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 **MOTION TO INTERVENE BY DORDT COLLEGE AND MARCH FOR LIFE EDUCATION AND DEFENSE FUND**

MOTION TO INTERVENE BY DORDT COLLEGE AND MARCH FOR LIFE EDUCATION AND DEFENSE FUND

Proposed Defendant-Intervenors Dordt College and March for Life Education and Defense Fund, respectfully move this Court for leave to intervene as of right under Federal Rule of Civil Procedure 24(a) or, alternatively, for permissive intervention under Rule 24(b).

THEREFORE, Proposed Defendant-Intervenors pray that this Court grant them intervention in this action.

Dated: December 12, 2017

Respectfully submitted,

/s/ Andrew D. Beckwith
Andrew D. Beckwith
(MA BBO 657747)
MASSACHUSETTS FAMILY INSTITUTE
400 TradeCenter Suite 1950
Woburn, Massachusetts 01801
Telephone: (781) 569-0400
Email: andrew@mafamily.org

/s/ David A. Cortman
David A. Cortman*
Gregory S. Baylor*
Christen M. Price*
ALLIANCE DEFENDING FREEDOM
440 First Street NW, Suite 600
Washington, D.C. 20003
Telephone: (202) 393-8690
Email: dcortman@ADFlegal.org

Counsel for Proposed Defendant-Intervenors

**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 December 12, 2017.

/s/ Andrew D. Beckwith
Andrew D. Beckwith

CERTIFICATE PURSUANT TO LOCAL RULE 7.1(a)(2)

I certify that on December 8, 2017, I conferred with Jonathan Burke, Jonathan Miller, and Julia Kobick, counsel for the Plaintiff, who represented that the Plaintiffs do not consent to this motion. Furthermore, I conferred with Ethan Davis, Daniel Riess, and Jason Weida, counsel for Defendants, who represented that the Defendants do not take a position on our motion.

/s/ Andrew D. Beckwith
Andrew D. Beckwith

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' MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE**

PROPOSED DEFENDANT-INTERVENORS' MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

OTHER AUTHORITIES:

INTRODUCTION

The Affordable Care Act's contraceptive mandate, by requiring Dordt College and March for Life (Proposed Intervenors) to provide insurance coverage for abortifacient drugs and devices, compelled both organizations to act contrary to their religious or moral conviction that all unborn children have inestimable worth and dignity and therefore should never be aborted. In October 2017, the Department of Health and Human Services (HHS) revised its contraceptive mandate regulations, which now include exemptions based on religious beliefs and moral convictions. This was a welcome sign that years of litigation and importuning the government for relief had finally yielded a solution that properly balanced competing interests.

The Commonwealth of Massachusetts (Plaintiff) now threatens to upset that equipoise by bringing this suit. It seeks a permanent injunction that threatens to eviscerate the exemptions granted by the federal government. To ensure that these exemptions remain intact and that a potentially contradictory ruling does not hamper their ongoing litigation efforts, Dordt College and March for Life should be granted intervention as of right to defend their interests in this matter. Alternatively, Proposed Intervenors should be granted permissive intervention.

BACKGROUND

A. Proposed Defendant-Intervenor Dordt College

Dordt College is a Christ-centered institution of higher learning located in Sioux Center, Iowa. Its mission is to equip students, alumni, and the broader community to work effectively toward Christ-centered renewal in all aspects of contemporary life. Hoekstra Decl. ¶¶ 3, 5. To that end, Dordt College offers academic programs, maintains institutional practices, and conducts social activities in a visionary, integrated, and biblically-informed manner—which is designed to foster discipleship as a way of life, both on and off campus. Hoekstra Decl. ¶ 5.

The College is owned and controlled by an incorporated society composed primarily of the Christian Reformed Church of North America (CRCNA). Hoekstra Decl. ¶ 6. The College is a non-denominational agency of the CRCNA, and the society elects members of Dordt College's Board of Trustees, which governs the College. Hoekstra Decl. ¶ 7, 8. The College draws its faculty, staff, and administration from among those who profess and demonstrate a strong commitment to the Christian faith and the Reformed Christian perspective. Hoekstra Decl. ¶ 9.

Dordt College unreservedly shares the Christian Reformed Church's religious views regarding abortion, believing that the procurement of, participation in, facilitation of, or payment for abortion (including abortion-causing drugs and devices like Plan B and ella) violates the Sixth Commandment and is inconsistent with the dignity conferred by God on creatures made in His image. Hoekstra Decl. ¶ 13.

To fulfill its religious commitments and duties in the Christ-centered educational context, Dordt College promotes its employees' and students' spiritual and physical well-being and health. This includes providing generous health insurance to employees and their dependents and facilitating a student health plan. Hoekstra Decl. ¶ 15.

The College's employee health plans cover various contraceptive methods that are not abortifacient. Hoekstra Decl. ¶ 17. However, consistent with its religious commitments, the College's contract for employee health coverage excludes ella and Plan B, which can and sometimes do act as abortifacients. Hoekstra Decl. ¶ 18.

B. Proposed Defendant-Intervenor March for Life

March for Life is a pro-life, non-sectarian nonprofit advocacy organization that has existed for over 40 years precisely to oppose the destruction of human life at any stage before birth, including by abortifacient methods that may act after the union of a sperm and ovum. Mancini

Decl. ¶¶ 7, 11. March for Life is one of the oldest pro-life organizations in the nation. Mancini Decl. ¶ 4.

March for Life was founded in 1973, following the Supreme Court's landmark decision in *Roe v. Wade*, when a group of pro-life leaders gathered to express concern that the first anniversary of the decision would come and go with no recognition. Mancini Decl. ¶ 5. The hallmark of March for Life is its annual march on the Supreme Court and United States Capitol, held every year on or around January 22, the anniversary of *Roe v. Wade*. Mancini Decl. ¶ 6.

Based on scientific fact and medical knowledge, March for Life holds as a basic tenet that human life begins at conception. It thus believes that each life should be protected and certainly not intentionally terminated by abortion. Mancini Decl. ¶¶ 7-11. March for Life's founding documents and articles of incorporation list this belief as an underlying principle. Mancini Decl. ¶ 12. March for Life's commitment to opposing all abortion includes moral opposition to providing coverage for abortion or abortifacients (and counseling in favor of abortion) in its health insurance plan. Mancini Decl. ¶ 21.

March for Life believes that hormonal drugs and devices within the ACA's contraceptive mandate are abortifacients, because those drugs and treatments may prevent or dislodge an implanted human embryo after fertilization, thereby causing its death. Mancini Decl. ¶ 20. Providing abortifacients thus runs directly contrary to March for Life's moral conviction that life begins at conception and thus should be protected. Mancini Decl. ¶ 21.

C. The ACA and the Contraceptive Mandate

In March 2010, Congress passed, and President Obama signed into law, the Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (2010), and the Health Care and Education Reconciliation Act, Pub. L. No. 111-152 (2010), together known as the Affordable Care

Act (ACA). The ACA regulates the national health insurance market by, *inter alia*, directly regulating "group health plans" and "health insurance issuers." The ACA requires that some health plans provide coverage for "preventive services," including preventive care for women. 42 U.S.C. § 300gg-13(a), (a)(4).

Although the ACA did not originally specify what preventive care for women included, the Health Resources and Services Administration (HRSA) within HHS eventually issued guidelines on August 1, 2011 providing that women's preventive care would include "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." HRSA, Women's Preventive Services Guidelines (Aug. 1, 2011).

Among these items are included hormonal oral and implantable contraceptives, IUDs, and products categorized as emergency contraception, which Dordt College and March for Life believe can prevent the implantation of a newly conceived human embryo, thereby causing an abortion. Mancini Decl. ¶ 20; *See* Hoekstra Decl. ¶ 22.

On the same day that HRSA issued these guidelines, the federal government promulgated another regulation which exempted some entities that objected to providing contraceptive coverage. 76 Fed. Reg. 46,621 (Aug. 3, 2011); *see also* 45 C.F.R. § 147.130(a)(1)(iv). This second regulation granted HRSA "discretion to exempt certain religious employers from the Guidelines where contraceptive services are concerned." 76 Fed. Reg. at 46,623. The term "religious employer" narrowly referred to churches, religious orders, denominations, and their integrated auxiliaries. 76 Fed. Reg. at 46,625; 45 C.F.R. § 147.131(c) (final exemption).

The contraceptive mandate and exemption were later enshrined in a third regulation, 77 Fed. Reg. 8,725 (Feb. 15, 2012), in which the federal government exempted "churches, their

integrated auxiliaries, and conventions or associations or churches" and "the exclusively religious activities of any religious order" if they: "(1) Ha[ve] the inculcation of religious values as [their] purpose; (2) primarily employ[] persons who share [their] religious tenets; (3) primarily serve [] persons who share [their] religious tenets." *See id*. at 8,726.

The exemption excluded many religious organizations who are neither churches nor religious orders, but who also oppose abortion due to religious conviction, such as Dordt College. Hoekstra Decl. ¶24. The exemption did not include non-religious entities like March for Life, even though its moral convictions mirror the religious beliefs of those churches opposing abortion Mancini Decl. ¶¶ 22-23.

More regulations followed. *See, e.g.*, 78 Fed. Reg. 8,461 (Feb. 6, 2013) (attempting to simplify the religious employer exemption to exempt all churches, integrated auxiliaries, conventions or associations of churches, and religious orders); 77 Fed. Reg. 16,501, 16,503 (Mar. 21, 2012) (presenting "questions and ideas" on how to "maintain the provision of contraceptive coverage without cost sharing," while accommodating the non-exempt religious organizations' beliefs); 78 Fed. Reg. at 8,463 (February 6, 2013) (proposing to "accommodate" non-exempt religious organizations by allowing their plans to not cover the mandated items, but requiring the entities to submit a form causing their insurers and third party administrators to provide "separate" payments to their plan participants for the same objectionable items); 79 Fed. Reg. 51,092 (Aug. 27, 2014) (augmenting the "accommodation" for nonprofit religious organizations by allowing them to submit a letter to HHS instead of a form to their insurer as part of the accommodation); 79 Fed. Reg. at 51,122 (issuing proposed rules whereby the so-called accommodation would be extended to include for-profit corporations who objected to the contraceptive mandate).

Notwithstanding this flurry of regulatory activity and developing so-called accommodations and exemptions for religious and for-profit corporations (some of which did not even object to abortion, abortifacient drugs or devices, or the contraceptive mandate),[1] the federal government never saw fit to exempt many religious organizations, such as schools, that hold religious convictions against abortion, nor to exempt or even "accommodate" pro-life, non-religious, nonprofit organizations such as March for Life.

D. Dordt College Lawsuit

Dordt College believes that certain drugs and devices within the ACA's contraceptive mandate are abortifacients. Hoekstra Decl. ¶ 22. The federal government provided regulatory exemptions from the ACA's contraceptive mandate for many employers (including ones who sponsored "grandfathered" health plans) and some religious entities, but never extended any of those exemptions to Dordt College. Hoekstra Decl. ¶ 24.

Dordt College, because of its religious convictions, could not provide or facilitate the provision of abortifacient drugs or devices though its health plans. Hoekstra Decl. ¶ 25. At the same time, Dordt College could not sustain the heavy fines and penalties that would alternatively come with noncompliance. Hoekstra Decl. ¶ 25. Moreover, Dordt College was unwilling to be categorized as essentially less religious than other institutions by being excluded from the government's existing religious exemption scheme. Hoekstra Decl. ¶25. Accordingly, to vindicate its right to operate consistent with its religious convictions, and to rectify what it believed were violations of its constitutional and statutory rights, Dordt College sued the federal

[1] This included exemptions affecting tens of millions of people by declaring that "grandfathered" health plans, even those administered by those with no religious or moral objection to abortion or abortifacient drugs, need not follow the preventive service mandate. 42 U.S.C. § 18011(a)(3)-(4).

government on October 23, 2013. Complaint, *Dordt College v. Sebelius, et al.*, No. 13-cv-4100 (Oct. 23, 2013, N.D. Iowa).

Dordt College argued that applying the contraceptive mandate to it violated the Religious Freedom Restoration Act (RFRA), the Free Exercise, Free Speech, and Establishment Clauses of the First Amendment, and its right to expressive association under the First Amendment. It also argued that the contraceptive mandate was arbitrary and capricious under the Administrative Procedure Act (APA) (5 U.S.C. § 706(2)(A)). *Dordt Coll. v. Sebelius, et al.*, No. 13-cv-4100 (Oct. 23, 2013, N.D. Iowa).

Dordt College was granted a preliminary injunction against the contraceptive mandate. *Dordt Coll. v. Sebelius*, 22 F. Supp. 3d 934 (N.D. Iowa 2014), *aff'd sub nom. Dordt Coll. v. Burwell*, 801 F.3d 946 (8th Cir. 2015), *cert. granted, judgment vacated, Burwell v. Dordt Coll.*, 136 S. Ct. 2006 (2016). The Supreme Court vacated the judgment affirming the preliminary injunction, but did not vacate the injunction itself. But the injunction is not a permanent one, which means that the relief secured by Dordt College is neither guaranteed nor final.

In fact, in a separate lawsuit involving the contraceptive mandate, HHS opposed the plaintiff's attempt to convert its existing preliminary injunction into a permanent injunction, arguing that the interim final rules (IFRs) made the issue moot. Def. Opp. to Mot. for a Perm. Inj. at *8-10, *Catholic Benefits Ass'n v. Hargan*, No. 5:14-cv-00240 (Nov. 22, 2017, W.D. Okla.).

E. March for Life Lawsuit

Given the federal government's arbitrary and capricious regulatory rollout of the ACA, and the unconstitutional imposition represented by the contraceptive mandate, March for Life sued the government. *See* Complaint, *March for Life, et al. v. Burwell, et al.*, No. 14-cv-1149 (July 7, 2014 D. D.C.). March for Life argued that the contraceptive mandate was arbitrary and capricious under

the Administrative Procedure Act (5 U.S.C. § 706(2)(A)) and violated the Fifth Amendment's equal protection guarantee. On August 31, 2015, the district court found that while it would be "difficult to imagine a more textbook example of the trait HHS purports to accommodate" than March for Life, the agency nonetheless was "excised from the fold because it is not 'religious.'" *March for Life v. Burwell*, 128 F. Supp. 3d 116, 127 (D.D.C. 2015). The Court found that treatment was "nothing short of regulatory favoritism" and thus an equal protection violation, and accordingly issued a permanent injunction for March for Life. *Id*. at 127.

On October 28, 2015 the federal government filed its notice of appeal, and on June 17, 2016, the D.C. Circuit Court of Appeals ordered the case held in abeyance pending the resolution of *Priests for Life v. HHS* (D.C. Cir. Nos. 13-5368, 13-5371, 14-5021) following the Supreme Court's remand in *Zubik v. Burwell* , 136 S. Ct. 1557 (2016). *See* Clerk's Order, *March for Life v. Burwell*, No. 15-5301 (D.C. Cir. Feb. 24, 2016). Thus March for Life's case is ongoing and its relief is neither guaranteed nor final.

F. The Interim Final Rules At Issue in this Case

On October 6, 2017, HHS complied with that order by issuing the two IFRs central to this lawsuit. 82 Fed. Reg. at 47,792 (Oct. 13, 2017). The first IFR protects those with religious objections, while the second protects those with moral objections to the contraceptive mandate.

The "religious" IFR exempts religious nonprofits and for-profits who have religious objections to covering any drugs, devices, or services required by the contraceptive mandate. 45 C.F.R. § 147.132. The "moral" IFR, exempts, *inter alia*, any nonprofit from having to provide contraceptive coverage in their health care plans "to the extent [that it objects] based on [its] sincerely held moral convictions." 45 C.F.R. § 147.133(a)(ii). In promulgating and justifying these new regulations, the federal government specifically noted the lawsuit filed by March for

Life and concluded that the "United States has a long history of providing conscience protections in the regulation of health care for entities and individuals with objections based on religious beliefs and moral convictions." 82 Fed. Reg. at 47,792 (Oct. 13, 2017).

G. The Instant Action

Massachusetts filed this action on the very day the new IFRs were issued, seeking a declaration that the exemptions created by the IFRs are unlawful under the APA and the Constitution's Establishment and Equal Protection Clauses, and seeking preliminary and permanent injunctions against them. Pl.'s Comp. Massachusetts then filed an amended complaint on November 16, 2017, which no longer sought the preliminary injunction. Pl's Am. Comp. Then the Commonwealth immediately filed a motion for summary judgment on November 17, 2017, with the accompanying memorandum on November 20, 2017. Pl.'s Mot. for Summ. J.; Pl. Mem. in Supp. of Mot. for Summ. J.

If the Plaintiff is granted the relief it seeks in this litigation, Dordt College, March for Life, and other religious or nonreligious nonprofits may be compelled to choose between violating their moral convictions by providing health care coverage which provides abortifacients, or risking crippling fines leading to their organizations' possible extinction. Hoekstra Decl. ¶ 27; Mancini Decl. ¶ 23.

STANDARD OF REVIEW

Regarding intervention of right, the Federal Rules of Civil Procedure provide:

> On timely motion, the court must permit anyone to intervene who:
>
> (1) is given an unconditional right to intervene by a federal statute; or
>
> (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter

> impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a).

The First Circuit requires four prerequisites for granting intervention of right: "(1) a timely application for intervention; (2) a demonstrated interest relating to the property or transaction that forms the basis of the ongoing action; (3) a satisfactory showing that the disposition of the action threatens to create a practical impairment or impediment to its ability to protect that interest; and (4) a satisfactory showing that existing parties inadequately represent its interest." *Pub. Serv. Co. of New Hampshire v. Patch*, 136 F.3d 197, 204 (1st Cir. 1998) (citing *Conservation Law Found. v. Mosbacher*, 966 F.2d 39, 41 (1st Cir.1992)).

The Federal Rules also allow for permissive intervention:

> On timely motion, the court may permit anyone to intervene who:
>
> (A) is given a conditional right to intervene by a federal statute; or
>
> (B) has a claim or defense that shares with the main action a common question of law or fact.
>
> Fed. R. Civ. P. 24(b)(1).

Permissive intervention is "appropriate where a proposed intervenor files a timely motion asserting that it has a claim or defense that shares a common question of law or fact with the main action, and where intervention will not unduly delay or prejudice the adjudication of the main claims." *Lexington Luminance LLC v. Google, Inc.*, No. CIV.A. 12-12218-GAO, 2014 WL 172203, at 1 (D. Mass. Jan. 16, 2014) (citing Fed. R. Civ. P. 24(b)).

As shown below, Dordt College and March for Life satisfy the requirements for both intervention by right and permissive intervention.

ARGUMENT

I. Dordt College and March for Life are Entitled to Intervene as of Right.

A. Dordt College and March for Life's Motion to Intervene is Timely.

The First Circuit gauges timeliness by considering four factors: "(i) the length of time that the putative intervenor knew or reasonably should have known that his interests were at risk before he moved to intervene; (ii) the prejudice to existing parties should intervention be allowed; (iii) the prejudice to the putative intervenor should intervention be denied; and (iv) any special circumstances militating for or against intervention." *R & G Mortg. Corp. v. Fed. Home Loan Mortg. Corp.*, 584 F.3d 1, 7 (1st Cir. 2009) (internal citations omitted) (denying a post-settlement intervention motion as untimely).

"The timeliness inquiry is inherently fact-sensitive and depends on the totality of the circumstances," and "the status of the litigation at the time of the request for intervention is highly relevant." 584 F.3d at 7 (internal citations and quotation marks omitted). In one case in this circuit, a motion filed under circumstances similar to this one was timely when filed roughly three months after the original complaint: the court had not issued a scheduling order, discovery had not begun, and the defendant had not answered the complaint. *Cabot LNG Corp. v. Puerto Rico Elec. Power Auth.*, 162 F.R.D. 427, 429 (D.P.R. 1995).

Here, the litigation is in its earliest stages. Dordt College and March for Life are filing their motion approximately two months after the original complaint, approximately four weeks since the amended complaint and motion for summary judgment, and just over three weeks after plaintiffs filed their memorandum supporting the motion for summary judgment. As in *Cabot*, the court has not issued a scheduling order, and discovery has not yet begun. Also, the defendants first responded in this litigation only a few days before the date of this filing.

Moreover, Proposed Intervenors do not seek to alter any current deadlines, so there can be no argument that their intervention will result in any prejudice to the parties. And as will be argued below, the Proposed Intervenors' interest in this case involves protecting their fundamental rights, and the special circumstance of their having litigated to obtain relief akin to the very regulations at issue in this case. The Proposed Intervenors' motion is therefore timely.

B. As Beneficiaries of the Challenged Regulations Who Do Not Want to be Forced to Violate their Consciences, Dordt College and March for Life Have a Significantly Protectable Interest in the Subject Matter of this Action.

To justify intervention as of right, the proposed intervenor's interests must be "significantly protectable." *Donaldson v. United States*, 400 U.S. 517, 531 (1971). The First Circuit has "emphasized that [t]here is no precise and authoritative definition of the interest required to sustain a right to intervene, while reiterating that the intervenor's claims must bear a 'sufficiently close relationship' to the dispute between the original litigants and that [t]he interest must be direct, not contingent." *Conservation Law Found. of New England, Inc. v. Mosbacher*, 966 F.2d 39, 41–42 (1st Cir. 1992) (internal citations and quotation marks omitted).

Particularly relevant for this case, a regulatory scheme's beneficiaries have an interest in litigation challenging the scheme. *Verizon New England v. Maine Pub. Utilities Comm'n*, 229 F.R.D. 335, 337 (D. Me. 2005) (finding that a regulatory scheme's beneficiaries had an interest in litigation challenging the scheme). *See also Conservation Law Found.*, 966 F.2d at 40 (1st Cir. 1992) (finding that commercial fishing groups had a significantly protectable interest in environmental groups' challenge to state fishery plan, and granting intervention as of right); *Animal Prot. Inst. v. Martin*, 241 F.R.D. 66, 69–70 (D. Me. 2007) (finding that trapping and

sportsmen's organizations had a significantly protectable interest in animal rights organization's challenge to Maine's existing trapping practices).

In *Verizon*, the court distinguished the proposed intervenors' claims from a case where the intervenors claimed a general interest in the litigation as consumers, agreeing with the proposed intervenors' claim to be the "direct and intended beneficiaries" of the regulatory scheme at issue. *Verizon New England*, 229 F.R.D. at 337.

Here, the Plaintiff seeks to invalidate the religious and moral exemptions in the IFRs, which now stand as regulatory protections for Dordt College and March for Life and other organizations who object to complying with the ACA's contraceptive mandate on moral or religious grounds. The Plaintiff also seeks to nullify through a declaratory judgment the federal government's recent and proper recognition—resulting in part from the litigation efforts of Dordt College, March for Life, and many others—that religious convictions and moral convictions are a proper predicate for granting exemptions to the contraceptive mandate. *See* Am. Compl. at 23 (seeking to have the IFRs declared unlawful and enjoined as APA and constitutional violations).

Like the intervenors in *Verizon*, Dordt College and March for Life are among the intended beneficiaries of the regulations at issue, and have a direct, substantial, and specific interest in the contraceptive mandate's exemptions remaining intact. They have litigated for several years to receive relief akin to that provided in the new regulations, and their interest is based on their legally protected religious and moral conscience rights.

Put simply, the relief the Plaintiff seeks here would eliminate the sort of protections Dordt College and March for Life have been fighting for since the ACA passed. Granting that relief would have direct, harmful effects upon Proposed Intervenors' ability to operate their organizations and fulfill their mission in accord with their religious commitments or moral

convictions. Therefore, as beneficiaries of the IFRs whose ability to follow their consciences or suffer ruinous fines is at stake, Dordt College and March for Life have a significantly protectable legal interest in seeing that the IFRs are not eliminated or even weakened by the relief Massachusetts requests.

C. If Plaintiff's Claims Succeed, Dordt College and March for Life's Ability to Protect Their Interest in Not Violating their Consciences May Be Impaired.

A significantly protectable interest is very closely linked with the third requirement for intervention of right—that the challenge's outcome may impair the proposed intervenor's interest. In one case, to which this one is analogous, a court permitted healthcare providers to intervene as of right in a challenge to the constitutionality of a statute that protected the providers from being forced to participate in abortions. *California ex rel. Lockyer v. United States*, 450 F.3d 436, 442 (9th Cir. 2006) ("Having found that appellants have a significant protectable interest, we have little difficulty concluding that the disposition of this case may, as a practical matter, affect it.").

Similarly, the First Circuit has found impairment of a protectable interest where the proposed intervenors were the subjects of the regulation at issue: "Here, the adverse effect is certain. The fishing groups seeking intervention are the real targets of the suit and are the subjects of the regulatory plan. Changes in the rules will affect the proposed intervenors' business, both immediately and in the future." *Conservation Law Found.*, 966 F.2d at 43.

The posture of this case is similar to that in *Conservation Law Found.*, except that Massachusetts is a public party attacking the regulation, and the Proposed Intervenors' interest is based primarily on their constitutional rights, rather than economic profit. The distinct possibility of impairment is clear here. If the Plaintiff prevails, Dordt College and March for Life would lose

vital and hard-won regulatory exemptions that permit them to operate consistent with their religious and moral convictions without risking crippling fines.

Moreover, the rules are a backstop for the intervenors, due to the status of the injunctions the Proposed Intervenors currently enjoy. Because Dordt College only has a preliminary injunction, *Dordt Coll. v. Sebelius*, 22 F. Supp. 3d 934 (N.D. Iowa 2014), and the government has already taken the position that the IFRs render moot requests for permanent injunctions, Def. Opp. to Mot. for a Perm. Inj. at *8-10, *Catholic Benefits Ass'n v. Hargan*, No. 5:14-cv-00240 (Nov. 22, 2017, W.D. Okla.), the IFR may end up being the College's sole source of permanent relief. Similarly, March for Life's lawsuit is not yet resolved, and any resolution that holds the moral exemption unlawful would be in tension with the injunctive relief previously granted to March for Life, potentially making it more difficult for March for Life to ultimately prevail in that case once it is actively resumed. Thus, the Proposed Intervenors satisfy the impairment factor.

D. No Existing Parties to the Action Adequately Represent Dordt College and March for Life Due to the Specific, Parochial Nature of Their Interests in Not Being Forced to Violate Their Consciences, and their History of Litigation Against the Contraceptive Mandate.

"An intervenor need only show that representation may be inadequate, not that it is inadequate." *Conservation Law Found.*, 966 F.2d at 44. "One way for the intervenor to show inadequate representation is to demonstrate that its interests are sufficiently different in kind or degree from those of the named party." *B. Fernandez & Hnos., Inc. v. Kellogg USA, Inc.*, 440 F.3d 541, 546 (1st Cir. 2006) (internal citations omitted). The burden of showing inadequate representation is lighter when the proposed intervenor's interest is direct and substantial. *Id.*

When the government is the representative party, representation may be inadequate even if there are overlapping goals, if the proposed intervenor asserts private interests rather than public ones. *See Conservation Law Found.*, 966 F.2d at 44 (finding that the government, which had already entered into a consent decree with the plaintiffs, could not adequately represent fishermen's private economic interests in litigation challenging the validity of an agency's fishery plan) ("The Secretary's judgments are necessarily constrained by his view of the public welfare. While the Secretary may well believe that what best serves the public welfare will also best serve the overall interests of fishermen, the fact remains that the fishermen may see their own interest in a different, perhaps more parochial light."); *Animal Prot. Inst. v. Martin*, 241 F.R.D. 66, 70 (D. Me. 2007) (finding that intervenors' private goals, including economic and recreational interests, might diverge from the government's broad public interest, making government representation inadequate).

The First Circuit has also indicated that the potential harm to the proposed intervenor relative to the representative party is relevant: "The potential for this litigation to have a greater adverse impact on Kellogg Caribbean is a sufficient basis for concluding that Kellogg USA may not serve as an adequate proxy." *B. Fernandez & Hnos., Inc.*, 440 F.3d at 547 (finding that cereal distributor overcame presumption that cereal manufacturer adequately represented cereal distributor's interests where both companies had the same corporate parent, in part because the proposed intervenor faced a potentially more adverse impact from the litigation).

The government's interest in defending this case is broad, public, general, and non-parochial. *See, e.g.*, 82 Fed. Reg. at 47,793 (Oct. 13, 2017) (introducing the IFRs as a way of "balanc[ing] the Government's interest in ensuring coverage for contraceptive and sterilization services" with the need for "conscience protections for individuals and entities with sincerely held

religious beliefs in certain health care contexts"); 82 Fed. Reg. at 47,821-47,822 (Oct 13, 2017) (estimating the number of persons affected by, and considering the cost of, initiating new IFRs).

But March for Life and Dordt College's interests are not a general public interest; they have private interests in protecting their own freedom of conscience without being subjected to ruinous fines. While the government and the Proposed Intervenors arguably have a similar ultimate goal—defending the exemptions' validity—the Proposed Intervenors' interests are distinct, direct, and substantial, and are different in both kind and degree from those of the federal defendants. Moreover, if Plaintiffs are successful, Proposed Intervenors must either abandon exercise of their fundamental rights, or risk extinction by government fine. Thus, they face a greater harm if the Plaintiffs succeed than do the Defendants.

This conclusion is bolstered by the IFRs' history: the exemptions were prompted in part by the litigation efforts of Dordt College, March for Life, and other organizations which endured protracted litigation battles with the federal government to oppose the contraceptive mandate. *See* 82 Fed. Reg. 47,797-47,799 (Oct. 13, 2017) (discussing effects of past and still-pending litigation on the development of regulations, including Dordt College and March for Life's lawsuits, and conceding that the new IFRs are a result of the government's "reexamin[ation of] the exemption and accommodation scheme currently in place for the Mandate").

Finally, Proposed Intervenors are currently adverse to the government in ongoing litigation about this very topic. Despite the overlap in the intervenors' goals with those of the current government, a new administration could be in place before this is resolved. Under such circumstances, where the federal government acted in response to the litigation efforts of Dordt College, March for Life and others, inadequacy of representation is clear.

Therefore, since Dordt College and March for Life have filed a timely motion, have a significantly protectable interest that could be impaired by the litigation's outcome, and will not be adequately represented by existing parties, they should be granted intervention as of right.

II. Dordt College and March for Life Should Alternatively be Granted Permissive Intervention.

Permissive intervention is proper as well. Federal Rule of Civil Procedure 24(b)(1) provides that "[o]n timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." A court must also consider "whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

This court has found that permissive intervention is "appropriate where a proposed intervenor files a timely motion asserting that it has a claim or defense that shares a common question of law or fact with the main action, and where intervention will not unduly delay or prejudice the adjudication of the main claims." *Lexington Luminance LLC*, 2014 WL 172203, at *1 (citing Fed. R. Civ. P. 24(b)) (permitting manufacturer to permissively intervene in patent infringement litigation concerning the manufacturer's product).

Also, a proposed intervenor's ability to assist with developing the case is a relevant consideration when determining whether to grant permissive intervention. That "the applicants may be helpful in fully developing the case is a reasonable consideration in deciding on permissive intervention." *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 172 F.3d 104, 113 (1st Cir.1999) (vacating denial of intervention and remanding due to appeals court clarifying the relevant standard).

As already established, Proposed Intervenors' motion is timely filed and will cause no undue delay or prejudice to the original parties. *See supra* at 11-12. Proposed Intervenors seek no delay in any of the proceedings. Moreover, Proposed Intervenors' defenses "share[] a common question of law or fact with the main action[.]" 2014 WL 172203 at *1. Dordt College intends to defend the propriety of the exemption created by the religious IFR, and March for Life the exemption created by the moral IFR; these defenses arise directly from the challenge brought by the Plaintiff in its Amended Complaint.

Accordingly, Dordt College and March for Life respectfully request in the alternative that this Court grant them permissive intervention.

CONCLUSION

For the foregoing reasons, Dordt College and March for Life Education and Defense Fund respectfully ask the Court to grant their Motion to Intervene.

Dated: December 12, 2017

Respectfully submitted,

/s/ Andrew D. Beckwith

Andrew D. Beckwith
(MA BBO 657747)
MASSACHUSETTS FAMILY INSTITUTE
400 TradeCenter Suite 1950
Woburn, Massachusetts 01801
Telephone: (781) 569-0400
Email: andrew@mafamily.org

/s/ David A. Cortman

David A. Cortman*
Gregory S. Baylor*
Christen M. Price*
ALLIANCE DEFENDING FREEDOM
440 First Street NW, Suite 600
Washington, D.C. 20003
Telephone: (202) 393-8690

Email: dcortman@ADFlegal.org

Counsel for Proposed Defendant-Intervenors

**Motion for admission pro hac vice forthcoming*

CERTIFICATE OF SERVICE

I hereby 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).

/s/ Andrew D. Beckwith
Andrew D. Beckwith