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January 24, 2019

Via CM/ECF

Ms. Maria R. Hamilton
Clerk of Court
United States Court of Appeals
for the First Circuit
John Joseph Moakley U.S. Courthouse
1 Courthouse Way, Suite 2500
Boston, Massachusetts 02210

Re: *Commonwealth of Massachusetts v. U.S. Department of Health and Human Services et al.*, No. 18-1514

Dear Ms. Hamilton:

In this case, plaintiff, the Commonwealth of Massachusetts, challenges two interim final rules issued by the Departments of Health and Human Services (HHS), Labor, and the Treasury. The rules expanded the religious exemption to the contraceptive-coverage mandate adopted pursuant to the Patient Protection and Affordable Care Act, and created a new exemption for entities with moral objections to providing contraceptive coverage.

On December 26, 2018, counsel for the federal defendants filed a motion to stay briefing in this case because of the lapse in appropriations to the Department of Justice, explaining that, absent an appropriation, Department of Justice attorneys are prohibited from working, even on a voluntary basis, except in very limited

circumstances, including “emergencies involving the safety of human life or the protection of property.” 31 U.S.C. § 1342. The Court granted the motion on January 8, 2019, and directed that the federal defendants’ response brief be due ten days after Department of Justice attorneys are permitted to resume their usual civil-litigation functions.

As counsel for the federal defendants previously informed the court, in November 2018, the agencies promulgated final rules superseding the interim rules challenged by Massachusetts in this case. Several other States are challenging those final rules in two separate cases in the Northern District of California and the Eastern District of Pennsylvania. Those district courts denied the government’s motions to stay proceedings in light of the lapse in appropriations, *see* Order, *California v. HHS*, No. 4:17-cv-5783 (N.D. Cal. Dec. 27, 2018); Order, *Pennsylvania v. Trump*, No. 2:17-cv-4540 (E.D. Pa. Dec. 27, 2018), and subsequently issued preliminary injunctions enjoining the final rules, *see* Order at 45, *California, supra* (Jan. 13, 2019); Order, *Pennsylvania, supra* (Jan. 14, 2019). The federal defendants filed notices of appeal in those cases on January 22, 2019.

Upon further review and consultation, counsel for the federal defendants have concluded that authorization exists to litigate those appeals notwithstanding the appropriations lapse. The Office of Legal Counsel has previously advised that “[t]o the extent that any of [the Department of Justice]’s functions are necessary to the effective execution of functions by an agency that has current fiscal year appropriations, such that a suspension of the Department’s functions during the period of anticipated funding lapse would prevent or significantly damage the execution of those funded functions, the Department’s functions and activities may continue.” *Effect of Appropriations for Other Agencies and Branches on the Authority to Continue Department of Justice Functions During the Lapse in the Department’s Appropriations*, 19 Op. O.L.C. 337, 338 (1995).¹ Counsel is informed that HHS has current fiscal year appropriations to administer the contraceptive-coverage mandate; and that the efficient, lawful, and fair administration of its program will be harmed unless the government takes expeditious action to secure reversal of the

¹ Available at <https://www.justice.gov/file/20141/download>.

injunction, which threatens substantial injury to HHS's ability to carry out its regulatory responsibilities and obligations. Under these circumstances, counsel for the federal defendants have concluded that they may litigate the appeals of the preliminary injunctions in the *California* and *Pennsylvania* cases notwithstanding the appropriations lapse.

In this case, however, the district court concluded that Massachusetts lacks standing to challenge the rules and granted summary judgment in favor of the government. Unlike the adverse decisions in the *California* and *Pennsylvania* cases, the district court's decision here does not threaten damage to HHS's funded functions. There is thus no basis for the federal defendants to request that the stay of briefing be lifted in this appeal.

We note, however, that "it has long been the [Department of Justice's] position that, during an appropriations lapse, attorneys representing the government are to comply with a court order that they continue with litigation even though the litigation does not fall within an exception to the [Anti-Deficiency] Act." *Participation in Congressional Hearings During an Appropriations Lapse*, 19 Op. O.L.C. 301, 303 (Nov. 16, 1995).² If the Court were to order that the stay in this case be lifted, Department of Justice attorneys would be permitted to resume work in this appeal.

Respectfully submitted,

/s/ Sharon Swingle
Sharon Swingle
*Counsel for the Federal
Government*

cc: Counsel of record (via CM/ECF)

² Available at <https://www.justice.gov/file/20156/download>.

CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2019, I electronically filed the foregoing letter with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Sharon Swingle
Sharon Swingle
*Counsel for the Federal
Government*