

No. 13-03853

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

UNIVERSITY OF NOTRE DAME,
Plaintiff-Appellant,

v.

KATHLEEN SEBELIUS, in her official capacity as Secretary of the U.S. Department of Health and Human Services; THOMAS PEREZ, in his official capacity as Secretary of the U.S. Department of Labor; JACOB J. LEW, in his official capacity as Secretary of the U.S. Department of the Treasury; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; U.S. DEPARTMENT OF LABOR; and U.S. DEPARTMENT OF THE TREASURY,
Defendants-Appellees,

&

JANE DOE 1, JANE DOE 2, and JANE DOE 3,
Intervenors-Appellees.

Appeal from the United States District Court
For the Northern District of Indiana
District Court Case No. 3:13-CV-1276
The Honorable Philip P. Simon

**PLAINTIFF-APPELLANT'S REPLY IN SUPPORT OF ITS MOTION FOR
LIMITED REMAND TO SEEK DISCOVERY AND SUPPLEMENT THE RECORD,
OR IN THE ALTERNATIVE, TO DISMISS**

JONES DAY
Matthew A. Kairis (counsel of record)
325 John H. McConnell Blvd, Suite 600
Columbus, OH 43216
(614) 469-3939

ATTORNEY FOR PLAINTIFF-APPELLANT UNIVERSITY OF NOTRE DAME

Plaintiff-Appellant the University of Notre Dame (“Notre Dame”) submits this reply in support of its motion for limited remand to seek discovery and supplement the record, or in the alternative, to dismiss (doc. 27). Both the Government-Appellees¹ and Intervenors-Appellees have filed responses in opposition. (Docs. 28 & 29, respectively).

Notre Dame seeks the requested relief so as to allow this Court to make a ruling that is based on facts, as opposed to the parties’ assertions.

Intervenors-Appellees are now full parties to this dispute; their arguments, raised for the first time on appeal, will be considered by this Court. But, these arguments contain *no* citations to an underlying factual record, and are instead based on unrebuttable averments in the affidavits filed in support of the motion to intervene.

Notre Dame has had no opportunity to develop a record to rebut Intervenors-Appellees’ arguments. Intervenors-Appellees moved to intervene in the district court on December 19, 2013, the day before the district court issued its opinion denying the motion for preliminary injunction. (Dist. Ct. Doc. 33.) Notre Dame thus faced the dilemma of filing its notice of interlocutory appeal and seeking a stay of the district court proceedings, or proceeding in the district court to develop a record to rebut Intervenors-Appellees’ claims. Given the Mandate’s then-impending January 1, 2014, enforcement date, Notre Dame

¹ The United States does not object to Notre Dame’s alternative request for a voluntary dismissal of this appeal, but notes that it will move to dismiss the complaint in the district court. (Doc. 28, at 3.) It is free to do so.

chose to appeal and seek an injunction in this Court. Intervenors-Appellees now fault Notre Dame for not remaining in the district court to create a factual record, even though a) doing so would have foreclosed Notre Dame's ability to file an interlocutory appeal, b) Intervenors-Appellees were not yet parties when Notre Dame filed its notice of appeal, and c) Notre Dame believed that the path it chose minimized the likelihood that its religious beliefs would be compromised. Notre Dame's decision to appeal when it did is understandable.²

Intervenors-Appellees assert that they will be prejudiced should this Court grant the instant motion. In support of this claim, they state that discovery upon remand would "deny[] [them] their first bite at myriad factual questions," and that their counsel is "feverishly working on an appellate brief." (Doc. 29, at 7.) The district court is well-suited to preside over discovery and to set appropriate discovery limits. And, as the appellate brief's purpose is to argue that the Mandate should not be preliminarily enjoined, Intervenors-Appellees would enjoy the same result should this motion be granted.

This motion is not about gamesmanship or evading review.³ Notre Dame believes that it will ultimately prevail in this Court, and would be content to

² Intervenors-Appellees fault Notre Dame for asking for a remand or dismissal after previously seeking expedited review. The basis for expedited review in the emergency motion for an injunction pending appeal, however, was to stop the Mandate's enforcement before January 1, 2014. That date has passed, and although Notre Dame still seeks a rapid resolution of this dispute, it does not do so at the expense of fair presentment of its arguments on appeal.

³ Intervenors-Appellees assert that Notre Dame seeks review from a panel different from the one that granted the motion to intervene. (Doc. 29, at 8.) But, at this point, the panel's composition is unknown. See 7th Cir. Practitioner's Handbook for Appeals, at 10 ("The identity of the three judges on any panel is not made public

withdraw the instant motion should Intervenors-Appellees be considered *amici curiae*. But, barring this, Notre Dame should not be hamstrung by the lack of a factual record that could be used to address Intervenors-Appellees's new claims, which are not limited to the face of the contested regulations, but instead discuss how the regulations personally affect third parties not party to the district court proceedings. Should this Court consider these new arguments without the aid of an underlying record, it risks rendering an opinion that could be called into doubt when new facts are adduced in the district court. Permitting a limited remand, or in the alternative, a dismissal of this appeal, would yield the most juridically sound result.

Respectfully submitted, this the 22nd day of January, 2014.

By: s/ Matthew A. Kairis

Matthew A. Kairis (OH No. 55502)

(Counsel of record)

JONES DAY

325 John H. McConnell Blvd., Suite 600

P.O. Box 165017

Columbus, OH 43216

(614) 469-3939

Counsel for Plaintiff-Appellant University of Notre Dame

(continued...)

until the day the cases are argued.”); 7th Cir. Op. P. 6(d) (noting that a matter will be assigned to a motions panel for argument and decision only upon the motion panel's recommendation to the chief judge). Intervenors-Appellees' presumptuous argument, much like the substantive arguments it seeks to raise before this Court, is without factual support.

CERTIFICATE OF SERVICE

I hereby certify that, on January 22, 2014, I electronically filed a true and correct copy of the foregoing using the CM/ECF system, which will send notification of such filing to all counsel of record.

By: s/ Matthew A. Kairis

Matthew A. Kairis (OH No. 55502)

(Counsel of record)

JONES DAY

325 John H. McConnell Blvd., Suite 600

P.O. Box 165017

Columbus, OH 43216

(614) 469-3939

Counsel for Plaintiff-Appellant University of Notre Dame