

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

University of Notre Dame,
Plaintiff-Appellant,

v.

No. 13-3853

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

and

Jane Doe 3 and Ann Doe,
Intervenors-Appellees.

Status Report of Intervenors-Appellees

In accordance with this Court's Order of May 10, 2017, Intervenors-Appellees report the following:

1. Despite our reaching out to the government since filing our last report with this Court on May 1, Intervenors still have *not* been included in any discussions that occurred concerning possible resolution of this case. Intervenors thus did not participate in the discussions on May 12, 23, and 30 that the government and Notre Dame identified in their Joint Status Report filed earlier today.

2. Intervenors' position on the merits has not changed since our previous status report. 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. 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, 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/h2ojyj5>. Granting the exemption that Notre Dame and the other religiously affiliated 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.

3. Yesterday, media reports included a leaked draft of a 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 in just the way that the government previously reported could not be done without depriving women like Intervenors 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>. If enacted, this new rule would allow Notre Dame to block Intervenors from receiving contraceptive coverage at all, even from an independent third-party provider. More generally, women across the country would be left without access to crucial medical care, and the costs and burdens of employers' religious beliefs would be shifted onto their employees—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). 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: June 1, 2017

Certificate of Service

On June 1, 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 CF/ECF system.

/s/ Richard B. Katskee
Richard B. Katskee