IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

UNIVERSITY OF NOTRE DAME, Plaintiff, v. KATHLEEN SEBELIUS, in her official capacity as Secretary, United States Department of Health and Human Services, *et al.*, Defendants.	)	Case No. 3:13-cv-1276 Electronically Filed

MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE
AND FOR CONSIDERATION OF INTERVENORS' ARGUMENTS
IN OPPOSITION TO
PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Jane Doe #1, Jane Doe #2, and Jane Doe #3 respectfully submit this memorandum in support of their motion to intervene of right, or alternatively, for permissive intervention, under Fed. R. Civ. P. 24(a)(2) and (b)(2). Because the status of these proceedings would leave the Intervenors with no reasonable opportunity to separately brief the question of the Plaintiff's entitlement to a preliminary injunction if they were to wait until this Court has ruled on the requested intervention, the Intervenors also submit this memorandum as a proposed brief in opposition to the Plaintiff's preliminary-injunction motion.

INTERESTS OF PROPOSED INTERVENORS

The proposed Intervenors are women of childbearing age who rely on Notre Dame's health-insurance plan as their means of healthcare coverage and who need, but are currently unable to afford, contraceptives. They seek to intervene because their interests in obtaining contraception would be substantially prejudiced if Notre Dame's arguments were to prevail. Their current inability to obtain contraceptive coverage subjects them to a heightened risk of unwanted pregnancy and diminishes their control over their reproductive capacity and bodily autonomy. This hardship would be redressed if Notre Dame were to be denied the exemption that it seeks. *See* Decls. 1, 2 & 3.

In opposing the University's request for an exemption, the Intervenors seek to press several arguments that the United States has not made, and that the United States cannot make for political and practical reasons. These arguments will not be preserved for appeal unless they are made by a litigant in the proceedings. Accordingly, the Intervenors easily satisfy the requirements of both mandatory and permissive intervention, and their arguments in opposition to the issuance of a preliminary-injunction should be considered by the Court.

ARGUMENT

I. The Proposed Intervenors Are Entitled To Intervention Of Right.

Pursuant to Fed. R. Civ. P. 24(a)(2), a party is entitled to intervention of right when four criteria are met: "(1) timely application; (2) an interest relating to the subject matter of the action; (3) potential impairment, as a practical matter, of that interest by the disposition of the action, and (4) lack of adequate representation of the interest by the existing parties to the action." *Southmark Corp. v. Cagan*, 950 F.2d 416, 418 (7th Cir. 1991). The proposed Intervenors satisfy these criteria.

A. This motion is timely.

This motion is timely: it comes a mere two weeks after the filing of the University's Complaint on December 3, 2013. *See Nissei Sangyo Am., Ltd. v. United States*, 31 F.3d 435, 438 (7th Cir. 1994) (timeliness requirement satisfied when an intervenor does not "drag its heels" and files its motion "reasonably promptly"). Due to the dispatch with which it was filed, the motion cannot be said to prejudice the original parties' interests through delay. *See Schultz v. Connery*, 863 F.2d 551, 554 (7th Cir. 1988). Nor can it be said to be an effort to "derail[ ] a lawsuit within sight of the terminal." *Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 949 (7th Cir. 2000). Although the University has leveraged its delay in filing this lawsuit into pressure on the Court to rule on its motion for a preliminary injunction, any such time pressure is not attributable to the Intervenors, who have "act[ed] with dispatch." *Atlantic Mut. Ins. Co. v. Northwest Airlines, Inc*., 24 F.3d 958, 960 (7th Cir.1994).

B. The proposed Intervenors have a "direct, significant legally protectable interest" in the subject matter of this case.

Under Rule 24(a)(2), an intervenor must show that it has "a direct, significant legally protectable interest" in the subject matter of a case. *Wade v. Goldschmidt*, 673 F.2d 182, 185 (7th

Cir. 1982). Whether the moving party has such an interest is determined by "focus[ing] on the issues to be resolved by the litigation and whether the potential intervenor has an interest in those issues." *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 322 (7th Cir. 1995). While this requirement "has never been defined with particular precision[]," it is "something more than a mere 'betting interest,' but less than a property right." *Sec. Ins. Co. of Hartford v. Schipporeit, Inc.*, 69 F.3d 1377, 1380-81 (7th Cir. 1995); *see also Meridian Homes Corp. v. Nicholas W. Prassas & Co.*, 683 F.2d 201, 204 (7th Cir. 1982) (the term "interest" is "broadly construed" under Rule 24(a)(2)).

The principle issue in this case is whether the Religious Freedom Restoration Act (RFRA) entitles the University to an exemption from a requirement that triggers a third-party insurer's obligation to provide the University's students and employees with coverage for contraception. The proposed Intervenors are students at the University whose access to contraception will be enabled or extinguished by the ultimate ruling in the case; they are the intended beneficiaries of the regulation at issue. If the University were to prevail, the proposed Intervenors' ability to obtain contraception would be negatively impacted; if the United States prevails, the proposed Intervenors would gain access to the contraception that they need. Indeed, the proposed Intervenors' interest in this issue is at least as strong as the United States's interest in the integrity of its regulatory scheme and the University's purported religious exercise. The proposed Intervenors therefore have a direct, significant, and legally protectable interest in the issue to be decided in this case. *See, e.g.*, *Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 572 (7th Cir. 2009) (loss of statutorily-conferred benefits by a class of persons whose interests a law was intended to protect is a sufficient interest for purposes of Rule 24(a)(2)); *cf. Reich*, 64 F.3d at 323 (employees' interest in the specifics of their relationship with their employer is a "direct,

significant and legally protectable" interest under Rule 24(a)(2)).

C. The outcome of this case would impair Intervenors' interest.

In addition to an interest in the subject matter of a case, Rule 24(a)(2) requires "at least potential impairment of that interest if the action is resolved without the intervenor[.]" *Reid L. v. Ill. State Bd. of Educ.*, 289 F.3d 1009, 1017 (7th Cir. 2002). Whether an interest would be impaired "depends on whether the decision of a legal question involved in the action would as a practical matter foreclose rights of the proposed intervenors in a subsequent proceeding." *Meridian Homes Corp.*, 683 F.2d at 204.

A holding that the University is entitled to the exemption that it seeks would, by dint of stare decisis, foreclose the affected women from later arguing that Notre Dame is required to comply with the regulatory requirements that ensure the women's access to contraceptive coverage. *See Id*. (impairment for purposes of Rule 24(a)(2) is "measured by the general standards of stare decisis."). Such an impact easily satisfies the "minimal" requirement of impairment under Rule 24(a)(2). *Utah Ass'n of Cntys. v. Clinton*, 255 F.3d 1246, 1253 (10th Cir. 2001).

D. The proposed Intervenors' interests are not adequately represented.

Under Rule 24(a)(2), "[a] party seeking intervention as of right must only make a showing that the representation 'may be' inadequate and 'the burden of making that showing should be treated as minimal.'" *Ligas ex rel. Foster v. Maram*, 478 F.3d 771, 774 (7th Cir. 2007) (*quoting Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n. 10 (1972)). The proposed Intervenors satisfy this burden, as they intend to press and develop four arguments that have not been made by the government and that, if successful, would afford the Intervenors' interests lasting protection. *See City of Chi. v. Fed. Emergency Mgmt. Agency*, 660 F.3d 980,

985-86 (7th Cir. 2011) ("Cases allow intervention as a matter of right when an original party does not advance a ground that if upheld by the court would confer a tangible benefit on an intervenor who wants to litigate that ground.").

First, the affected women wish to press the argument that interpreting RFRA to allow the University to deprive them of contraceptive coverage would place RFRA in conflict with the Establishment Clause. The Supreme Court has long held that the government may not grant religious exemptions when doing so would impose significant burdens on third parties. Thus, in *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709 (1985), the Court struck down a statute that provided employees with an absolute right not to work on the Sabbath day of their choosing. The Court reasoned that, under the statute, "religious concerns automatically control over all secular interests at the workplace; the statute takes no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath." *Id.* at 709. More recently, in *Cutter v. Wilkinson*, 544 U.S. 709 (2004), the Court upheld the Religious Land Use and Institutionalized Persons Act (RLUIPA) -- a statute that, like RFRA, requires courts to apply strict scrutiny to laws that burden religious exercise -- against an Establishment Clause attack. A unanimous Court relied on *Caldor* to hold that in applying RLUIPA, "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Id.* at 720. Under Notre Dame's proposed application of RFRA, its interests would prevail over all other societal interests -- including the interest of the affected women in obtaining contraceptive coverage -- thereby placing RFRA, as applied in this case, in conflict with the Establishment Clause.

The government has not made this argument. Instead, it has argued that it is free to grant or deny the exemption that Notre Dame seeks and that it has, as a matter of policy, chosen to

deny it. *See* Defs.'Mem. in Opp'n at 25. This is hardly surprising, as the government typically seeks to preserve the greatest latitude in policy making. Prevailing on the Establishment Clause argument outlined above would run counter to that goal because it would preclude this or future administrations from granting, via statute or regulation, the exemption sought by Notre Dame and similarly situated institutions. The United States also would be disinclined to make this argument because it could seen as casting constitutional doubt on a federal statute, and potentially could be used against the United States in future litigation.

Under these circumstances, the United States cannot be said to be "charged by law with protecting the interests of the proposed intervenors." *Maram*, 478 F.3d at 774; *see also Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 659 (7th Cir. 2013) (not every governmental actor with an interest in defending the validity of a law is necessarily "charged by law with protecting the interests of" potential intervenors). The United States and the affected women thus have goals that are, in fundamental ways, distinct and "at variance." *See Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 101 F.3d 503, 508 (7th Cir. 1996) (distinguishing between cases in which adequacy is presumed and a case "in which the government had substantive interests at variance" with proposed intervenors). The United States cannot be said to be protecting the interests of the proposed Intervenors when those Intervenors seek to establish rights that are adverse to the government's interests.

Second, the proposed Intervenors intend to argue that, if the University's religious exercise is burdened, it is only by choice: Notre Dame may elect to discontinue students' health-insurance coverage -- an option pursued by many universities in this country, both before and since the passage of the Affordable Care Act. *See* Louise Radnofsky, *Big Changes in College Health Plans*, The Wall Street Journal, June 4, 2012, *available at* http://on.wsj.com/1khPkaa

(last visited December 18, 2013). The availability of this cost-free choice undercuts the University's claim that the challenged regulatory scheme leaves it with no choice but to violate its religious conscience. Insofar as Notre Dame asserts that it is religiously compelled to ensure that its students have access to adequate medical care, or that it would be competitively disadvantaged in relation to other academic institutions if it were to discontinue coverage, nothing would preclude the University from passing on to students, in the form of vouchers or stipends, some or all of the amounts currently expended by the University in providing students with health insurance. In turn, the students could use those funds to purchase insurance through the marketplace created by the Affordable Care Act. The United States, however, has not raised this possibility, as doing so would run counter to the government's overarching policy goal of encouraging employers and other institutions to continue to offer insurance.

Third, Intervenors seek to argue that, even if the University's religious exercise were substantially burdened by the challenged regulations, there is a compelling interest for the imposition of that burden, namely, providing the affected women with access to contraception and the consequent control over their sexual lives, bodily integrity, and reproductive capacity. Contraceptives lower the risk of unintended pregnancy, the consequences of which can be dire for both mother and fetus. See Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gaps* 103-04 (2011) (discussing health risks associated with unintended pregnancy, including low birth weight, prematurity, and health risks for women with certain medical conditions). The availability of contraceptives serves the interest of women in bodily autonomy, see *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972), and in "removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 626 (1984).

This argument likewise has not been made by the government here, and the affected women are uniquely situated to develop it, as they are the ones whose interests are at stake.

Finally, Intervenors seek to preserve the argument -- also not made by the government -- that Notre Dame is not a person that exercises religion under the Religious Freedom Restoration Act when it provides employee benefits. Indeed, Notre Dame has itself stated, on more than one occasion, that it is not engaging in "religious exercise" when it provides health insurance. In *Laskowski v. Spellings*, 546 F.3d 822 (7th Cir. 2008), an Establishment Clause challenge to public funding of a teacher-training program at Notre Dame, the University argued that the benefits that it provides, including health insurance, are "secular expenses" without religious import. *See* Br. of Def.-Intervenor-Appellee at 7-8, *Laskowski*, No. 05-2749 (7th Cir.), 2005 WL 3739459, at *8. Similarly, in *Am. Jewish Cong. v. Corp. for Nat. & Cmty. Serv*., 323 F. Supp. 2d 44 (D.D.C. 2004), *rev'd sub nom. Am. Jewish Cong. v. Corp. for Nat'l. & Cmty. Serv*., 399 F.3d 351 (D.C. Cir. 2005), another Establishment Clause challenge to Notre Dame's receipt of public funds, the University argued that purchasing health insurance is "administrative" in nature and does not constitute "religious instruction or activity." Mem. of Def.-Intervenor Univ. of Notre Dame, *Am. Jewish Cong.*, 2003 WL 25709328,at Part A, § 3, para 10.

The United States has argued that *for-profit companies* do not exercise religion under RFRA, *see Korte v. Sebelius*, 735 F.3d 654, 675 (7th Cir. 2013), but it has not sought to make that argument with respect to a nonprofit institution like Notre Dame. To be sure, the Intervenors' ability to press this argument may have been prejudiced by the holdings in *Korte* -- that "closely held" corporations are "persons" within the meaning of RFRA, *id*., and that the corporations' religious exercise was substantially burdened by virtue of the imposition of an obligation on the corporations' owners and managers, *id*. at 685 -- but those holdings potentially

could be undone by the United States Supreme Court's decision in *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F. 3d 1114 (10th Cir. 2013), *cert. granted* , 2013 WL 5297798 (U.S. Nov. 26, 2013) (No. 13-354), in a way that also could impact whether Notre Dame is properly understood to be a person exercising religion under RFRA. In light of that possibility, Intervenors seek to preserve this argument here.

It is not enough to say that the Intervenors can raise these arguments as *amicus curiae*. *See Snyder v. Phelps*, 580 F.3d 206, 216 (4th Cir. 2009), *aff'd*, 131 S. Ct. 1207 (2011) (the court will not consider an issue raised by *amicus* but waived by the "party entitled to pursue it"); *Christopher M. by Laveta McA. v. Corpus Christi Indep. Sch. Dist.*, 933 F.2d 1285, 1293 (5th Cir. 1991) ("[A]n issue waived by appellant cannot be raised by *amicus curiae*."); *Amoco Oil Co. v. United States*, 234 F.3d 1374, 1378 (Fed. Cir. 2000) ("It is the appellant's case, not a joint appeal by the appellant and amicus. Appellant must raise in its opening brief all the issues it wishes the court to address."). Nor can the United States choose to assert these arguments for the first time on appeal. *See United States v. United Foods, Inc.*, 533 U.S. 405, 416-17 (2001).

In sum, the women who would be most affected by the outcome of this litigation are entitled to a seat at the table. They seek to press arguments that the United States will not otherwise raise or that it has little incentive to develop, and that will not otherwise be preserved for appeal. They are thus entitled to intervention as of right.

II. Alternatively, the Affected Women Should Be Granted Permissive Intervention.

Even if the Court were to decide that the affected women are not entitled to intervention of right under Fed. R. Civ. P. 24(a)(2), the Court should still permit intervention under Rule 24(b). Under Rule 24(b), a party may intervene at the discretion of the court so long as the proposed intervenor "demonstrate[s] that there is (1) a common question of law or fact, and (2)

independent jurisdiction." *Sec. Ins. Co. of Hartford v. Schipporeit, Inc.*, 69 F.3d 1377, 1381 (7th Cir. 1995). In exercising its discretion under Rule 24(b), "the court must give some weight to the impact of the intervention on the rights of the original parties." *Id.*

There is no doubt that the women who seek to intervene in this case have a "defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(a)(2). Like the government, these women seek to establish that RFRA does not entitle Notre Dame to the exemption that it seeks, albeit on grounds more favorable to the women's interests. As to independent jurisdiction, the Intervenors' interest in this case turns upon the same questions of federal and constitutional law affording this Court jurisdiction over the original parties' dispute. *See Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Cont'l Ill. Corp.*, 113 F.R.D. 532, 538 (N.D. Ill. 1986) ("[P]ermissive intervention as a defendant in a federal question lawsuit ordinarily causes no jurisdictional problems" because their interests concern federal questions already present in the case.).

Nor will granting this motion cause undue delay or otherwise prejudice the interests of the original parties. As discussed above, the proposed Intervenors filed this motion in a timely manner at the outset of the litigation. The parties have no cognizable interest in preventing the affected women from asserting their personal rights. *See Solid Waste Agency of N. Cook Cnty.*, 101 F.3d at 509. And the University "can hardly be said to be prejudiced by having to prove a lawsuit it chose to initiate." *Schipporeit*, 69 F.3d at 1381.

Once the prerequisites for permissive intervention are satisfied, it rests within the Court's discretion whether to grant intervention, though the exercise of that discretion should be "liberally" exercised "in favor of potential intervenors." *Pension Ben. Guar. Corp. v. Slater Steels Corp.*, 220 F.R.D. 339, 341 (N.D. Ind. 2004). The Court should exercise its discretion to

allow the intervention because, as discussed above, the Intervenors have an important and substantial stake in these proceedings. They are the ones who stand to benefit or suffer harm from the case's outcome. They are in a unique position to develop the legal arguments -- and the factual underpinnings of those arguments -- described above. Their inclusion as parties undoubtedly would be beneficial to the Court. *Cf. United States v. Bd. of Sch. Comm'rs of City of Indianapolis, Ind.*, 466 F.2d 573, 576 (7th Cir. 1972) (permitting persons of a particularly affected class to intervene "may prove helpful to the trial judge's consideration of all aspects of [a] societally affected legal problem.").

Furthermore, permissive intervention is a mechanism through which courts "address important issues in [a] case once, with fairness and finality," resolving all issues for all stakeholders in one proceeding. *Schipporeit*, 69 F.3d at 1381. Not only would it be unfair to exclude would-be litigants from a case in which their rights are at stake, but doing so would leave important issues unlitigated. This would disserve the purpose of permissive intervention generally, and the administration of justice in this case in particular.

The women on Notre Dame's health-insurance plan are the individuals with the greatest personal stake in the outcome of this lawsuit. Accordingly, the proposed Intervenors respectfully request that the Court grant their request to participate as parties to the case.

III. The Plaintiff's Motion for a Preliminary Injunction Should Be Denied.

Notre Dame moved for a preliminary injunction approximately one week ago. The Court held a hearing on that motion today. Given this timeline, the Intervenors would have little or no opportunity to present to the Court their arguments in opposition to the issuance of a preliminary injunction if the Intervenors were to wait until this Court rules on the requested intervention. Accordingly, the Intervenors ask that the arguments presented above, in Section I.D., be

considered by the Court in ruling on the Plaintiff's preliminary-injunction motion. In all other respects, Intervenors join in the arguments made by the United States in opposing the issuance of a preliminary injunction.

Respectfully submitted on December 19, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2013, a true and correct copy of the foregoing was filed with this court by using this court's CM/ECF system, which will serve notice on the attorneys of record in this case who are registered with the CM/ECF system.

/s/ Seymour Moskowitz
Seymour Moskowitz