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,* DORDT COLLEGE; and MARCH FOR LIFE EDUCATION AND DEFENSE FUND, *Proposed Defendant-Intervenors.*	Case No. 17-cv-11930-NMG

PROPOSED DEFENDANT-INTERVENORS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

March for Life Education and Defense Fund and Dordt College (Proposed Intervenors) have both moved to intervene as defendants in this case because the interim final rules (IFRs) Massachusetts challenges prevent the federal government from forcing them to choose between violating their consciences or paying crippling financial penalties. This Court's resolution of the cross-motions for summary judgment and Defendants' motion to dismiss will directly affect Proposed Intervenors' fundamental rights.

As set forth in their motion to intervene, both March for Life and Dordt College hold that human life should be protected from the moment of conception, and cannot provide drugs and devices that can and do destroy very young human lives. The original, narrow contraceptive mandate exemption excluded Proposed Intervenors, forcing them to defend their rights in federal court. Proposed Intervenors are now exempt under the IFRs, which Massachusetts seeks to undo here.

March for Life and Dordt College agree with the Departments that the Commonwealth's complaint should be dismissed, the Commonwealth's motion for summary judgment should be denied, and summary judgment for the Defendants should be entered. The Proposed Intervenors, acknowledging that the Court has not yet ruled on their motion to intervene, respectfully request that the Court consider their arguments below. This memorandum of law is designed to supplement and complement the arguments set forth by the Departments in their brief. Where this brief does not address every Commonwealth contention, the Proposed Intervenors rely upon the Departments' brief. This brief specifically adopts the background section and Establishment Clause arguments in the Departments' brief.

ARGUMENT

I. THE DEPARTMENTS POSSESS THE AUTHORITY TO ADOPT THE IFRs.

Massachusetts contends that the IFRs exceed the Departments' statutory authority and are inconsistent with the ACA's requirement that some plans cover all FDA-approved contraceptives. Pl's Br. in Support of Mot. for Summ. J. (hereinafter "Pl. MSJ") at 21-33. It claims that the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb *et seq*., is the only potentially legitimate source of rulemaking authority; that federal agencies may protect religious liberty only when there is no debate as to whether the application of a law violates RFRA; and that because some courts have rejected RFRA challenges to the accommodation's alternative compliance mechanism, RFRA cannot be used to justify the rules. Pl. MSJ at 29-33.

These contentions should be rejected. First, the power of federal agencies to protect religious exercise is not limited to those circumstances in which the application of a rule would undeniably violate RFRA. Second, as explained by the Departments in their summary judgment brief, the accommodation's alternative compliance mechanism *does* violate RFRA, rendering the rules valid. Def's Summ. J. Br. at 30-35. Third, the Commonwealth's concession that the superseded Church Exemption is valid fatally undermines its entire position. Finally, the Constitution requires the Departments also to exempt those that object on non-religious moral grounds.

A. The Power of Federal Agencies to Protect Religious Exercise is Not Limited to Circumstances Where There is No Debate a Law Would Violate RFRA.

In Section II.C. of its summary judgment brief, Pl. MSJ at 29-33, the Commonwealth argues that the Departments may create exemptions from the contraceptive mandate only in those circumstances in which the mandate "is *inconsistent with* the Constitution or with another federal statute." Pl. MSJ at 29 (emphasis added). It similarly declares that "the ACA's coverage

mandate can only be limited to the extent *required by* RFRA's accommodation of religious exercise." *Id*. at 30 (emphasis added). Massachusetts argues that the Departments "have no authority" to "go[] beyond what RFRA *demands*." *Id*. at 33 (emphasis added).

Massachusetts seems to presuppose that it is easy to determine what "RFRA demands," whether an exemption is "required by RFRA," and when a law is "inconsistent with" RFRA. This presupposition ignores reality. It is rarely obvious whether the application of a law to a particular individual or organization violates RFRA, and, as discussed in more detail below, it is unreasonable to forbid agencies to act to protect religious liberty in the absence of such certainty.

As a general matter, the application of constitutional and quasi-constitutional rights jurisprudence almost always depends upon the specific facts and circumstances in which the legal issue arises. *See, e.g., Van Orden v. Perry*, 545 U.S. 677 (2005) (whether Ten Commandments display on public property violates Establishment Clause turns heavily on particular facts and circumstances).

The problem is particularly acute in the RFRA context. The very terms of the statute make its application to particular cases far from obvious. What burdens are "substantial?" 42 U.S.C. § 2000bb-1(a). What governmental interests are "compelling?" *Id*. at § 2000bb-1(b)(1). To what degree must the application of the challenged law advance the government's stated interest to satisfy strict scrutiny? *Id*. at § 2000bb-1(b)(2). In assessing whether the challenged law advances a compelling interest, does it matter how many individuals or organizations desire religious exemptions? How feasible do less restrictive alternatives have to be? Do less restrictive means have to already exist to "count" for RFRA purposes, or can the government be required to create them? Is it legitimate to require the federal government to spend more money

to utilize less restrictive alternatives? *See Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751, 2786 (2014) (Kennedy, J., concurring). The answer to none of these questions is obvious.

There are only two things regarding RFRA and the contraceptive mandate that are beyond debate: (1) that the "unadorned" mandate substantially burdens the religious exercise of those who object on religious grounds; and (2) that the existence of the accommodation's alternative compliance mechanism (a less restrictive alternative) means that the imposition of that substantial burden via the "unadorned" mandate is unjustified and thus violates RFRA. The only reason these assertions are beyond debate is because the Supreme Court definitively answered the underlying issues in *Hobby Lobby*. It bears noting that even these conclusions were hotly contested prior to the *Hobby Lobby* decision. *Compare Hobby Lobby Stores v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013), *with Conestoga Wood Specialties Corp. v. U.S. Dep't of Health & Human Servs.*, 724 F.3d 377 (3d Cir. 2013).

Beyond those two undisputed propositions, there are a number of contested questions, including (1) whether the accommodation's alternative compliance mechanism substantially burdens an objecting plan sponsor's religious exercise; (2) whether the application of the mandate to objecting plan sponsors advances a compelling governmental interest; and (3) whether there are means of advancing the government's stated interests that are less restrictive of objectors' religious exercise.

Massachusetts seems to contend that the answers to at least the first two of these questions are so obvious that the Departments' disagreement with the Commonwealth in the IFRs is beyond the pale and renders their rulemaking invalid. Its contention is based on the fact that a number of courts rejected claims by non-exempt religious non-profits that the federal government violated RFRA by forcing them to comply with the mandate via the

accommodation's alternative compliance mechanism. Pl. MSJ at 31-32. Of course, it is true that most of the federal courts of appeals that addressed the issue held that the accommodation's alternative compliance mechanism does not substantially burden the religious exercise of objecting plan sponsors. *See, e.g., Geneva Coll. v. U.S. Dep't of Health & Human Servs.*, 778 F.3d 422 (3d Cir. 2015). But it is also true that a significant number of other courts reached contrary conclusions. *See, e.g., Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, 801 F.3d 927 (8th Cir. 2015). The Supreme Court itself considered but did not fully resolve the issue; significantly, when remanding the cases to the courts of appeals, it prohibited the government from imposing taxes or penalties upon the challengers for their refusal to participate in the accommodation scheme. *Zubik v. Burwell*, 136 S. Ct. 1557, 1561 (2016).

What, then, in the absence of a definitive Supreme Court opinion, is the standard for determining whether an agency has "gone beyond" what RFRA "demands"? Massachusetts does not even grapple with the question.

Interestingly, the Commonwealth apparently does *not* believe that a definitive Supreme Court decision is *necessary*, asserting without reservation that the exemption for churches, denominations, and integrated auxiliaries is required by RFRA. Pl. MSJ at 30. No court, let alone the Supreme Court, has ruled on this question, and some have argued that the exemption is *not* required by RFRA. The agencies themselves adhered to this position until recently. *See, e.g.*, 76 Fed. Reg. 46,621 (Aug. 3, 2011) (declining to rely upon RFRA to justify Church Exemption).

What standard, then, should a court entertaining an APA "contrary to law" challenge use in determining whether an agency has "gone beyond what RFRA demands" when "what RFRA demands" is in dispute? The Intervenors suggest that a court may invalidate an agency's effort

to comply with RFRA only where its interpretation is so unreasonable as to be worthy of the label "arbitrary and capricious" or where it violates the Establishment Clause. In other words, an agency's conclusion that application of a statute or regulation would violate RFRA is entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). As long as its exercise of delegated lawmaking power is reasonable, an agency is not required to agree with contrary conclusions reached by a lower federal court. *See National Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005).

This is not to say that *all* agency RFRA determinations are entitled to such deference. This case presents the unusual situation in which agencies are arguing that their previous actions violated RFRA. In almost all circumstances, federal agencies will vigorously argue when challenged that their actions did *not* violate RFRA. Such arguments are not entitled to the same deference. Courts have declined to defer under *Chevron* to agency arguments that they have not violated so-called "trans-substantive" statutes such as the Freedom of Information Act, which are principally intended to constrain agency conduct. *See Reporters Comm. for Freedom of Press v. U.S. Dep't of Justice*, 816 F.2d 730, 734 (D.C. Cir. 1987). However, when such tension does not exist—as when agencies elect to restrain their own behavior in an effort to comply with RFRA—all the usual reasons for deferring to agency action under *Chevron* are applicable.

The Departments' interpretation of RFRA is eminently reasonable. Numerous courts have held that the accommodation's alternative compliance mechanism violates RFRA, *see, e.g.*, *Sharpe Holdings*, 801 F.3d 927, and the Supreme Court itself was unable to finally resolve the question (but prohibited the government from imposing fines or penalties on the challengers for refusing to participate in the accommodation scheme). *See Zubik v. Burwell*, 136 S. Ct. 1557.

Indeed, the Departments' interpretation is not only reasonable, but also correct. *See* Def. Br. at 30-35. In addition, the IFRs do not violate the Establishment Clause. *See* Def. Br. at 38-42.

As an empirical matter, federal government agencies have for many years adopted regulatory protections of religious exercise in the absence of definitive judicial decisions. For example, during World War I, the executive branch went beyond the narrow draft exemptions enacted by Congress to protect additional conscientious objectors from military service. *See* Jeremy Kessler, *The Administrative Origins of Modern Civil Liberties Law*, 114 Colum. L. Rev. 1083, 1118 (2014). *See also* 21 C.F.R. § 1307.31 (Drug Enforcement Administration (DEA) exempting members of the Native American Church from the Controlled Substances Act without explicit congressional directive); *Bear Lodge Multiple Use Ass'n v. Babbitt*, 175 F.3d 814, 817-18 (10th Cir. 1999) (National Park Service issued regulations limiting recreational access to Devils Tower National Monument in order to protect and accommodate Native American religious exercise). The Commonwealth's position, if accepted, would threaten these longstanding regulatory protections of religious liberty.

For all these reasons, the Court should reject Massachusetts' claim that the Departments exceeded their authority in promulgating the IFRs.

B. The Commonwealth's Treatment of the "Church Exemption" Reveals the Incoherence of Its Position.

In its brief, the Commonwealth argues that its position does not jeopardize the superseded Church Exemption, which it concedes is a valid exercise of the Departments' authority. *See* Pl. MSJ at 30 & n.24. Massachusetts claims that the Departments correctly concluded imposing the mandate on churches, denominations, and their integrated auxiliaries (but not on any other religious objectors) would violate the Religious Freedom Restoration Act, and thus that RFRA

both justified and required the Church Exemption. *Id*. The Commonwealth's argument not only attempts to re-write history but also exposes the incoherence of its legal position.

1. *The Church Exemption did not rest on RFRA.*

It is helpful to understand the origin, history, and stated rationale for the Church Exemption in assessing the impact of the Commonwealth's concession that the exemption is valid. The original Church Exemption was based explicitly on the unusually narrow exemptions a small number of states included in their own contraceptive coverage mandates[1] rather than on the Departments' assessment of RFRA. *See* 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011). Neither the preamble nor the text of the August 3, 2011 interim final rules mentions RFRA at all.

Oddly, eligibility for the Church Exemption (in all its iterations prior to the IFR challenged in this lawsuit) rested primarily (and eventually exclusively) on whether an organization is exempt from filing an informational tax return: an exempt religious employer was defined as "an organization that is organized and operates as a nonprofit entity and is referred to section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended." *See* 45 C.F.R. § 147.131(a)(version in effect from Sept. 14, 2015 through Oct. 12, 2017), citing 26 U.S.C. § 6033(a)(3)(A)(i)(churches, their integrated auxiliaries, and conventions or associations of churches) and (iii)(the exclusively religious activities of any religious order). The Form 990 exemption long predates RFRA and the policy considerations underlying it are quite different from those at stake in the contraceptive coverage context.

The Departments strangely claimed that the category of religious employers exempt from the Form 990 filing requirement just happen to be the same category of religious employers that

[1] *See Insurance Coverage for Contraception Laws*, http://www.ncsl.org/research/health/insurance-coverage-for-contraception-state-laws.aspx (last visited Dec. 21, 2017)

are "more likely than other employers to employ people of the same faith who share the same objection" to contraceptives or abortifacients. 78 Fed. Reg. at 39,874 (Jul. 2, 2013). The government reasoned that exempting such employers would not undermine the contraceptive mandate's goals, since the employees of such organizations would not want to use the drugs and devices to which the employer objected. It did not argue that RFRA required exempting houses of worship and integrated auxiliaries, or that RFRA somehow applies differently to churches than to others who enjoy its protections.

In explaining their decision to keep the August 2011 definition of "religious employer" in their February 2012 final rule, the Departments barely mention RFRA, asserting without explanation that its approach "is consistent with" RFRA." 77 Fed. Reg. 8,725, 8,729. The Departments did *not* contend that RFRA required the Church Exemption. The Commonwealth's assertion to the contrary, Pl. MSJ at 6, is simply false. *See also* 77 Fed. Reg. 16,501 (Mar. 21, 2012) (not a single mention of RFRA in Advance Notice of Proposed Rulemaking regarding potential "accommodation" of non-exempt religious employers).

In short, the Commonwealth's suggestion that the Departments concluded that RFRA requires the Church Exemption is simply unsupported by the historical record. Therefore, if the Commonwealth wants to avoid jeopardizing the Church Exemption, it must concede either that the accommodation violates RFRA or that federal agencies *may* go beyond "what RFRA demands" to protect freedom of conscience.

2. *Justifying the Church Exemption with the ministerial exception and general principles of church autonomy is inconsistent with the Commonwealth's attack on the IFRs.*

In an effort to support the Church Exemption while attacking the IFRs' expanded exemptions, Massachusetts also invokes (a) the ministerial exception affirmed by the Supreme court in *Hosanna-Tabor Evangelical Church & Sch. v. EEOC*, 565 U.S. 171 (2012); (b) the

"principle of non-interference enshrined in the First Amendment;" and (c) respect for the "particular sphere of autonomy" that houses of worship enjoy. Pl. MSJ at 30 & n. 24.

It must be observed at the outset that there is a glaring incongruity between (a) the Commonwealth's willingness to accept somewhat amorphous "principles of non-interference" and imprecise notions of "respect" when it comes to houses of worship and their integrated auxiliaries, and (b) its rigid demand that federal agency regulations may *only* address clear and undisputed violations of RFRA when it comes to everyone else. Massachusetts' stance towards churches fits far better with a correct conception of federal regulatory power to protect freedom of conscience.

In any event, the ministerial exception and principles of church autonomy are indeed legitimate and powerful components of First Amendment jurisprudence. But they are not necessarily particularly compelling explanations for the superseded Church Exemption, at least when viewed through the lenses the Commonwealth wears when challenging the IFRs. First, while it is true that the ministerial exception prevents government interference in church-minister relationships, *Hosanna-Tabor*, 565 U.S. 171, not everyone who works for a church—or who is covered by its health plan—is a minister. *Id*. at 190-94.

Second, church autonomy principles tend to control in particular situations, such as cases involving (1) questions about correct doctrine and resolving doctrinal disputes;[2] (2) the choice of ecclesiastical polity, including the proper application of procedures set forth in organic documents, bylaws, and canons;[3] and (3) the admission, discipline, and expulsion of

[2] *See, e.g., Maryland & Va. Churches of God v. Church at Sharpsburg*, 396 U.S. 367, 368 (1970) (per curiam).
[3] *See, e.g., Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-24 (1976) (civil courts may not probe into church polity).

organizational members.[4] Despite the power of church autonomy principles, churches are not categorically exempt from federal wage and hour laws or from employment non-discrimination rules. *See* 29 U.S.C. § 201 *et seq.* (Fair Labor Standards Act); 42 U.S.C. § 2000e *et seq.* (Title VII of the Civil Rights Act of 1964).

None of this is to say that the original Church Exemption was somehow invalid. It was not. But, again, if the Commonwealth truly wants to avoid jeopardizing the Church Exemption and wants to take a logically coherent position, it must acknowledge that federal agencies have substantial authority to craft regulations protecting religious exercise and freedom of conscience.

C. The Departments Possess the Authority to Protect Non-Religious Conscientious Objectors.

Massachusetts' attack on the Departments' authority to promulgate the Moral IFR consists of a single paragraph, in which it observes that RFRA—which protects religious exercise—cannot justify protecting the consciences of those who object to the Mandate on non-religious moral grounds. Pl. MSJ at 33. Of course, the Commonwealth is correct that the Moral IFR is not necessary to ensure compliance with RFRA. But that does not mean that the Departments were without justification.

In addition to the arguments set forth by the Departments in their brief, Def's SJ Br. at 25-30, the unconstitutionality of withholding relief from non-religious objectors also justifies the Moral IFR. *See March for Life Educ. & Defense Fund v. Burwell*, 128 F. Supp. 3d 116 (D.D.C. 2015) (exclusion of moral objector from exemption to HHS Mandate lacks rational basis in violation of Fifth Amendment equal protection principles).

Under the Equal Protection doctrine of the Fifth Amendment, the federal government cannot make a distinction that "bears no rational relationship to a legitimate governmental

[4] *See, e.g.*, *Bouldin v. Alexander*, 82 U.S. (15 Wall.) 131, 139-40 (1872).

interest." *See Frontiero v. Richardson*, 411 U.S. 677, 683 (1973); *see also Nazareth Hosp. v. U.S. Dep't of Health & Human Servs.*, 747 F.3d 172, 180 (3d Cir. 2014). The government must demonstrate "a rational relationship between the disparity of treatment and some legitimate governmental purpose." *U.S. v. Pollard*, 326 F.3d 397, 407 (3d Cir. 2003) (citing *Heller v. Doe*, 509 U.S. 312, 320 (1993)). "[G]overnment [is required to] not treat similarly situated individuals differently without a rational basis." *Noble v. U.S. Parole Comm'n*, 194 F.3d 152, 154 (D.C. Cir. 1999) (emphasis omitted) (*citing Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985)).

Intervenor March for Life draws its workforce exclusively from among those who share and abide by its views regarding the use of abortifacient drugs and devices. Imposing the contraceptive mandate on organizations like March for Life, whose employees all oppose abortifacients, cannot pass rational basis review. The stated purpose behind the mandate is to offer contraceptive coverage to women who "want it," to prevent "unintended" pregnancies, 77 Fed. Reg. at 8,727, and thus to advance "women's health and equality" when women voluntarily use the items, 79 Fed. Reg. at 51,123. There is no rational purpose behind imposing the mandate on those who do not want the items and will not use them.

The decision in *Center for Inquiry, Inc. v. Marion Circuit Court Clerk*, 758 F.3d 869 (7th Cir. 2014), vindicated the kind of Equal Protection concerns underlying the Departments' decision to exempt organizations objecting to the Mandate on non-religious grounds. To do otherwise would have been to treat such groups less favorably than houses of worship and their integrated auxiliaries, not because the Mandate advances the government's interests differently for people who work at churches, but simply because such objectors are "non-religious ethical groups" instead of churches. *See Ctr. for Inquiry*, 758 F.3d at 874.

In *Center for Inquiry*, the Seventh Circuit deemed it an Equal Protection violation to give favorable treatment to clergy but not to non-clergy persons in the form of permitting them to solemnize marriages. *Id.* at 874. The general notion that government can give privileges to churches did not save the state in that case. Instead of merely asking whether churches and their clergy can be given special privileges *in general*, the court examined the nature of the legal rule and the privilege offered, and asked whether the state's rationale in fact had any inherent connection to a solemnizer being associated with a church. *Id.*

The superseded Church Exemption did the same thing: it gave churches a benefit just because they are churches, without any rationale that explains why the government's interest with respect to this particular mandate and the exemption it offers to churches is furthered in respect to churches that may or may not object to abortifacients but not for non-church groups like March for Life that actually do. The court explained in *March for Life*, "[o]n the spectrum of 'likelihood' that undergirds HHS's policy decisions" to exempt churches because their employees likely oppose contraception, "March for Life's employees are, to put it mildly, 'unlikely' to use contraceptives." 128 F. Supp. 3d at 127. Therefore, "March for Life and exempted religious organizations were not just 'similarly situated,' they are *identically* situated." *Id.*

The Departments promulgated the Moral IFR in part to eliminate the constitutional defect with the superseded Church Exemption identified in *March for Life*.[5] As Massachusetts itself conceded, Pl. MSJ. at 29, federal agencies may craft exemptions from otherwise applicable rules

[5] The existence of a contrary decision, *Real Alternatives, Inc. v. U.S. Dep't of Health & Human Servs.*, 867 F.3d 338 (3d Cir. 2017), does not mean that the Departments lacked regulatory authority to exempt non-religious objectors through the Moral IFR.

in order to comply with the Constitution. Accordingly, this Court should reject the Commonwealth's contention that the agencies lacked authority to promulgate the Moral IFR.

II. THE INTERIM FINAL RULES DO NOT VIOLATE EQUAL PROTECTION PRINCIPLES.

The IFRs do not violate Fifth Amendment equal protection principles because they do not create sex-based classifications, and would survive heightened scrutiny regardless because they protect freedom of conscience.

A. The Interim Final Rules Do Not Create a Sex-Based Classification.

The IFRs do not create a sex-based classification because they are facially gender-neutral and do not implicitly target women. The Commonwealth's theory to the contrary rests not on anything specific in the IFRs' language but on the fact that the background rule (the contraceptive mandate) confers a benefit that can only be used by women. Thus, any modifications to that mandate, including exemptions, necessarily affect only women, but that does not mean the exemptions make sex-based classifications. The sex-based classification is in the mandate, which the Commonwealth is not challenging.

1. *The Interim Final Rules are facially gender-neutral.*

The IFRs are facially gender-neutral, in contrast to the explicit sex-based classifications in the cases the Commonwealth cites. *See Orr v. Orr*, 440 U.S. 268 (1979) (finding that rule requiring only husbands, not wives, to pay alimony after a divorce violated the Equal Protection Clause); *United States v. Virginia*, 518 U.S. 515, 519 (1996) (finding that public all-male military college violated the Equal Protection Clause by not admitting women); *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1686 (2017) (finding that residency requirement for citizenship transfer treating unwed mothers and fathers differently violated the Equal Protection Clause).

Orr is distinguishable from this case, as it concerned explicit sex-based classifications, rooted in sex-stereotypes about gender roles in marriage, to serve a goal (protecting financially vulnerable spouses) that the state could meet through other means: an alimony rule based on need, rather than sex. 440 U.S. at 281-82. So too with the Virginia Military Institute, which refused to admit women. 518 U.S. at 519. Similarly, in *Morales*, the pre-birth residency requirement for a US-citizen parent to confer citizenship on a child born abroad was five years for unwed fathers, but one year for unwed mothers. 137 S. Ct. at 1686.

In contrast, the IFRs contain no explicit sex classifications. In its amended complaint and summary judgment brief, Massachusetts alleges that the IFRs "insert a gender-based classification" or "insert gender-based exemptions," respectively. Am. Compl. at ¶ 103; Pl. MSJ at 38. Massachusetts claims the IFRs "create exemptions only for 'women's preventive care.'" Pl. MSJ at 38. But the phrase "women's preventive care" appears nowhere in either regulation's text. 45 C.F.R. § 147.132; 45 C.F.R. § 147.133(a)(1)(ii). It appears exactly three times in each IFR's preamble, in sections describing the contraceptive mandate, not the exemptions. *See* 82 Fed. Reg. 47,792, 47,793-94 (Oct. 13, 2017); 82 Fed. Reg. 47,838, 47,840 (Oct. 13, 2017).

Both documents also claim the exemptions target women but leave coverage for men "unchanged" or "untouched." Am. Compl. at ¶ 105; Pl. MSJ at 39. This is misleading; the contraceptive mandate excludes male contraceptives from preventive services, 42 U.S.C. § 300gg-13(a) (4), and no other form of preventive care is at issue here. The mandate itself creates sex-based classifications, by not covering contraceptives for men. Should the mandate become gender-neutral, the exemptions will apply gender neutrally. *See* 45 C.F.R. § 147.132; 45 C.F.R. § 147.133(a) (1)(ii).

2. *The Interim Final Rules do not implicitly target women.*

Massachusetts' assertions about the IFRs' impact on women are insufficient to sustain the equal protection claim for at least six reasons. First, Massachusetts fails to identify any women affected by the IFRs or otherwise make a single relevant allegation about any Massachusetts employer. Massachusetts does not estimate how many Massachusetts employers might invoke either the religious or the moral exemption. And throughout the onslaught of litigation brought against the contraceptive mandate, no Massachusetts employer with religious or moral objections challenged the mandate.

Instead, Massachusetts proffers statistics estimating that 666-2,520 Massachusetts women might lose their contraceptive coverage, based on solely calculating Massachusetts' "share of the national population," from the Departments' nationwide estimate, not on any actual Massachusetts employers' beliefs or policies. Pl. MSJ at 13 n.13. Moreover, Massachusetts did not involve itself in the earlier contraceptive mandate litigation, which dealt with the very concerns that the IFRs now resolve. Massachusetts did not challenge the original contraceptive mandate's exemption, 77 Fed. Reg. 8,725 (Feb. 15, 2012), nor the exemption for grandfathered plans, which requires neither religious nor moral conviction. 42 U.S.C. § 18011(a)(3)-(4).

Second, Massachusetts does not appear to account for women who are themselves opposed to abortifacients or other forms of birth control, and who choose to work for employers who share the same religious or moral convictions. *See, e.g.*, Mem. in Supp. of Mot. to Intervene, attach. Mancini Decl. at ¶13. Those women cannot reasonably be said to suffer an adverse impact from the IFRs, because they would not use the devices or services in question even if their employers covered them. Thus, Massachusetts' position would deny women the right to work at an employer that shares their views.

Third, Massachusetts' argument makes no distinction between contraceptives that can act as abortifacients, and those that do not. It assumes that every employer who invokes the exemption will refuse to cover contraceptives entirely, rather than only excluding abortifacient coverage. But as Dordt College noted in its Motion to Intervene, it covers forms of birth control that are not abortifacient. *See* Mem. in Supp. of Mot. to Intervene at 2 (citing Hoekstra Decl. at ¶13).

Fourth, Massachusetts does not challenge the mandate itself, which only covers contraceptives for women, arguably further entrenching the view that women are solely responsible for avoiding unwanted pregnancies. The exemptions would apply to male contraceptives as well, if the contraceptive mandate were gender neutral.

Fifth, the equal protection argument proceeds as though women have no cost-free alternatives for getting birth control if their employers do not pay for it. But in Massachusetts they do: the state has provided just such a program, Pl. MSJ at 10-13, and also expanded requirements for private insurers a few days after it filed the amended complaint in this case. *See* Mass. Gen. Laws ch. 32A § 28 (2017).

Sixth, the case Massachusetts cites regarding birth control and the Equal Protection Clause is inapposite. *Carey v. Population Servs., Int'l*, 431 U.S. 678, 681 (1977) (finding that statute criminalizing sale of contraceptives to minors or by a non-pharmacist and their advertisement and display altogether violated the equal protection clause).

The Commonwealth uses the term "access to contraception" equivocally, to characterize both the issues in *Carey* and in the instant case. But *Carey* is distinguishable, as it had nothing to do with subsidizing contraception, but rather concerned a situation in which some people were being prevented from legally buying birth control at all. The exemptions here do not ban birth

control, and the mandate still requires employers who have no religious or moral objections to pay for it. *Cf. Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 269 (1993) (opposition to abortion is not a sex-based classification).

In addition to the shortcomings of the Commonwealth's claims stated above, the IFRs are constitutional under the standard for assessing equal protection claims based on disparate impact. If a statute is facially gender-neutral, but has a disparate impact on one sex, it does not violate the Equal Protection Clause if 1) it is truly neutral, neither explicitly or implicitly based on gender, and 2) the disparate impact is not caused by "invidious gender-based discrimination." *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 274 (1979) (finding that state law preference for hiring veterans for civil service positions did not violate the equal protection clause). The IFRs should be evaluated similarly to the veterans' preference law in *Feeney*.

In *Feeney*, the court noted that the statute's language was gender-neutral, preferring "veterans," not "men," but that men were the law's primary beneficiaries, as most veterans at that time were male. *Id.* at 267. Although the veterans' classification disproportionately affected women, the court found that the relevant inquiry was whether "this veteran preference excludes significant numbers of women from preferred state jobs because they are women or because they are nonveterans." *Id.* at 275. The Court concluded that the law could not "plausibly be explained only as a gender-based classification . . . Veteran status is not uniquely male." *Id.* at 275.

Similarly, the IFRs, while disproportionately affecting women as exemptions from a mandate that only applies to contraceptives for women, are facially neutral and were not issued to discriminate against women. The record behind the IFRs shows that HHS issued them to

protect religious freedom and conscience rights. The Commonwealth offers no evidence suggesting otherwise.

Importantly, and distinct from *Feeney*, the instant case is not about access to public employment, but what private entities may be required to subsidize over their conscience-based objections. The exemptions are themselves gender-neutral, being based on religious or moral conviction, not sex. That they disproportionately affect women is a function of how the contraceptive mandate itself defines "preventive services," not a function of the exemptions.

Because the IFRs are truly neutral, based on religious or moral convictions related to contraception, and because they are not motivated by invidious discrimination against women, any disparate impact the IFRs have on women does not violate the Equal Protection Clause.

B. Though the Interim Final Rules Did Not Create a Sex-Based Classification, They Would Satisfy Heightened Scrutiny Regardless.

Sex-based classifications are subject to intermediate scrutiny, and if the IFRs are deemed to create a sex-based classification, they would satisfy that heightened scrutiny, because they are "substantially related" to achieving "an important governmental objective," namely, protecting conscience rights of both religious and nonreligious people and organizations. *See Orr*, 440 U.S. at 278–79 (internal citations omitted). *See also Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 873 (1992) (noting that "not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right" and acknowledging that state governments have a valid interest in restricting abortions, even where private parties' consciences are not involved).

In this case, the IFRs are "substantially related" to the "important governmental objective" of protecting freedom of conscience rights for religious and secular people with convictions about abortion or abortifacients. The exemptions give such persons and entities the

right to not cover those products in their insurance plans. Not only are the IFRs "substantially related" to the government's objectives as to freedom of conscience, they are entirely related: the whole reason for the IFRs' being is to protect conscience rights. Therefore, because the IFRs are motivated by and deeply intertwined with the government's goal of protecting conscience rights, the IFRs would satisfy heightened scrutiny even if they were deemed to create a sex-based classification.

In sum, the IFRs create no sex-based classification, nor do they implicitly engage in sex discrimination. Regardless, they are "substantially related" to achieving the government's goal of conscience protection, and thus satisfy heightened scrutiny. Therefore, the IFRs do not violate the Fifth Amendment's equal protection principles.

CONCLUSION

Proposed Intervenor-Defendants respectfully ask this Court to dismiss this action or enter summary judgment for Defendants, and to deny Plaintiff's motion for summary judgment.

Dated: January 8, 2018

Respectfully submitted,

/s/ David A. Cortman

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Counsel for Proposed Defendant-Intervenors

**Motion for admission pro hac vice filed*

***Motion for admission pro hac vice forthcoming*

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing on January 8, 2018.

/s/ Andrew D. Beckwith
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