IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNIVERSITY OF NOTRE DAME, Plaintiff-Appellant, v. KATHLEEN SEBELIUS, in her official capacity as Secretary, United States Department of Health and Human Services, *et al.*, Defendants-Appellees.	No. 13-3853

GOVERNMENT'S RESPONSE TO NOTRE DAME'S MOTION FOR LIMITED REMAND OR, IN THE ALTERNATIVE, TO DISMISS ITS APPEAL

Defendants-appellees, the Secretary of Health and Human Services, *et al.*, respectfully respond to the University of Notre Dame's "Motion For Limited Remand To Seek Discovery And Supplement The Record, Or In The Alternative, To Dismiss."

STATEMENT

1. The University challenges regulations establishing minimum health coverage requirements under the Affordable Care Act insofar as they include contraceptive coverage as part of women's preventive health coverage. Unlike the plaintiffs in *Korte* v. *Sebelius*, 735 F.3d 654 (7th Cir. 2013), on which the University heavily relies, Notre Dame is concededly eligible for the religious accommodations set out in the regulations and therefore is not required "to contract, arrange, pay, or refer for contraceptive coverage,"

78 Fed. Reg. 39,870-01, 39,874 (July 2, 2013). To be relieved of these obligations, it need only self-certify that it is a non-profit organization that holds itself out as religious organization and has a religious objection to providing coverage for contraceptive services. *See* 78 Fed. Reg. at 39,874-39,886; 45 C.F.R. § 147.131(b); 29 C.F.R. § 2590.715-2713A(b).

2. The district court denied the University's motion for a preliminary injunction on December 20, 2013, concluding that its claims fail as a matter of law. On December 30, this Court denied the University's motion for an injunction pending appeal and ordered expedited briefing. Pursuant to that schedule, Notre Dame filed its opening brief on January 13, 2014. The government's responsive brief is due on January 27. The Court has scheduled oral argument for February 12.

On January 8, three students moved to intervene on appeal. (The students had moved to intervene in district court, but the court has not acted on their motion.) The University opposed the intervention motion. The government took no position.

On January 14, this Court granted the students' motion to intervene. Nearly a week later—half way through the government's briefing time—the University moved for a limited remand to permit discovery into the student-interveners' allegations or, in the alternative, to dismiss its appeal.

DISCUSSION

1. The district court denied a preliminary injunction because the University's claims fail as a matter of law. The court rejected the University's contention that its

religious exercise is substantially burdened by regulations that permit the University to opt out of providing contraceptive coverage to its employees and students. At the parties' joint request, the court stayed district court proceedings pending the disposition of this appeal.

The government believes that the relevant issues are those addressed in the district court's order denying a preliminary injunction. The University does not and could not suggest that discovery would bear on the resolution of those issues. More generally, its challenge to the regulations is governed by the familiar rule that "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973). If there were a remand, the government would move to dismiss the complaint for failure to state a claim or, alternatively, for summary judgment on the basis of the administrative record.

2. It is generally a litigant's prerogative to dismiss its appeal, and if plaintiff were moving for dismissal simply to allow the case to proceed to final judgment, we would have no objection to such a motion. It is unclear, however, how discovery requests to Notre Dame students could be germane to the legal questions addressed by the district court that are the subject of this preliminary injunction appeal.

We note also that the plaintiff's motion comes somewhat belatedly in the context of this highly expedited briefing. The University might, in opposing the motion for intervention, have urged that it did not wish to proceed with the appeal if intervention

were granted. At a minimum, the University could have moved for dismissal immediately following the grant of the intervention motion on January 14, rather than waiting until the following week.

In sum, although plaintiff is free to dismiss its appeal so that the case can proceed to final judgment, we respectfully urge that the Court should not endorse the premise of the University's motion—that discovery of the student interveners is appropriate to resolve the validity of the challenged regulation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 21, 2014, I electronically filed the foregoing document with the Clerk of the Court by using the appellate CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Adam Jed
Adam C. Jed