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*.	Leave to file granted on January 19, 2018

COMBINED MEMORANDUM IN OPPOSITION TO DEFENDANTS' CROSS-MOTION TO DISMISS OR FOR SUMMARY JUDGMENT, AND REPLY BRIEF IN SUPPORT OF THE COMMONWEALTH OF MASSACHUSETTS' MOTION FOR SUMMARY JUDGMENT

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Until their promulgation of the Interim Final Rules ("IFRs") challenged in this case, the Departments of Health and Human Services, Labor, and the Treasury (the "Departments") sought to balance the religious liberty rights of employers[1] with Congress's mandate in the Patient Protection and Affordable Care Act ("ACA") that employer-sponsored health plans cover contraceptive care for women. But in creating a host of broad new exemptions from the ACA's contraception mandate, the Departments abandoned that effort. The Departments' action, embodied in the IFRs, conflicts with the plain text of the ACA, the Administrative Procedure Act, the Establishment Clause and equal protection provisions of the Constitution, and the Supreme Court's instruction that the Departments must "accommodat[e] [employers'] religious exercise while at the same time ensuring that women covered by [employer-sponsored] health plans receive full and equal health coverage, including contraception coverage." *Zubik v. Burwell*, 136 S. Ct. 1557, 1560 (2016) (internal quotation marks omitted).

The Departments assert that "[t]his case is about religious liberty and freedom of conscience." Defts.' Br. Summ. J., at 1 (Doc. Nos. 33, 34) ("Def. Br."). But that statement only tells part of the story, and it lays bare the Departments' singular focus on employers' religious interests, at the expense of women. Through this action, the Commonwealth of Massachusetts seeks to redress the Departments' harmful and unlawful actions and restore the lawful balance between women's statutory right to contraceptive care and employers' religious interests.

ARGUMENT

I. Massachusetts Has Standing to Bring Suit Because the IFRs Will Inflict a Concrete, Imminent Fiscal Harm on the Commonwealth and Frustrate Its Efforts to Promote the Health and Well-Being of Its Residents.

The Commonwealth brings this action pursuant to the expansive "omnibus judicial-review

[1] Here and throughout, the term "employers" refers to those entities covered by the IFRs that have sincere religious and/or moral objections to contraception.

provisions" of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551–559, 701–706. *Lexmark Intern., Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1389 (2014). These provisions "embody the basic presumption" that comprehensive judicial review should be available to any person[2] adversely affected by the actions of an administrative agency. *Scanwell Labs., Inc. v. Shaffer*, 424 F.2d 859, 865–66, 872–73 (D.C. Cir. 1970) (standing to challenge agency action not limited to party suffering "legal wrong"); *see also United States v. SCRAP*, 412 U.S. 669, 689 & n. 14 (1973) (plaintiff need not be "significantly" affected to challenge agency action under the APA; an "identifiable trifle" is "sufficient"); *Save our Heritage, Inc. v. F.A.A.*, 269 F.3d. 49, 56 (1st Cir. 2003) ("A reasonable claim of minimal impact is enough for standing."). The APA grants the Commonwealth the right to challenge the Religious and Moral IFRs on the grounds that the Departments: (1) violated notice-and-comment rulemaking requirements, 5 U.S.C. § 706(2)(D); (2) exceeded their authority and jurisdiction under the ACA, *id.* §§ 706(2)(A) and (C); and (3) violated the Establishment Clause and the equal protection guarantee of the Fifth Amendment, *id.* § 706(2)(B).[3]

The Departments' challenge to the Commonwealth's standing to maintain this action under Article III of the Constitution is without merit. *See* Def. Br. at 10. As two courts concluded in similar cases, the IFRs have caused or will cause the Commonwealth to suffer redressable

[2] It is uncontested that the Commonwealth is a "person" for the purposes of the APA. *See Texas v. United States*, 809 F. 3d 134, 162–63 (5th Cir. 2015) (Texas meets standing requirements under APA); *see also California v. Health and Human Services*, --- F. Supp. 3d ---, 2017 WL 6524627, at *9 n. 10 (N.D. Cal. Dec. 21, 2017).

[3] The Departments devoted five pages of their brief to a claim that the Commonwealth did not assert—namely, that the IFRs are "arbitrary and capricious," in violation of the Administrative Procedure Act. *See* Def. Br. 25–30. The Commonwealth's complaint, amended complaint, and motion for summary judgment in this case make clear that, in addition to its constitutional claims, Massachusetts contends only that the IFRs violated the APA's notice and comment rulemaking provisions and are "'in excess of [the Departments'] statutory . . . authority" and "not in accordance with the law.'" Pl.'s Br. Summ. J. at 21 (Doc. 26) (quoting 5 U.S.C. § 706(2)(A) and (C)); *see also* Am. Compl. ¶¶ 80–93.

procedural and economic injuries, and will harm its quasi-sovereign interest in the health and well-being of its citizens. *See California v. Health and Human Services*, --- F. Supp. 3d ---, 2017 WL 6524627, at *8–*9 (N.D. Cal. Dec. 21, 2017); *Pennsylvania v. Trump*, --- F. Supp. 3d ---, 2017 WL 6398465, at *6–*8 (E.D. Pa. Dec. 15, 2017). These injuries are more than sufficient to meet the minimum requirements imposed by Article III, which are "related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." *Assoc. of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 151–52 (1970). Moreover, "States are not normal litigants for the purpose of invoking federal jurisdiction," and the Commonwealth is entitled to "special solicitude in [the] standing analysis." *Massachusetts v. EPA*, 549 U.S. 497, 518, 520 (2007); *see also California*, 2017 WL 6524627, at *8; *Pennsylvania*, 2017 WL 6398465, at *5.[4]

A. The IFRs Impose a Procedural Injury on the Commonwealth.

First, the Commonwealth's contention that the Departments failed to engage in notice and comment rulemaking in violation of the APA establishes a procedural injury sufficient for Article III standing. *See California*, 2017 WL 6524627, at *8–9. To demonstrate a cognizable procedural injury, the Commonwealth must show only that the IFRs threaten concrete state interests, and that there is a possibility that the requested relief will relieve that harm. *Id.*; *see Town of Winthrop v. FAA*, 535 F.3d 1, 6 (1st Cir. 2008). The Departments do not dispute the latter factor. And, as argued below, the IFRs will directly harm Massachusetts' economic and quasi-sovereign interests.

[4] In a footnote, the Departments raise questions about the Commonwealth's standing to bring Establishment Clause and equal protection claims in particular. Def. Br. at 10 n. 5. But the APA provides the Commonwealth a right to challenge the IFRs on constitutional grounds. 5 U.S.C. § 706(2)(B). Because the Commonwealth has standing to sue under the APA, *see discussion infra*, it does not need to demonstrate any alternative basis for its standing to pursue its constitutional challenge. *See Scanwell Labs.*, 424 F.3d at 865–66, 872–73 (adversely affected party has standing under APA "regardless of a lack of legal right" under provision to be enforced).

B. The IFRs Cause Financial Harm to the Commonwealth.

Second, the IFRs will impose financial costs on the Commonwealth, and financial harm is the "paradigmatic" Article III injury. *Gianfrecesco v. Town of Wrentham*, 712 F.3d 634, 638 (1st Cir. 2013) (citing *Danvers Motor Co. v. Ford Motor Co.*, 432 F.3d 286, 291 (3d Cir. 2005)); *see also Texas v. United States*, 809 F.3d 134, 155 (5th Cir. 2015) (state has standing to challenge agency action that will impose significant costs). As described in the Commonwealth's Amended Complaint and Memorandum in Support of Its Motion for Summary Judgment, the IFRs will result in thousands of Massachusetts women losing coverage for contraceptive care and services. *See* Pl.'s Br. Summ. J. at 13–14 (Doc. 26) ("Pl. Br."). As a direct result, the Commonwealth will incur significant costs to provide replacement coverage and care for these women through MassHealth, Department of Public Health funded services ("DPH"), and the University of Massachusetts system ("UMass"). *Id*. at 13–15 & n. 15 (direct cost of providing replacement contraceptive coverage and care for women who lose coverage will be between $388,944 and $1,471,680 annually). The Commonwealth will also incur costs associated with the increase in unintended pregnancies and other negative health outcomes that result from reduced use of contraception, at a minimum through MassHealth's wraparound coverage provisions and State-funded clinics. *Id.*

The Departments object that the Commonwealth has not identified by name a Massachusetts employer that will claim an exemption under the IFR. Def. Br. at 11–12. The Commonwealth need not do so. To establish standing, a litigant suing to prevent prospective harm—which is decidedly the case here now that implementation of the IFRs has been preliminarily enjoined—does not need to allege an injury with "exactitude," but must only establish the likelihood that an injury will occur. *See Massachusetts*, 549 U.S. at 522 n. 21 (the "likelihood that [an injury will occur] . . . has nothing to do with whether" a plaintiff can set forth

the "exact metes and bounds" of that injury); *Pennsylvania*, 2017 WL 6398465, at *7 ("[T]he plaintiff must show that he is 'likely to suffer future injury' from the defendants' conduct." (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983))). Here, the Departments have made it "nearly impossible" to identify whether specific employers have claimed (or will claim) an exemption by eliminating the notification requirements included in prior regulations. *Pennsylvania*, 2017 WL 6398465, at *3, *19 n. 16. However, the Departments cannot dispute that Massachusetts women will lose contraceptive coverage as a result of the IFRs. In the IFRs, the Departments calculate that between 31,715 and 120,015 women who are currently using contraception will lose their employer-sponsored coverage—and this is likely a significant underestimate.[5] 82 Fed. Reg. 47792, 47823 (Oct. 6, 2017); 82 Fed. Reg. 47838, 47858 (Oct. 6, 2017); *see also Pennsylvania*, 2017 WL 6398465, at *19 (actual number of women losing coverage is likely "significantly higher" than estimated in IFRs). The Departments have provided no reason to doubt that a proportionate number of these women will reside in Massachusetts.[6] In other words, the Departments' own calculations establish that, *at a minimum*,[7] between 666 and 2,520

[5] The Departments likely underestimate both the number of people who will lose coverage as a result of the IFRs, Pl. Br. at 10 n. 11, and the percentage of those who lose coverage who are women of childbearing age who use contraception. For example, as to the latter point, the Departments assume that the percentage of people covered by employer-sponsored plans who are women of childbearing age is equal to the percentage of the general population who are women of childbearing age. 82 Fed. Reg. at 47,819, 47,821. This assumption is incorrect. According to 2015 American Community Survey data, women of childbearing age are overrepresented in the pool of people receiving employer sponsored insurance relative to the general population (22.3% to 20.5%). This is attributable in part to the fact that most children and elderly Americans—who are by definition not women of childbearing age—are insured through Medicaid, Medicare, or other non-employer based programs. *See, e.g.*, Kaiser Family Foundation, *Health Insurance Status: Coverage of Children 0-18*, https://www.kff.org/other/state-indicator/children-0-18/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D (showing that only 49% of children are covered by employer-sponsored plans).

[6] Thus, if anything, it is the Departments who engage in unfounded speculation in suggesting that Massachusetts employers with objections to contraception will for some reason *not* claim an exemption under the IFRs.

[7] Both the Departments' lower and upper bound estimates are based on assumptions designed to minimize the impact of the IFRs. *See* Pl. Br. at 10 n. 11. With respect to the upper bound estimate, it is

Massachusetts women will likely lose coverage. *See also* Dutton Decl. ¶ 27 (IFRs will likely result in Massachusetts women losing contraceptive coverage).

The Departments also contend that it is speculative to assume that women who lose coverage will make use of state-funded programs. Again, the IFRs indicate otherwise. *See Pennsylvania*, 2017 WL 6398465, at *7, *19. There, the Departments rely upon the fact that women who lose employer-sponsored coverage will be able to receive "free or subsidized care" through, among other things, state-funded programs in order to downplay the impact the IFRs will have on individuals and families.[8] *See* 82 Fed. Reg. at 47803; *see also Pennsylvania*, 2017 WL 6398465, at *7, 18–19. The Departments' attempt to disclaim this position set forth in the administrative record is unavailing—particularly given the evidence submitted by the Commonwealth. The declarations establish that a significant percentage of Massachusetts women who lose employer-sponsored coverage will be eligible to receive "free or subsidized care" through MassHealth, DPH, and UMass, *see* Frost Decl. ¶¶ 6–8 (approximately 25% of Massachusetts women are income eligible for state-funded programs despite being employed or receiving employer-sponsored-coverage); and that the Commonwealth's experience with this issue indicates that these women will, in fact, avail themselves of state-funded programs to fill gaps in coverage caused by the IFRs, *see* Boyle Decl. ¶ 4 (MassHealth already provides supplemental coverage to 150,000 residents who have commercial insurance); Childs-Roshak Decl. ¶¶ 12–14, 18–19 (women who lose coverage as a result of the IFRs "will seek care" through state-funded programs);

derived, in part, from calculations based on the number of employers that did not provide contraceptive coverage prior to the ACA. The Departments put this figure at 6%; however, as they acknowledge, the survey they base this figure on indicated that only 63% of employers reported providing contraceptive coverage. The remaining 37% either did not provide coverage (6%) or did not know whether their plan provided coverage (31%). *See* 82 Fed. Reg. at 47822 n. 88.

[8] In their brief, the Departments cite to this section of the IFRs to argue that they will have a "limited impact." Def. Br. at 33.

Dutton Decl. ¶¶ 9–11, 28 (medical providers will assist women affected by the IFRs in enrolling in state-funded programs); *see also Autolog Corp. v. Regan*, 731 F.2d 25, 31 (D.C. Cir. 1984) (plaintiff may establish Article III standing through allegation of harm involving a "chain of causation" so long as each link is "plausibl[e]") (internal quotations omitted).

Finally, the Departments argue that the cost of providing replacement coverage and care is not a cognizable harm because it amounts to "damage inflicted by the [Commonwealth's] own hand." Def. Br. at 12. By this, the Departments mean that, because the Massachusetts Legislature could, in theory, change Massachusetts law to avoid the costs imposed by the IFRs, those costs do not constitute an injury for the purpose of Article III. The Departments are incorrect on both the facts and the law. First, it is *federal* law that requires the Commonwealth to provide coverage for family planning services through MassHealth. *See* Boyle Decl. ¶ 4; 42 U.S.C. § 1396d(a)(4)(C) (family planning is a "mandatory" benefit under Medicaid). Second, changes in federal regulations that force States to choose between incurring costs and altering established laws or programs impose a cognizable harm. *See Texas*, 809 F.3d at 156–57. If this were not the case, States would be "deprive[d] of judicial recourse for many *bona fide* harms," and particularly economic harms, since most financial losses can be avoided by changing state law, or offset by increasing taxes. *Id.* This is not a situation, as the Departments imply, where the Commonwealth has contrived an artificial injury to claim standing. *See, e.g.*, *Pennsylvania v. New Jersey*, 426 U.S. 660 (1976) (state could not complain of the costs of a program that provided tax credits to residents for taxes paid to other states); *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 269 (4th Cir. 2011) (distinguishing between conflicts between federal law and state laws that "provide for the administration of a state program" and conflicts created by state laws passed to manufacture standing). The fact that the Commonwealth has sued to redress harm caused by a unilateral and

"significant change in the defendants' policies shows that its injury is not self-inflicted." *Texas*, 809 F.3d at 158; *see also Wyoming v. Oklahoma*, 502 U.S. 437, 447–48 (1992) (Wyoming had standing to sue Oklahoma based upon a change in an Oklahoma statute that resulted in a decrease in Wyoming tax revenue from coal mining).

C. The IFRs Harm the Commonwealth's Quasi-Sovereign Interests.

The Commonwealth also has standing to sue because of the threat posed by the IFRs to its quasi-sovereign interests in the "health and well-being—both physical and economic—of its residents" and in "securing its residents from the harmful effects of discrimination." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607, 609 (1982). The medical research underpinning the contraception mandate establishes that access to affordable contraception is critical to the health and well-being—both physical and economic[9]—of women and their families. Pl. Br. 3–4; Dutton Decl. ¶¶ 12–23; *see also Pennsylvania*, 2017 WL 6398465, at *19–20. And as the Departments have repeatedly acknowledged, there is no substitute for the comprehensive, "seamless," no-cost contraceptive coverage required by the ACA.[10] *See* Dutton Decl. ¶¶ 27–30

[9] Access to contraception improves women's ability to choose their own path, including if and how they pursue educational and employment opportunities that can result in, among other benefits, significantly increased lifetime earnings. *See* A. Sonfield et al., *The Social and Economic Benefits of Women's Ability to Determine Whether and When to Have Children*, Guttmacher Institute, at 7, 11–12 (Mar. 2013), https://www.guttmacher.org/sites/default/files/report_pdf/social-economic-benefits.pdf; Joint Economic Committee, *The Economic Benefits of Access to Family Planning* (2015).

[10] When cost is not a factor, women choose more effective and reliable methods of contraception. *See* L. Sobel et al., *The Future of Contraceptive Coverage*, The Henry J. Kaiser Family Foundation (Jan. 2017), https://ww.kff.org/womens-health-policy/issue-brief/the-future-of-contraceptive-coverage/. However, absent comprehensive affordable coverage, many forms of contraception, such as IUDs which have upfront costs in excess of $1,000, are prohibitively expensive. In fact, many women report that they would be unable to cover the cost of even less expensive methods of contraception if not covered by insurance. *See* 82 Fed. Reg. at 47821, 47858 (less expensive methods of contraception cost about $600 per year); B. DiJulio et al. *Data Note: American Challenges with Health Care Costs*, The Henry J. Kaiser Family Foundation (Mar. 2017), https://www.kff.org/health-costs/poll-finding/data-note-americans-challenges-with-health-care-costs/ (approximately one-third of uninsured and lower-income people would be unable to pay for an unexpected $500 in medical expenses). Women with more limited contraception options—whether because of cost or other restrictions—are more likely to be dissatisfied with their method of contraception, are thus less likely to use contraceptives consistently, and are more likely to

(not all women who lose coverage will be protected by Massachusetts law and state-funded programs; even small obstacles deter use of contraception). The new exemptions created by the IFRs will have predictable results: "access to no cost-contraceptive services for many women will be curtailed," leading to an increase in unintended pregnancies and other negative outcomes—in terms of health, finances, and equality—for women and their families. *Pennsylvania*, 2017 WL 6398465, at *19; *see also* Childs-Roshak Decl. ¶¶ 20–26; Dutton Decl. ¶¶ 12–30. And as a direct result, the Commonwealth will be forced "to expend more funds to protect its quasi-sovereign interest[s] in ensuring women residents receive adequate contraceptive care." *Pennsylvania*, 2017 WL 6398465, at *19.

The Departments contest this claim, relying on *Massachusetts v. Mellon*, 262 U.S. 447 (1923), for the proposition that the Commonwealth cannot assert a quasi-sovereign interest against the federal government. The Supreme Court, however, has rejected this interpretation of *Mellon*. In *Massachusetts v. EPA*, the dissent raised the same language from *Mellon* cited by the Departments to argue that a State could not rely on injuries to its quasi-sovereign interests to establish its standing to sue a federal agency. *See Massachusetts*, 549 U.S. at 539 (Roberts, C.J., dissenting) ("[W]hile a state might assert a quasi-sovereign right as *parens patriae* for the protection of its citizens [against a private party], it is no part of its duty or power to enforce their rights in respect of their relations with the Federal government.") (internal quotations omitted). The opinion for the Court rejected this position, stressing that *Mellon* did not address "quasi-sovereign rights," which belong to the States directly and not to their citizens. *Massachusetts*, 549

experience unintended pregnancies and other negative health effects. *See* Guttmacher Institute, *Improving Contraceptive Use in the United States*, at 4–5 (May 2008), https://www.guttmacher.org/sites/default/files/report_pdf/improvingcontraceptiveuse_0.pdf.

U.S. at 520 n. 17 (quoting *Mellon*, 262 U.S. at 484–85).[11] In this case, the Commonwealth is seeking to do no more than what the Supreme Court permitted in *Massachusetts v. EPA*: to assert its right under a federal statute—the APA—to challenge the actions of an administrative agency that has harmed its quasi-sovereign (and proprietary) interests by violating federal law. *Id.*

II. The Departments Violated the Administrative Procedure Act by Issuing the IFRs Without Notice and Comment Rulemaking.

The Departments' promulgation of the IFRs without notice and comment rulemaking violated the procedural requirements of the APA, 5 U.S.C. § 553. Indeed, two courts have granted preliminary injunctions temporarily barring implementation of the IFRs after concluding that the Departments lacked statutory authority or good cause to forgo notice and comment. *See California*, 2017 WL 6524627, at *11–15; *Pennsylvania*, 2017 WL 6398465, at *9–14.

No statute authorizes the Departments' noncompliance with the APA's notice and comment requirement. Under 5 U.S.C. § 559, an agency may only bypass that requirement "when a subsequent statute 'plainly expresses a congressional intent to depart from normal APA procedures.'" *Lake Carriers' Ass'n v. EPA*, 652 F.3d 1, 6 (D.C. Cir. 2011) (quoting *Asiana Airlines v. FAA*, 134 F.3d 393, 398 (D.C. Cir. 1998)); *see* 5 U.S.C. § 559 (a "[s]ubsequent statute may not be held to supersede or modify" notice and comment provisions "except to the extent that it does so expressly"). Courts have uniformly concluded that the general grants of rulemaking authority relied on by the Departments here[12] do not supply the plain statement necessary to supersede the APA's notice and comment provisions. *See California*, 2017 WL 6524627, at *12–*13; *Pennsylvania*, 2017 WL 6398465, at *10; *Geneva Coll. v. Sebelius*, 929 F. Supp. 2d 402, 444

[11] Moreover, *Mellon* precludes States from suing as *parens patriae* only to prevent the application of federal law to their citizens. *See Massachusetts v. EPA*, 549 U.S. at 520 n. 17. Here, the Commonwealth is suing based upon the Departments' violation of federal law; it is seeking to vindicate, not avoid or resist, the rights Congress has afforded to Massachusetts residents.

[12] *See* 29 U.S.C. § 1191c; 26 U.S.C. § 9833; 42 U.S.C. § 300gg-92.

(W.D. Pa. 2013); *Coalition for Parity, Inc. v. Sebelius*, 709 F. Supp. 2d 10, 18–19 (D.D.C. 2010).[13] The two cases cited by the Departments—*Asiana Airlines*, 134 F.3d at 397–98, and *Methodist Hospital of Sacramento v. Shalala*, 38 F.3d 1225, 1237 (D.C. Cir. 1994)—only undermine their claim of authority. The statutory language at issue in both cases was mandatory, using the term "shall" and expressly directing agencies to issue interim final rules by prescribed deadlines. *See Asiana Airlines*, 134 F.3d at 397–98; *Methodist Hosp.*, 38 F.3d at 1237; *Pennsylvania*, 2017 WL 6398465, at *10 & n. 7. The permissive language the Departments rely on here, which uses the word "may," is not comparable and does not mandate "procedures so clearly different from those required by the APA that [Congress] must have intended to displace the norm." *Asiana Airlines*, 134 F.3d at 397.

Nor does the APA's good cause exception excuse the Departments' noncompliance with notice and comment procedures. The Departments do not even recognize—much less argue that they satisfy—the First Circuit's stringent standards for when the good cause exception may be invoked. *See Levesque v. Block*, 723 F.2d 175, 184–85 (1st Cir. 1983) (providing standards); *Kollett v. Harris*, 619 F.2d 134, 145 (1st Cir. 1980) (good cause exception is "narrowly construed"). The First Circuit has made clear that "any time one can expect real interest from the public in the content of the proposed regulation, notice-and-comment rulemaking will not be contrary to the public interest." *Levesque*, 723 F.2d at 185. The Departments do not argue a lack of interest in the substance of the IFRs; on the contrary, they highlight the volume of comments

[13] The Departments cite *Real Alternatives v. Burwell*, 150 F. Supp. 3d 419 (M.D. Pa. 2015), for the proposition that "APA notice-and-comment requirements did not apply to" a prior rule "issued under this specific statutory authority." Def. Br. at 14. But the cited material is simply a quotation, in the court's factual background section, of the Departments' *own determination* that they were authorized to bypass the APA; the case itself did not address the question of whether bypassing notice and comment was appropriate under the APA, an issue not raised by the plaintiffs there. *See* 150 F. Supp. 3d at 427 n. 6 (quoting 76 Fed. Reg. 46621, 46624 (Aug. 3, 2011)); *see also id.* at 443 (summarizing plaintiff's APA arguments).

on prior versions of the rules. Def. Br. at 17. The other considerations they mention—their desire to provide relief to employers with religious and moral objections to contraception; their purported interest in resolving litigation; and the order of one court after *Zubik* requiring the Departments to state their position, *see* Def. Br. at 16—are irrelevant to the public interest component of the First Circuit's narrow good cause exception. Moreover, each is self-evidently insufficient to establish that notice and comment would have been contrary to the public interest under any standard. Whatever relief the IFRs provide to objecting employers, the women who will lose contraceptive coverage, together with the States whose finances are impacted by the new exemptions, were certainly entitled to comment; and the IFRs, which predictably and immediately spurred a new round of lawsuits that seek to protect the public fisc and to prevent harm to those women, failed to resolve litigation over the contraception mandate.

The Departments no longer argue that notice and comment would have been "impracticable." *See* Def. Br. at 15–18. Instead, they argue that the "combined effect" of other considerations amounts to good cause. *Id.* at 18. But none of these considerations is relevant, *see Levesque*, 723 F.2d at 184–85, and even if they were, they do not excuse the Departments' non-compliance with the APA. The Departments first contend that because they received hundreds of thousands of comments on prior versions of the regulations, they did not need to solicit comments on new versions of the regulations. Def. Br. at 16–17. But the IFRs adopted vastly different policies than had previously been proposed or contemplated; among other things, they created new exemptions for publicly traded corporations with religious objections to contraception and for employers with moral objections to contraception, and they made the Accommodation optional. *See* Pl. Br. at 9. The public had no prior notice of these changes, which "represent a direct repudiation of Defendants' prior well-documented and well-substantiated public positions."

California, 2017 WL 6524627, at *14. Moreover, if solicitation of comments on prior versions of a regulation could satisfy the APA, agencies would never have to engage in notice and comment rulemaking when they modify, reconsider, or reverse a preexisting rule. That is obviously not the system Congress intended or required in the APA. *See* 5 U.S.C. § 553(b), (c).

Second, the Departments contend that because they accepted comments for 60 days after the IFRs became effective, they have an open mind about the rules. Def. Br. at 17. Their own actions undermine this claim: shortly after the rules became effective, a division of HHS "issued guidance for the implementation of the 2017 IFRs" and the Departments stipulated to dismiss cases remanded by *Zubik* in light of the IFRs. *California*, 2017 WL 6524627, at *14 ("[T]he issuance of this guidance, *before* the end of the post-promulgation comment period, suggests that it does not appear that the Defendants expect public comment to inform implementation." (internal quotation marks omitted)).[14] In any event, it is "antithetical to the structure and purpose of the APA for an agency to implement a rule first, and then seek comment later." *Paulson v. Daniels*, 413 F.3d 999, 1005 (9th Cir. 2005); *see also California*, 2017 WL 6524627, at *14; *Pennsylvania*, 2017 WL 6398465, at *13 ("permitting post-issuance commentary *carte blanche* would write the notice and comment requirements out of the APA").

The Departments' failure to comply with the APA was not harmless error. In general, "an utter failure to comply with notice and comment cannot be considered harmless if there is any uncertainty at all as to the effect of that failure." *Sugar Cane Growers Cooperative of Fla. v.*

[14] *See e.g.*, Motion for Voluntary Dismissal, *Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs.*, 778 F.3d 422 (3d Cir. 2015) (Nos. 13-3536 & 14-1374); Joint Stipulation of Dismissal of Appeal, *Priests For Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229 (D.C. Cir. 2014) (No. 13-5368); Joint Stipulation of Dismissal of Appeal, *Roman Catholic Archbishop of Washington v. Burwell*, Nos. 13-5371 & 14-5021 (D.C. Cir. Oct. 16, 2017); Motion for Voluntary Dismissal, *Southern Nazarene University v. Burwell*, No. 14-6026 (10th Cir. Oct. 6, 2017); Joint Stipulation of Voluntary Dismissal in Nos. 14-1376 & 14-1377, *Zubik v. Burwell*, Nos. 14-1376 & 14-1377 (3d Cir. Oct. 6, 2017).

Veneman, 289 F.3d 89, 96 (D.C. Cir. 2002). Here, the Departments would have benefitted from the Commonwealth's views on the rules. The Departments claim that Massachusetts "does not allege any specific comments that it would have submitted on the Rules," Def. Br. at 18, but on December 5, 2017, Massachusetts *did* submit a comment that highlighted the IFRs' legal infirmities and explained how the "IFRs will harm women and children, and the public health in general, and result in significant financial and administrative burdens to the States." *See* Crossnoe Decl. Ex. A. The Departments' acceptance of comments *after* issuance of the IFRs cannot, however, cure their failure to incorporate public comment *before* the IFRs became effective; if that were the rule, "section 553 obviously would be eviscerated." *Sugar Cane Growers*, 289 F.3d at 96; *see also State of N.J. Dep't of Envtl. Prot. Agency v. EPA*, 626 F.2d 1038, 1049 (D.C. Cir. 1980) (APA provides right to notice and comment at an "early stage" of the rulemaking process when agencies will give "real consideration to alternative ideas"); *Pennsylvania*, 2017 WL 6398465, at *13 ("Post-issuance commentary does not ameliorate the need for notice and comment because by the time agencies issue interim rules, they are less likely to heed public input."). Nor can comments on prior versions of the regulations excuse the failure to accept public comment before promulgating the IFRs; as discussed, key provisions of the IFRs were not previously proposed and therefore could not have been anticipated or addressed by earlier comments. *See supra*, at 12; *California*, 2017 WL 6524627, at *14 (acceptance of comments on prior rules "does not render harmless *this* procedural error, regarding *these* IFRs" if only because of "substantial differences [from] previous iterations").

The Departments cite *Conservation Law Foundation v. Evans*, 360 F.3d 21 (1st Cir. 2004), in support of their claim of harmless error, *see* Def. Br. at 18, but in that case "the omission of a formal public comment period clearly had no bearing on the procedure used or the substance of

[the] decision reached." *Evans*, 360 F.3d at 29 (internal quotation marks omitted). Before promulgating rules without a formal comment period, the agency in *Evans* had held 14 public meetings and accepted written and oral comments, including from the plaintiffs, before and during the meetings. *Id.* at 29–30. In contrast, the Departments held no public hearings and accepted no comments before issuing the IFRs. It is therefore implausible to suggest that public comment would have had no effect on the substance of the rules. The Departments' procedural APA violation was not harmless. *See California*, 2017 WL 6524627, at *15; *Pennsylvania*, 2017 WL 6398465, at *14 n. 11.

III. The Departments Had No Authority to Create Broad New Exemptions from the Affordable Care Act's Contraception Mandate.

The IFRs must also be set aside because they exceed the Departments' authority under the ACA and are not compelled or authorized by the Religious Freedom Restoration Act ("RFRA").[15]

A. The ACA Gives the Departments No Discretion to Create Exemptions from the Contraception Mandate.

The plain text of the Women's Health Amendment, Section 2713(a)(4) of the ACA, 42 U.S.C. § 300gg-13(a)(4), requires employer-sponsored group health plans to provide cost-free coverage for the preventative care services, including contraceptive care, included in the Health

[15] Notably, the Departments raise no argument that the Commonwealth fails to satisfy the "zone of interests" test to assert claims under the APA. *See Texas v. United States*, 787 F.3d 733, 754 (5th Cir. 2015). This is neither a standing nor a jurisdictional issue and can be waived. *See Lexmark Int'l Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 & n. 3–4 (2014); *Hispanic Affairs Project v. Perez*, 206 F. Supp. 3d 348, 367 (D.D.C. 2016). The Departments forgo this argument for good reason: the zone-of-interests test is "not meant to be especially demanding," and must be applied in light of Congress's intent to make agency action broadly and presumptively reviewable. *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 399 (1987). Here, the Commonwealth is a "suitable challenger" to the Departments' actions, *Scheduled Airlines Traffic Offices, Inc. v. Dept. of Defense*, 87 F.3d 1356, 1359 (D.C. Cir. 1996), because it will be economically harmed by the IFRs. *See Assoc. of Data Processing*, 397 U.S. at 154 ("Certainly he who is likely to be financially injured may be a reliable private attorney general to litigate issues of public interest [under the APA]"); *Amgen v. Smith*, 357 U.S. 103, 109 (2004) ("Parties motivated by purely [economic] interests routinely satisfy the zone of interest test").

Resources and Services Administration's ("HRSA") Women's Preventative Services Guidelines. While the statute unquestionably delegates HRSA authority to determine *what* preventative care services are covered, it mandates that employer health plans cover those services once they are included in the Guidelines. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2762 (2014) (the "ACA *requires* an employer's group health plan or group-health-insurance coverage to furnish [those] 'preventative care and screenings' for women without 'any cost sharing requirements'" (quoting 42 U.S.C. § 300gg-13(a)(4)) (emphasis added)).

The statute's text makes clear that the Departments lack the "discretion" they claim "to exempt entities from coverage requirements announced in HRSA's Guidelines." 82 Fed. Reg. at 47794. The ACA's use of the word "shall"—twice—is powerful evidence that Congress gave the Departments no discretion to create the expanded exemptions. *See* 42 U.S.C. § 300gg-13(a)(4). The statute directs that employer-sponsored group health plans "s*hall*, at a minimum provide coverage for and *shall not* impose any cost sharing requirements for . . . with respect to women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the [HRSA] for purposes of this paragraph." *Id.* (emphasis added). "'[S]hall' is the language of command," *Moon v. U.S. Dep't of Labor*, 727 F.2d 1315, 1319 (D.C. Cir. 1984), and "indicates the absence of discretion." *LO Shippers Action Comm. v. Interstate Commerce Comm'n*, 857 F.2d 802, 806 (D.C. Cir. 1988); *see also Claudio-De Leon v. Sistema Universitario Ana G. Mendez*, 775 F.3d 41, 46 (1st Cir. 2014) ("[I]t is axiomatic that the word 'shall' has a mandatory connotation."). While the term "'may' confers discretion," the term "'shall' imposes an obligation." *Int'l Union, UAW v. Dole*, 919 F.2d 753, 756 (D.C. Cir. 1990) (citing *Haig v. Agee*, 453 U.S. 280, 294 (1981)); *see also Ass'n of Civilian Technicians, Montana Air Chapter No. 29 v. Fed. Labor Relations Auth.*, 22 F.3d 1150, 1153 (D.C. Cir. 1994) ("The word 'shall' generally

indicates a command that admits of no discretion."). Thus, the U.S. District Court for the Eastern District of Pennsylvania recently concluded that "the mandatory language 'shall'" indicates that "no exemptions created by HHS are permissible (unless they are required by RFRA)." *Pennsylvania*, 2017 WL 6398465, at *16.[16]

The Departments have no answer to this plain language. Nor do they dispute the other aspects of the statute, discussed in the Commonwealth's brief, that confirm their lack of discretion. *See* Pl. Br. at 23–27. Specifically, they do not dispute that the exemption for employers with grandfathered health plans is the only exemption from the preventative services requirement. *See* 42 U.S.C. § 18011(e). They claim that the grandfather exemption "demonstrates that Congress did not intend absolutely uniform minimum coverage across employers," Def. Br. at 24, but that is precisely the point. Congress did not intend grandfathered plans to be subject to the contraception mandate and so explicitly exempted them. "[T]he proper inference . . . is that Congress considered the issue of exceptions and, in the end, limited the statute to the on[e] set forth." *United States v. Johnson*, 529 U.S. 53, 58 (2000). Nor do the Departments dispute that the statutory term "additional" in section 2713(a)(4) indicates that Congress empowered HRSA only to decide what additional types of preventative care services to include in the Guidelines; that HRSA has no expertise in creating employer-based exemptions from essential health services for women; that the statutory term "for purposes of this paragraph" requires the Departments to honor the purpose of the Women's Health Amendment; or that Congress did not include moral or religious exemptions in the ACA as enacted and subsequently rejected a proposed "conscience amendment" that would have accomplished precisely what the Departments seek to do in the IFRs. *See* Pl. Br. at 23–27.

[16] Confirming the point, the term the Departments themselves use—the "contraceptive mandate"—suggests that it is just that: a mandate. 82 Fed. Reg. at 47793.

The Departments identify only two textual considerations that, they contend, support their claim of authority to create exemptions from the contraception mandate. First, they point out that while the preventative services requirement for children requires coverage of "evidence-informed preventative care and screenings *provided for* in the comprehensive guidelines supported by" HRSA, 42 U.S.C. § 300gg-13(a)(3) (emphasis added), the preventative services requirement for women requires coverage of "such additional preventive care and screenings not described in paragraph (1) *as provided for* in comprehensive guidelines supported by the [HRSA] for purposes of this paragraph," *id.* § 300gg-13(a)(4) (emphasis added). The use of the word "as" in the women's provision, the Departments contend, suggests that Congress gave them authority to exempt employers from the requirement. Def. Br. at 21. It is not at all clear how the Departments derive this meaning from the word "as," but in any event, the use of the word "as" in the women's requirement has an obvious explanation. As the Departments themselves explain, when the ACA was enacted, the children's preventative services guidelines were in existence, while the women's guidelines were not. Def. Br. at 20. The word "as" was used "in anticipation of HRSA issuing guidelines" for women. *Pennsylvania*, 2017 WL 6398465, at *17. Everyone agrees that Congress gave the Departments authority to issue guidelines on *what* preventative services must be covered for women, but there is no conceivable way to construe the word "as" to confer additional authority to exempt employers from the statutory mandate.

Second, the Departments point out that adjacent preventative services requirements use the terms "evidence-based" or "evidence-informed," while the women's preventative services requirement does not. *Compare* 42 U.S.C. §§ 300gg-13(a)(1) and (3), with *id.* § 300gg-13(a)(4). From this, the Departments contend that Congress empowered them to develop the Women's Guidelines in light of policy-based concerns. Def. Br. at 22. Even if that were true, at most it would

allow them to consider non-evidence-based factors in determining *what* preventative services for women must be covered. It cannot reasonably be construed to authorize the Departments to create out of whole cloth new exemptions to the Guidelines, particularly in light of the clear statutory command that the services identified in the Guidelines "shall" be covered by employers' plans. *See Public Citizen v. FTC*, 869 F.2d 1541, 1556–57 (D.C. Cir. 1989) ("there exists no general administrative power to create exemptions to statutory requirements based upon the agency's perception of costs and benefits" (internal quotation marks omitted)).

Because the text of the ACA is clear, the Departments had no authority to create the exemptions in the IFRs, and their interpretation of Section 2713(a)(4) is not entitled to deference under *Chevron, USA, Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837 (1984).

B. The IFRs Are Not Required or Authorized by RFRA.

The IFRs must also be set aside because they are not compelled by RFRA. Indeed, the Departments concede that the Moral IFR cannot be justified by RFRA. Def. Br. at 30, 34. Similarly, RFRA gives the Departments no basis for creating the expanded exemptions in the Religious IFR because the Accommodation already satisfies RFRA, and because the exemptions created by the Religious IFR do not "ensur[e] that women covered by [employer-sponsored] health plans receive full and equal health coverage, including contraception coverage." *Zubik*, 136 S. Ct. at 1560 (internal quotation marks omitted).

The Departments contend that the Accommodation is inconsistent with RFRA. But their argument elides the distinction between the fact that "certain entities" raised "sincere religious objections" to the Accommodation, Def. Br. at 31–32, 35, and the legally relevant issue of whether the Accommodation imposes a substantial burden on religious exercise. As the Departments previously explained in the Supreme Court, these are separate issues: while courts may not

question the legitimacy of religious beliefs, whether a substantial burden exists is a question to be objectively determined by the courts. *See* Respondents Br. at 33–34, 37, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (No. 14-1418) ("Zubik Br.") (attached at Crossnoe Decl. Ex. B) ("We do not suggest that petitioners' assertion of a substantial burden rests on any theological error or misjudgment, or that their beliefs are not sincerely held. . . . But we cannot agree . . . with petitioners' *legal* contention that their sincere objection establishes a cognizable burden under RFRA."). And as eight Courts of Appeals ruled, as a matter of law, the Accommodation imposes no such burden. *See, e.g.*, *Eternal Word Television Network, Inc. v. Sec'y of HHS*, 818 F.3d 1122, 1142,1144–47 (11th Cir. 2016) ("We conclude that it is for the courts to determine objectively what the regulations require and whether the government has, in fact, put plaintiffs to the choice of violating their religious beliefs.").[17]

The only requirement the Accommodation imposes on employers is that they provide notice of their religious objection to providing contraceptive coverage. *Id.* at 1148. This requirement—which is common to most if not all accommodations—imposes no burden on religious exercise. *Id*. After notice is provided, the government arranges for third parties to independently provide seamless coverage as required by the ACA and HRSA guidelines. *Id.* at 1149; *see also* Def. Br. at 6 (describing the Accommodation). The Departments repeat the claim that this process makes employers "complicit" in third parties' provision of contraceptive coverage to employees, Def. Br. at 31–32, but RFRA provides no right to object to the independent activities

[17] *See also Mich. Catholic Conf. & Catholic Family Servs. v. Burwell*, 807 F.3d 738, 749–55 (6th Cir. 2015); *Catholic Health Care Sys. v. Burwell*, 796 F.3d 207, 218 (2d Cir. 2015); *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1180 (10th Cir. 2015); *E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449, 463 (5th Cir. 2015); *Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 615 (7th Cir. 2015); *Geneva Coll. v. Sec'y of HHS*, 778 F.3d 422, 442 (3d Cir. 2015); *Priests for Life v. HHS*, 772 F.3d 229, 252 (D.C. Cir. 2014); *Mich. Catholic Conf. & Catholic Family Servs. v. Burwell*, 755 F.3d 372, 390 (6th Cir. 2014); *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 559 (7th Cir. 2014).

of third parties. *See* Zubik Br. at 26, 49–50 ("Petitioners' sincere religious objections to the government's arrangements with third parties do not establish a cognizable burden under RFRA."); *see also Priests for Life v. HHS*, 772 F.3d 229, 246 (D.C. Cir. 2014) ("[Employers] have no RFRA right to be free from the unease, or even anguish, of knowing that third parties are legally privileged or obligated to act in ways their religion abhors.").[18] The Accommodation does not, therefore, impose a substantial burden on employers' religious exercise. *See Pennsylvania*, 2017 WL 6398465, at *17–18.

The Departments also contend that the exemptions created by the Religious IFR are authorized by RFRA even if they are not required or compelled.[19] The argument is similarly meritless. The ACA *requires* that employer-sponsored group health plans ensure women seamless, no-cost access to preventative care services, including contraception. 42 U.S.C. § 300gg-13(a)(4). As explained in the Commonwealth's opening brief, the Departments must "harmonize" the ACA with RFRA in order to honor Congress's intent. *Boston & Maine Corp. v. Mass. Bay Transp. Auth.*, 587 F.3d 89, 98 n. 1 (1st Cir. 2009). The Commonwealth does not contend that the Accommodation is the only means of satisfying this obligation, or that the Departments do not have leeway to take another approach; only that the expanded exemptions created by the Religious IFR go too far and are unlawful. Because the Accommodation satisfies RFRA, the Departments do not have authority to impose broader exemptions that negate the rights Congress guaranteed to women through the ACA. Pl. Br. at 29–33. Such an approach does not harmonize the ACA and RFRA, nor does it "take adequate account of the burdens a requested accommodation may impose

[18] As discussed below, *see infra*, at 25–27, such a right to enlist the government in compelling third parties to conform their behavior to the objector's religious beliefs would be inconsistent with the Establishment Clause.

[19] The Departments do not contend that their interpretation and application of RFRA are entitled to *Chevron* deference. *See Pennsylvania*, 2017 WL 6398465, at * 17 n. 15.

on nonbeneficiaries.'" *Hobby Lobby*, 134 S. Ct. at 2781 n. 37 (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005)); *see also id.* at 2786–87 (Kennedy, J., concurring) (an agency may not, consistent with RFRA, "unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling"). Under the Accommodation, women retain seamless access to contraceptive coverage, but under the IFR's expanded exemptions, women lose contraceptive coverage altogether. In putting the Departments' thumb entirely on the scale in favor of employers' religious interests, the Departments have gone far beyond what RFRA authorizes and what *Zubik* required. The IFR must be set aside.

Finally, the Departments incorrectly assert that if this Court rules that the Religious IFR is unlawful, it will threaten the Church Exemption. It bears emphasizing that that the Commonwealth does not challenge the validity of the Church Exemption. Thus, to the extent this Court concludes that the plain language of Section 2713(a)(4) forbids the exemptions created by the IFR, that decision will not affect the Church Exemption. Nor does the logic of the Commonwealth's position threaten the validity of the Church Exemption. The Church Exemption is required by RFRA and the First Amendment, 77 Fed. Reg. 8725, 8729 (Feb. 15, 2012), because of the "particular sphere of autonomy" that permits churches to manage their affairs free from government interference. 80 Fed. Reg. 41318, 41325 (July 14, 2015); *see also Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 189 (2012) (churches must be given "special solicitude"); *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713 (1976) (noting the "constitutional mandate that civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law"). Non-church employers do not enjoy the same "special solicitude" and are not entitled to the same exemptions as houses of worship. *Real Alternatives*,

Inc. v. Sec'y of HHS, 867 F.3d 338, 350–53 (3d Cir. 2017). The Departments maintained this exact position for years and defended it in the Supreme Court. *See, e.g.*, Zubik Br. at 69–70. It is perfectly consistent to recognize that an exemption from the contraception mandate must be accorded to houses of worship, but that the Accommodation comports with RFRA as it applies to other entities that do not enjoy special solicitude under the First Amendment. *See Pennsylvania*, 2017 WL 6398465, at *18.

IV. The Expanded Exemptions Created by the Religious IFR Violate the Establishment Clause.

The Departments contend that the expanded exemptions created by the Religious IFR are constitutional because they have the purpose and effect of lifting a burden on employers' religious exercise.[20] Def. Br. at 39. The argument is unfounded.[21] The Departments neither accurately describe what the IFR does, nor account for the burdens it imposes on employees, their dependents, and the Commonwealth. *See Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005) ("[A]n accommodation must be measured so that it does not override other significant interests.").

Through the Religious IFR, the Departments have replaced a balanced regulatory system that imposed no "cognizable burden on the . . . exercise of religion," *see* Zubik Br. at 34–53, with

[20] The Departments do not argue that the exemptions are required by the Free Exercise Clause. The principle on which they rely, that the government may voluntarily "accommodate the practice of religious beliefs" in certain situations, Def. Br. at 39, "does not supersede the fundamental limitations imposed by the Establishment Clause." *Lee v. Weisman*, 505 U.S. 577, 587 (1992).

[21] Despite the Departments' contention, see Def. Br. at 10 n. 5, the Commonwealth's asserted interests in this case are "sufficiently congruent" with those protected by the First and Fifth Amendments to permit it to proceed with its APA constitutional challenge. *Scheduled Airlines*, 87 F.3d at 1359 (zone of interest test bars only claims that are "more likely to frustrate than further . . . [constitutional] objectives"); *see also Assoc. Data Processing*, 397 U.S. at 153–54 (APA obviates judicially imposed "rules of self-restraint" and broadens the "class of people who may protest administrative action"); *Clarke*, 479 U.S. at 399 (zone of interests test does not require showing that provision to be enforced was intended to "benefit the would-be plaintiff"); *Nulankeyutmonen Nkihtaqmikon v. Impson*, 503 F.3d 18, 30 (1st Cir. 2007) (zone-of-interests test is satisfied if plaintiff can "demonstrate a plausible relationship between his interest and the policies to be advanced by the" provision to be enforced) (internal quotations omitted).

a set of expanded exemptions that advance religious objections to contraception at the expense of women and other third parties.[22] The Departments contend that the new exemptions allow employers to "declin[e] to provide contraceptive coverage" if doing so would violate their religious beliefs. Def. Br. at 41. But that is precisely what the Accommodation already accomplishes. *See Hobby Lobby*, 134 S. Ct. at 2763 (the Accommodation "effectively exempts" employers from the contraception mandate). The expanded exemptions have a very different purpose: to allow employers to block employees from independently accessing coverage for contraceptive services that employers "believe are sinful." *Priests for Life*, 772 F.3d at 251 (characterizing objections to the Accommodation)[23]; *see also* Def. Br. at 27 ("By extending a broader exemption, the Agencies have effectively provided the relief that [employers sought in

[22] Religious exemptions that impose burdens on non-beneficiaries are justifiable only as necessary to remove a significant imposition on "religious activity sheltered by the First Amendment." *Texas Monthly Inc. v. Bullock*, 489 U.S. 1, 17–19 & n. 8 (1989). As discussed below, the Departments have not identified any such burden imposed by the contraception mandate as modified by the Accommodation. While certain employers may object to the government arranging for employees to receive separate contraceptive coverage through the Accommodation, the Free Exercise Clause affords employers no right to demand that others refrain from engaging in activity that offends their religious beliefs. *See Bowen v. Roy*, 476 U.S. 693, 699–700 (1986); *see also* Zubik Br. at 42–49 (employers' objections to the government arranging for insurance coverage under the Accommodation "do[es] not establish a cognizable burden").

[23] The U.S. Courts of Appeals for the Second, Third, Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits reached identical conclusions concerning the nature of the religious objections the Departments now attempt to advance through the IFR. *See Catholic Health Care Sys.*, 796 F.3d at 223–24 (employers' objections to the Accommodation are a "demand that the Government join in their chosen religious practices by refraining from working with third parties to provide their employees contraceptive coverage"); *Geneva Coll.*, 778 F.3d at 438–39 ("[Employers] real objection is . . . to the actions of the insurance issuers and the third party administrators required by [the Accommodation]."); *E. Texas Baptist Univ.*, 793 F.3d at 459, 461 ("The acts that violate [employers'] faith are the acts of the government, insurers, and third-party administrators…[Employers have no right] to block third parties from engaging in conduct with which they disagree."); *Mich. Catholic Conf.*, 807 F.3d at 752 (employers' objections to the Accommodation are an objection to "the government's imposition of an independent obligation on a third party"); *Grace Schools v. Burwell*, 801 F.3d 788, 797 (7th Cir. 2015) ("[The Schools'] true objection was not to actions that the school itself was required to take but rather to the government's independent actions in mandating contraceptive coverage [through the Accommodation]."); *Little Sisters of the Poor*, 794 F.3d at 1183–84 ("[T]he only harm to [objecting employers] is that they sincerely feel aggrieved by their inability to prevent what other people would do to fulfill [the Accommodation]." (quoting *Priests for Life*, 772 F.3d at 246)); *Eternal Word*, 818 F.3d 1149–50 ("Plaintiffs' challenge is in substance indistinguishable from an objection to the government's requiring another entity to provide coverage.").

Priests for Life and related litigation]."). Granting employers this authority does not lift any burden on their religious exercise, *see Priests for Life*, 772 F.3d at 251, but instead confers official endorsement on their religious beliefs. *See Lee*, 505 U.S. at 629 (Souter, J., concurring) ("Concern for the position of religious individuals in the modern regulatory State cannot justify official solicitude for religious practice unburdened by general rules."). Because of the continued existence of the Accommodation, the expanded exemptions serve no valid secular purpose and have the unconstitutional effect of "subject[ing] . . . employees to the religious views of the[ir] employer." 77 Fed. Reg. at 8728; *see also Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring in the judgment) ("In order to perceive the government action as a permissible accommodation of religion, there must in fact be an identifiable burden *on the exercise of religion* that can be said to be lifted by the government action." (emphasis in original)).

The Departments' contention that the exemptions merely serve to lift a burden on religious exercise is further belied by their expansive scope. The Departments have explained that they created the Religious IFR to respond to objections to the Accommodation raised by "certain entities" in connection with the *Zubik* litigation. Def. Br. at 31. But the exemptions do not in fact respond to these objections: the Departments did not create limited exemptions available only to those "certain entities" that allege sincere religious objections to the Accommodation, but instead created sweeping exemptions available to *all* employers regardless of whether they have any religious objection to the Accommodation. *See* 82 Fed. Reg. at 47792. For example, under the Religious IFR, employers may claim an exemption—rather than the Accommodation—solely and explicitly to deter access to contraceptive services. The Departments' decision to delegate such gratuitous and "explicitly religious" control over access to a statutory benefit only underlines the

fact that, far from seeking to accommodate religious exercise, they are actually advancing and promoting religious objections to contraception. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 125–26 (1982); *see also Lee*, 505 U.S. at 629 (Souter, J., concurring).

The Departments cannot salvage the Religious IFR by pointing to the Moral IFR. The Establishment Clause prohibits the Departments from advancing religious interests regardless of whether they also confer benefits on secular entities. *See Larkin*, 459 U.S. at 123–24 (law granting churches and schools identical control over liquor license applications violated the Establishment Clause); *see also Wallace v. Jaffree*, 472 U.S. 38, 59 (1985) (law authorizing "period of silence for mediation or voluntary prayer" violated the Establishment Clause). The Departments contend that the existence of the Moral IFR at least indicates that the exemptions created by the Religious IFR have a secular purpose. Def. Br. at 39–40. Not so. To pass constitutional scrutiny, the exemptions themselves must actually serve a "valid secular purpose." *Edwards v. Aguillard*, 482 U.S. 578, 598 (1987) (Powell, J., concurring); *see also Weisman v. Lee*, 908 F.2d 1090, 1094 (1st Cir. 1990), *aff'd*, 505 U.S. 577 (Bownes, J., concurring) ("The question is not whether there is or could be any secular purpose, but whether the actual predominant purpose is to endorse religion."). As discussed, the Departments' alleged secular purpose—to "alleviate significant governmental interference with the exercise of religion," Def. Br. at 40—is already served by the Accommodation. The exemptions therefore fail the purpose prong of the *Lemon* and endorsement tests. *Edwards*, 472 U.S. at 587–88 (no valid secular purpose if alleged purpose is already served by existing law); *Wallace*, 472 U.S. at 59 (accord). And for the same reason, among others, the exemptions also have the effect of endorsing religious interests. *See Larkin*, 459 U.S. at 123–24 ("There can be little doubt that [the law] embraces valid secular legislative purposes. However, these valid secular objectives can be readily accomplished by other means.").

In sum, the Departments have unconstitutionally privileged employers' religious objections to the "independent conduct of third parties," *East Texas Baptist University v. Burwell*, 793 U.S. 449, 459 (5th Cir. 2015), over the health, well-being, and autonomy of employees (and their dependents)[24]—"interests the law deems compelling." *Hobby Lobby*, 134 S. Ct. at 2786–87 (Kennedy, J., concurring). The Departments have provided employers an "absolute and unqualified right" to exempt themselves from the contraception mandate "no matter what burden or inconvenience this imposes on [employees and others]." *Estate of Thornton v. Caldor*, 472 U.S. 703, 709 (1985). While the Departments assert that many women will be able to obtain replacement coverage through a family member's insurance plan, Def. Br. at 11, or state-funded program, 82 Fed. Reg. at 47803, the exemptions are not limited to such situations. More generally, the Religious IFR contains no exception for "special circumstances," *id.* at 709–10—for example, where losing coverage would impose severe health risks on a woman. *See Hobby Lobby*, 134 S. Ct. at 2785–86 (Kennedy, J., concurring) ("There are many medical conditions for which pregnancy is contraindicated."); Dutton Decl. ¶¶ 12–13. Particularly given the availability of the Accommodation as a means of reconciling competing interests, *id.* at 2787, this "unyielding weighting in favor of" employers' religious interests amounts to an endorsement of those interests in violation of the Establishment Clause. *Thornton*, 472 U.S. at 710.

V. The IFRs Violate the Equal Protection Guarantee of the Fifth Amendment.

The IFRs do not provide general religious or moral exemptions to the ACA, but instead

[24] The Departments' claim that the Religious IFR does not impose a burden on employers, Def. Br. at 41, is both correct and entirely beside the point. It is the burden imposed on employees, not employers, that violates the Establishment Clause. Similarly, the Departments' suggestion that the IFR is unproblematic because it permits, rather than compels, employers to exempt themselves from the contraception mandate, thereby imposing burdens on third parties, is inapposite. *See Amos*, 483 U.S. at 340 n. 1 (Brennan, J., concurring) ("The fact that a religious organization is permitted, rather than required, to impose this burden is irrelevant; what is significant is that the burden is the effect of the exemption.").

create selective exemptions to "certain" sections of the Act, Def. Br. at 43, namely the Women's Health Amendment—a provision included in the Act "to ensure that women receive full and equal health coverage appropriate to their medical needs." Zubik Br. at 5. Because the Departments have not provided an "exceedingly persuasive justification" for creating exemptions applicable only to women's medical care, the IFRs are unconstitutional.

The Departments deny that the IFRs are the result of an invidious intent to discriminate against women. Def. Br. at 43. But the Commonwealth does not need to prove any such intent to establish an equal protection violation. "A showing of discriminatory intent is necessary [only] to move a facially neutral law or regulation into a higher tier of scrutiny." *Joyce v. Town of Dennis*, 705 F. Supp. 2d 74, 79 (D. Mass. 2010) (Gorton, J.), *remanded on other grounds*, 720 F.3d 12 (1st Cir. 2013). The IFRs are not facially neutral: by creating exemptions specific to "women's preventive care and screenings," 82 Fed. Reg. at 47794, the Rules overtly single out women for disadvantageous treatment.

The Departments contend that this "sex-based distinction is a function of the [ACA]," and that men receive no better treatment than women under the IFRs. Def. Br. at 43–44. In other words, they argue that because Section 2713 does not require coverage of contraception for men, denying coverage for women does not create an equal protection problem. This argument evinces a deep misunderstanding of the ACA. Prior to the ACA, health insurance coverage for women's preventive care "ha[d] often been modeled on men's health needs and thus left women underinsured." *Priests for Life*, 772 F.3d at 235. Congress included Section 2713(a)(4) in the ACA to remedy those gender-based disparities, requiring coverage for preventive services specific to women in order to guarantee that they received coverage equal to that enjoyed by men. *See* Zubik Br. at 7–8.

The Departments are correct that Section 2713 requires coverage for contraception for women and not men. But this is not the result of women receiving preferential treatment, as the Departments suggest. Def. Br. at 44 (the ACA "does not authorize a male contraceptive services mandate"). Section 2713 requires coverage for preventive medical care and services. Contraception for women is covered as a form of preventive medicine because women face unique risks associated with unintended pregnancy. Institute of Medicine Report (Salera Decl. Ex. C) at 103–04. Although section 2713 requires coverage of preventive services specific to men,[25] contraception for men is not covered because men do not face any medical risks associated with pregnancy. Under the IFRs, then, men continue to enjoy full coverage for preventive care and services. The Departments have, however, made full coverage for women contingent on the religious and moral approval of their employers. This is not equal treatment.

The Departments' only explanation for singling out preventive care for women is that the contraception mandate has been the subject of extensive litigation.[26] Def. Br. at 44. But the Departments' desire to avoid litigation—or at least litigation brought by employers with religious and moral objections to contraception, *see* Def. Br. at 44 n. 16—is not a sufficient justification for gender discrimination. *See* Pl.'s Br. at 40.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the Memorandum in Support of the Commonwealth's Motion for Summary Judgment, the Commonwealth's Motion for Summary

[25] For example, under the guidelines specific to Section 2713(a)(1), abdominal aortic aneurysm screenings for men only are covered as a preventive service. *See* U.S. Preventive Services Task Force, *A and B Recommendations*, https://www.uspreventiveservicestaskforce.org/Page/Name/uspstf-a-and-b-recommendations/.

[26] The Departments do not attempt to differentiate between religious and moral objections to contraception and religious and moral objections to other preventive services covered by Section 2713, as well as additional provisions of the ACA.

Judgment should be granted and the Defendants' Motion to Dismiss or Cross-Motion for Summary Judgment should be denied.

Respectfully submitted,

COMMONWEALTH OF MASSACHUSETTS,

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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 January 19, 2018.

/s/ Julia Kobick
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