

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

University of Notre Dame,
Plaintiff-Appellant,

v.

Thomas E. Price, *et al.*,
Defendants-Appellees,

and

Jane Doe 3 and Ann Doe,
Intervenors-Appellees.

No. 13-3853

Status Report of Intervenors-Appellees

In accordance with this Court's Order of June 5, 2017, Intervenors-Appellees report the following:

1. Intervenors still have not been included in any discussions between Notre Dame and the government that may have occurred concerning possible resolution of this case.

2. The government is drafting new regulations on the Affordable Care Act's requirement that health insurance cover preventive-care services such as contraception. *See* Office of Information & Regulatory Affairs, Office of Management & Budget, *Coverage of Certain Preventive Services Under the Affordable Care Act* (received on May 23, 2017), <https://tinyurl.com/OMBReview> (pending EO 12866 Regulatory Review). On May 31, 2017, media reports included a leaked draft of the 125-page Interim Final Rule of the

Departments of Health and Human Services, Labor, and Treasury that would modify the religious accommodation at issue here to deprive women like Intervenor of access to essential health services. See Dylan Scott & Sarah Kliff, *Leaked regulation: Trump plans to roll back Obamacare birth control mandate*, VOX (May 31, 2017, 8:00 AM), <https://tinyurl.com/20170531FIR>. Although almost five weeks have now passed since the draft became public, the government has not yet issued it or any other rule, regulation, or guidance on the topic.

3. Intervenor's position on the merits has not changed. The Supreme Court has made clear that the Establishment Clause forbids religious exemptions or accommodations from generally applicable laws that would have a "detrimental effect on any third party." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2781 n.37 (2014); accord *Holt v. Hobbs*, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., concurring); *Cutter v. Wilkinson*, 544 U.S. 709, 720, 722 (2005) (courts "must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries" and must ensure that the accommodation is "measured so that it does not override other significant interests") (citing *Estate of Thornton v. Caldor*, 472 U.S. 703, 709–10 (1985)).

Hence, in *Hobby Lobby*, the Court held that certain closely held corporations could receive a religious accommodation with respect to the Affordable Care Act's contraceptive-coverage requirement when "the effect of the . . . accommodation on the women employed by Hobby Lobby and the other

companies involved in these cases would be precisely zero.” 134 S. Ct. at 2760; *see also id.* at 2781–82. Indeed, every member of the *Hobby Lobby* Court, whether in the majority or in dissent, reaffirmed that burdens on third parties must be considered. *See id.*; *id.* at 2786–87 (Kennedy, J., concurring); *id.* at 2790, 2790 n.8 (Ginsburg, J., joined by Breyer, Kagan, and Sotomayor, JJ., dissenting).

In January 2017, the Department of Labor reported—after reviewing 54,000 comments filed in response to a Request for Information—that it was not modifying the accommodation because “no feasible approach has been identified at this time that would resolve the concerns of religious objectors [in cases like this one], while still ensuring that the affected women receive full and equal health coverage, including contraceptive coverage.” Dep’t of Labor, *FAQs About Affordable Care Act Implementation Part 36*, 4 (Jan. 9, 2017), <http://tinyurl.com/h2ojy5>. Granting the exemption that Notre Dame and the other plaintiffs in these cases seek would impermissibly harm Intervenors and other employees and students by depriving them of the critical health coverage that Congress guaranteed to them under the Affordable Care Act.

The same would be true should the government eventually issue the leaked draft rule. That rule would leave Intervenors and women across the country without access to crucial medical care, and the costs and burdens of universities’ and employers’ religious beliefs would be shifted onto students, faculty, and staff—contrary to the Supreme Court’s directive that the parties

should “arrive at an approach going forward that . . . ensur[es] that women covered by [these] health plans ‘receive full and equal health coverage, including contraceptive coverage.’” *Zubik v. Burwell*, 136 S. Ct. 1557, 1560 (2016). Thus, the proposed rule would raise the same constitutional concerns—as well as additional constitutional and statutory ones—as does the request for an exemption that Notre Dame has made through this litigation.

4. Intervenors are prepared to move forward with supplemental briefing, oral argument, or whatever else the Court may direct.

Respectfully submitted,

/s/ Richard B. Katskee

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Date: July 3, 2017

Certificate of Service

On July 3, 2017, I electronically filed the foregoing Status Report with the Clerk of this Court through the appellate CM/ECF system. The participants in the case are registered CM/ECF users, and service will be accomplished through the CM/ECF system.

/s/ Richard B. Katskee

Richard B. Katskee