding the nationwide preliminary injunction issued by the U.S. District Court for the Eastern District of Pennsylvania, the U.S. District Court for the Northern District of California issued a separate preliminary injunction and is proceeding to the merits of the case. *See* 2017 WL 6524627, at *17.

CERTIFICATE OF SERVICE

I certify that this document filed through the CM/ECF system will be sent electronically to registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on December 22, 2017.

/s/ Julia Kobick
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