
No. 13-1228

United States Court of Appeals
FOR THE THIRD CIRCUIT

MOST REVEREND DAVID A. ZUBIK, BISHOP OF THE ROMAN CATHOLIC DIOCESE
OF PITTSBURGH, ET AL.,

Plaintiffs-Appellants,

v.

KATHLEEN SEBELIUS, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the
Western District of Pennsylvania in Case No. 2:12-cv-00676
Terrence F. McVerry, United States District Judge

**RESPONSE TO 1/25/13 ORDER REGARDING
JURISDICTION**

Appellants—Most Reverend David A. Zubik, Bishop of The Roman Catholic Diocese of Pittsburgh; The Roman Catholic Diocese of Pittsburgh; Catholic Charities of the Diocese of Pittsburgh, Inc.; and The Catholic Cemeteries Association of the Diocese of Pittsburgh—hereby submit that, for purposes of this appeal challenging the final HHS Mandate and religious employer exemption as presently promulgated, they intend to stand on their Complaint and unrebutted affidavits submitted in response to the Government’s motion to dismiss. *Warth v. Seldin*, 422 U.S. 490, 501 (1975) (court can allow plaintiff to supply factual affidavits to support

plaintiff's standing); *see also Baldwin v. Univ. Pittsburgh Med. Ctr.*, 636 F.3d 69, 73-74 (3d Cir. 2011) (court "may consider . . . any matters incorporated by reference or integral to the claim.").

Appellants recognize that the district court dismissed their Complaint without prejudice. However, "a plaintiff can appeal from a dismissal without prejudice when he declares his intention to stand on his complaint or when he cannot cure the defect in his complaint." *Booth v. Churner*, 206 F.3d 289, 293 n.3 (3d Cir. 2000). Indeed, this Circuit routinely allows cases to proceed once the appellant elects to stand on the complaint. *See, e.g., Garber v. Lego*, 11 F.3d 1197, 1198 n.1 (3d Cir. 1993) (recognizing this exception and allowing appeal of a dismissal without prejudice where the appellant had no desire to amend his complaint); *Umbenhauer v. Woog*, 969 F.2d 25, 30 n.6 (3d Cir. 1992) (dismissal without prejudice appealable where party elected to stand on his complaint).

In this appeal, Appellants challenge the HHS Mandate and religious employer exemption as currently drafted and published as final rules at 45 C.F.R. § 147.130(a)(1)(iv). For this challenge, Appellants stand on what they have filed below. Appellants respectfully submit that their detailed, fact-based Complaint, along with their affidavits which stand unchallenged and unrebutted by the Government, conferred jurisdiction on the district court to adjudicate this dispute. Appellants established standing and their claims are ripe under the applicable legal standards in this Circuit. The district court's dismissal of Appellants' Complaint as filed, in these circumstances, and even though it was without prejudice, was legal error that can and should be addressed by this Court.

Accordingly, Appellants submit that this Court has jurisdiction to entertain this appeal.

Date: February 8, 2013

By: /s/ Paul Michael Pohl

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CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2013, a copy of the foregoing Response to 1/25/13 Order Regarding Jurisdiction was submitted to the Court's electronic case filing system (ECF) for service electronically on the following counsel for Appellees, Filing Users of the Court's ECF system:

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