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

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| UNIVERSITY OF NOTRE DAME,<br>Plaintiff-Appellant,<br><br>v.<br><br>KATHLEEN SEBELIUS, in her official capacity as Secretary, United States Department of Health and Human Services, *et. al.*,<br>Defendants-Appellees<br><br>v.<br><br>JANE DOE 1, JANE DOE 2, and JANE DOE 3,<br>Intervenors-Appellees | No. 13-03853 |

**INTERVENORS-APPELLEES' OPPOSITION**
**TO PLAINTIFF-APPELLANT'S MOTION FOR LIMITED REMAND**
**TO SEEK DISCOVERY AND SUPPLEMENT THE RECORD,**
**OR IN THE ALTERNATIVE, TO DISMISS**

## INTRODUCTION

The University has moved for a remand, claiming that it must return to the district court to develop facts regarding the Intervenors' arguments and identities. *See* Pl.-Appellant's Mot. to Remand (Doc. No. 27) ("Pl.-Appellant's Mot."). The emergency that has propelled the University's every action in this case—its motion for a preliminary injunction, its request for expedited consideration of this appeal, and its request for an injunction pending appeal—has evaporated. But the very arguments that it cites in support of its current Motion were explicitly raised, and implicitly rejected, in conjunction with the preceding Motion to Intervene. And the allegedly new arguments that now require factual development were known to the University when the Intervenors moved to intervene in the district court more than one month ago. Yet the University did not seek at that time to supplement the record; instead, it sought a stay.

But now that the University is concerned that it may not get the result it wants on appeal, it has suddenly slammed on the breaks. This is bald-faced procedural gamesmanship, and hardly a compelling reason to deviate from the schedule this Court has set—a schedule requested by the University, and one that has already placed unusual demands on the time and resources of the federal judiciary, the United States, and the Intervenors. The Court should "exercise [its] discretion against dismissal [ ] to curtail strategic behavior" (*Albers v. Eli Lilly & Co.*, 354 F.3d 644, 646 (7th Cir. 2004)) by giving the University what it has sought all along: a speedy resolution of its request for a preliminary injunction.

## BACKGROUND

Roughly one year ago, on February 1, 2013, the Government issued a Notice of Proposed Rulemaking (NPRM) that would eventually become the accommodation at issue in this lawsuit. AA15 ¶ 59.[1] According to the University, the proposed regulations were immediately and roundly condemned by Catholic religious authorities. *Id.* Several months later, in July 2013, the government formally adopted a final rule that was virtually identical to the NPRM. *Id.* ¶ 60. Five months later still, and less than one month before the regulations were slated to go into effect, the University initiated this lawsuit. SA8.

Suddenly, the regulations presented an emergency of the highest order—one requiring the swift and full attention of the federal judiciary. With only weeks to spare, the University requested and received expedited proceedings in the court below. *Id.* Shortly thereafter, Jane Does 1-3 moved to intervene, *Univ. of Notre Dame v. Sebelius, et al.*, No. 3:13-cv-1276, N.D. Ind., Mot. to Intervene (Doc. No. 33), making the same arguments they would later make before this Court. The district court then denied the University's motion for a preliminary injunction, SA2, and the University immediately appealed, *Univ. of Notre Dame v. Sebelius, et al.*, No. 3:13-cv-1276, N.D. Ind., Not. of Interlocutory Appeal (Doc. No. 43). Before the district court could rule on the Intervenors' motion, the University moved for and received a stay of the proceedings below. *Id.*, Order Granting Stay (Doc. No 54).

Before this Court, the University promptly moved for an injunction pending

[1] These citations are to the appendices to the University's merits brief where possible.

appeal (styled an "emergency motion"), claiming that it had scant days before it would be forced to "aid[ ] and abet[ ] a crime" against its religious faith. Pl.-Appellant's Emergency Mot. for Inj. Pending Appeal (Doc. No. 3-1) at 19. This Court rejected that motion, but it expedited the briefing schedule. Order (Doc. No 11). Shortly thereafter, Jane Does 1-3 moved to intervene on appeal, reiterating the arguments originally submitted to the district court. Mot. to Intervene (Doc. No. 12). This Court granted the Intervenors' motion over the University's objections. Order (Doc. No. 22). Now, after a six-week-long sprint, within sight of the finish line, the University has concluded that there is no emergency after all, and that the case should be returned to the district court for further proceedings.

## ARGUMENT

### I. A Limited Remand Would Be Inappropriate and Prejudicial to the Other Litigants.

The University claims that it has been prejudiced by having not had an opportunity to develop the factual underpinnings of the Intervenors' standing and legal arguments in two respects: first, it has not had an opportunity to "test the veracity of the Intervenors-Appellees' statements" (Pl.-Appellant's Mot. at 6); and second, it has not had an opportunity to develop the facts necessary to respond to the Intervenors' legal argument that the challenged regulatory regime allows the University to drop its health-insurance plans without any compromise to its religious scruples (*id.* at 7). But the University made these very arguments in opposing intervention. *See* Pl.-Appellant's Opp. to Mot. to Intervene (Doc. No. 17) at 16-17 (complaining of inability to supplement record with factual information about

practical consequences of dropping insurance plans); *id*. at 19 (taking issue with inability to test accuracy of Intervenors' statements). Indeed, a principal basis of its opposition was that it "would be unduly prejudiced by being forced to rebut Applicants' new slate of arguments without the aid of a factual record." *Id.* at 1.

The University provides no reason why its purported hardship would justify derailing this appeal any more than it justified excluding the Intervenors. As the Intervenors pointed out in briefing on the intervention motion, the Intervenors' credibility is irrelevant to whether the University is obligated to provide health insurance, whether there is a compelling interest behind the regulatory scheme, and whether the University's formulation of RFRA violates the Establishment Clause. Mot. to Intervene (Doc. No. 12) at 4-10. These are legal arguments having nothing to do with the Intervenors' individual circumstances. *See id*. at 18-19.

And if the University has lost out on the opportunity to take discovery on the Intervenors' standing in advance of the preliminary-injunction appeal, it is only because of its own delay in filing suit, its own requests for expedited proceedings, and its own motion to stay the proceedings below. If, as the University says, "[t]his case is not what it was just a few weeks ago" (Pl.-Appellant's Mot. at 4), that is because there was no lawsuit just a few weeks ago, not because of any developments that the University could not have anticipated.

The University's second argument—that it needs a remand to shore up evidence on the practical consequences of discontinuing its health-insurance plans (*see* Pl.-Appellant's Mot. at 7)—is even less compelling. Not only will the University have

ample opportunity to develop the factual record when this interlocutory appeal has concluded, but the University evidently recognized when it filed suit that it must explain why it feels unable to simply drop its insurance. *See*, *e.g.*, AA56 ¶ 61 (alleging that dropping student insurance "would negatively impact Notre Dame's efforts to recruit and retain students"). The Intervenors' arguments about the availability of this option are apparent on the face of the regulatory scheme. Indeed, in opposing the intervention motion, the University argued that the Intervenors seek to raise "general arguments that the Department of Justice chose to make in different form" (Pl.-Appellant's Opp. to Mot. to Intervene (Doc. No. 17) at 8); that the differences between the arguments of the United States and those raised by the Intervenors amount to "quibbles" (*id.* at 13); and that the Intervenors are raising "general policy arguments that could be made by anyone with an opinion" (*id.* at 8). The University cannot now be heard to argue that the Intervenors' arguments amount to game-changers.

In any event, contrary to the University's protestations (*see* Pl.-Appellant's Mot. at 7 ("It would be fundamentally unfair to prevent Notre Dame from developing a defense to new facts and arguments not previously raised in the district court.")), the Intervenors' arguments *were* made by the Intervenors in district court, when they moved to intervene. *Univ. of Notre Dame v. Sebelius, et al.*, No. 3:13-cv-1276, N.D. Ind., Mot. to Intervene (Doc. No. 33). If the University was not pleased with the record, it had notice of the Intervenors' arguments and could have chosen to

supplement the record. Instead, the University chose to seek a stay of the proceedings below. The University's claim of unfairness thus rings hollow.

None of the cases that the University cites supports its entitlement to a do-over at this juncture. For example, in *United States v. Taylor*, this Court remanded for an evidentiary hearing because the district court had failed to make a necessary factual determination required by the law—not because a litigant wanted to supplement the record at the eleventh hour of its eleventh-hour-lawsuit. *See* 277 F. App'x 610, 612-13 (7th Cir. 2008). *Gabbanelli Accordions & Imports, L.L.C. v. Gabbanelli* involved a limited remand for the purpose of allowing a litigant to follow the procedure for lodging a recently issued foreign judgment. *See* 575 F.3d 693, 696-97 (7th Cir. 2009). As these and other cases recognize, a limited remand is appropriate when an appellate court determines that it would be appropriate to have the district court intervene for a "narrowly limited purpose," in a way that could obviate the need for, or otherwise have a substantial impact on, the appeal—not when the appellant decides that it wants an opportunity to insert additional evidence into the record. *Caterpillar, Inc. v. NLRB*, 138 F.3d 1105, 1107 (7th Cir. 1998) (citing cases).

The University paradoxically claims that giving it a chance to go back to the district court, and to return to this Court at a later date on its appeal of the denial of a preliminary injunction, would "conserve judicial resources." Pl.-Appellant's Mot. at 7. In fact, it would do nothing but flush down the drain the work that has already taken place on the appeal. It could likewise wreak havoc with the district court's

lengthy decision—one that the court rushed to issue. Would that decision need to be revised to reflect the new evidence that the University offers?

The University's claim that granting its Motion would not prejudice the other litigants (*see id.*) is equally remarkable. In fact, a remand limited to the questions that the University seeks to explore would be grossly prejudicial. Why the University should get a second bite at the apple, while denying the Intervenors their first bite at myriad factual questions that the Intervenors believe are relevant to the University's entitlement to relief, goes entirely unexplained. If this appeal returns to this Court, it should do so with a robust record, not a one-sided one.

The University has likewise overlooked the fact that counsel for the Intervenors, and presumably for the United States, has been feverishly working on an appellate brief—work that will likewise go down the tube if the University's Motion were to be granted. *See Albers*, 354 F.3d at 646 (denial of self-serving strategic voluntary dismissal helps ensure "investment of public resources already devoted to this litigation will have some return"). The undersigned counsel has done so because of an expedited briefing schedule that was set—and this bears repeating—because the University has unwaveringly held itself out as a litigant in dire need of a speedy resolution, one that is suffering "serious harm" from being forced to violate its religious beliefs every moment of every day that the preliminary injunction remains in place. Pl.-Appellant's Mot. for Inj. Pending Appeal (Doc. No. 3-1) at 18.

The University's opportunistic litigation strategy is exemplified by the University's seeking a result in the current motion that it earlier claimed would be

deeply injurious. In opposing intervention, the University told the Court that any "delay" that would be caused by a remand for further factual development of the Intervenors' claims "would require Notre Dame to comply with a law that, as this Court has found, 'substantially burdens their religious-exercise rights'…. [E]very day that goes by is another day that Notre Dame is forced to violate its religious beliefs[.]" *Id.* at 17 n.3. It is hard to square the University's motion not just with its overall position in this litigation, but with its earlier position on the very delay that it now seeks. The utter cynicism of the University's most recent motion is reason enough to deny the relief that it seeks.

## II. The Court Should Deny Voluntary Dismissal Under Federal Rule of Appellate Procedure 42(b).

Federal Rule of Appellate Procedure 42(b) gives this Court discretion over whether to allow voluntary dismissal where—as here—the non-moving parties do not agree. "The procedure is not automatic." *Albers v. Eli Lilly & Co.*, 354 F.3d 644, 646 (7th Cir. 2004). "[O]ne good reason to exercise discretion against dismissal is to curtail strategic behavior." *Id.* For all of the reasons discussed above, it would be difficult to find a better case for application of that principle.

The University claims that "it is not seeking to evade appellate review." Pl.-Appellant's Mot. at 9. This is likely true only to the extent that the University refers to appellate review generally, as opposed to review by this panel—which, as the University pointed out in its principal brief, has been somewhat less receptive to its arguments than it expected. *See* Pl.-Appellant's Br. (Doc. No. 18-1) at 2-3. The University's sudden loss of enthusiasm—after weeks of unbroken claims of

urgency—utterly exudes procedural gamesmanship. This Court should, as it has in similar circumstances, deny the University's motion and "carry through so that the investment of public resources already devoted to this litigation will have some return." *Albers*, 354 F.3d at 646.

## CONCLUSION

This Court already concluded, in granting the Motion to Intervene, that no undue prejudice would arise from allowing this appeal to go forward with the Intervenors' participation. The Intervenors seek to make largely legal arguments that are apparent on the face of the regulations in question and of which the University was well aware when it sought to stay the proceedings below. Furthermore, the United States and the Intervenors would be prejudiced by the dismissal of an appeal mere days before their briefs are due. The University's Motion should be denied.

Respectfully submitted on January 22, 2014, by

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 22, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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