

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

University of Notre Dame,
Plaintiff-Appellant,

v.

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

and

Jane Doe 3 and Ann Doe,
Intervenors-Appellees.

No. 13-3853

Status Report of Intervenors-Appellees

In accordance with this Court's Order of August 14, 2017, Intervenors-Appellees report the following:

1. The status of this case has not changed since Intervenors-Appellees filed their last status report, on August 1, 2017.

2. In *Zubik v. Burwell*, the Supreme Court instructed the Courts of Appeals to "allow the parties sufficient time to resolve any outstanding issues between them" on remand. 136 S. Ct. 1557, 1560 (2016). The Supreme Court also directed that "the parties on remand should be afforded an opportunity to arrive at an approach going forward that accommodates petitioners' religious exercise *while at the same time ensuring that women covered by petitioners' health plans 'receive full and equal health coverage, including contraceptive coverage.'*" *Id.* (emphasis added). The other parties to this case have reported

to this Court that they have “engage[d] in extensive settlement discussions” in keeping with the Supreme Court’s directive.¹ But Intervenors have been excluded from those discussions and all other efforts that may have been undertaken to resolve the case in the manner directed by the Supreme Court.

3. Excluding Intervenors—individuals who would be denied contraceptive coverage if Notre Dame were successful on its claims—raises the substantial question whether Notre Dame and the government are committed either to settling the case (which would require participation of all parties) or to implementing the Supreme Court’s directive to ensure that “women covered by petitioners’ health plans receive full and equal health coverage, including contraceptive coverage.” To the extent that this Court is awaiting action by the parties on the assumption that the parties are working in accordance with the Supreme Court’s directive to attempt to “resolve [the] outstanding issues between them,” Intervenors respectfully suggest that this assumption may be misplaced. Accordingly, Intervenors request that this Court order negotiations by all the parties to this suit.

¹ Specifically, Notre Dame and the government have reported settlement discussions on May 12, May 23, May 30, July 27, July 31, August 9, and August 23, 2017. Appellant University of Notre Dame and Appellees’ Joint Status Report, *Univ. of Notre Dame v. Price*, No. 13-3853, at 1 (7th Cir. Aug. 31, 2017); Appellant University of Notre Dame and Appellees’ Joint Status Report, *Univ. of Notre Dame v. Price*, No. 13-3853, at 1 (7th Cir. Aug. 1, 2017); Appellant University of Notre Dame and Appellees’ Joint Status Report, *Univ. of Notre Dame v. Price*, No. 13-3853, at 2 (7th Cir. June 1, 2017).

4. As previously reported, the government has stated that it is drafting new regulations on the Affordable Care Act's requirement that health insurance cover women's preventive-care services such as contraception. See Office of Information & Regulatory Affairs, Office of Management & Budget, *Coverage of Certain Preventive Services Under the Affordable Care Act* (received on May 23, 2017), <https://tinyurl.com/OMBReview> (pending EO 12866 Regulatory Review). On May 31, 2017, 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 to deprive women like Intervenor of coverage of 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>. Although almost thirteen weeks have passed since the draft became public, the government has not yet issued it or any other rule, regulation, or guidance on the topic.

5. Intervenor cannot comment on the status of the Office of Management and Budget's review of the draft regulations, for which the Court's Order of August 14, 2017, requests information, because Intervenor and their counsel have not been included in any meetings or other communications with the government regarding the content or status of any draft regulations or the additional steps, if any, that must be taken before those proposed regulations issue. And the government did not provide any new information in its Joint

Status Report filed today, other than to state that OMB did not complete interagency review of the draft interim final rule within the period allotted under Executive Order 12,866 but has instead extended its time to act; the government does not identify any new deadline for the review.

6. Intervenors' position on the merits has not changed. The Establishment Clause forbids government to grant religious exemptions or accommodations from generally applicable laws when the exemption or accommodation would have a detrimental effect on third parties. *Cutter v. Wilkinson*, 544 U.S. 709, 720, 722 (2005) (to comply with the Establishment Clause, 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)); see also *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2781 n.37 (2014); *Holt v. Hobbs*, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., concurring).

In *Hobby Lobby*, the Court held that under the Religious Freedom Restoration Act certain closely held corporations could avoid complying fully with 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. Indeed, 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.* at 2781 n.37; *id.* at 2786–87 (Kennedy, J., concurring); *id.* at 2790 & n.8 (Ginsburg, J., joined by Breyer, Kagan, and Sotomayor, JJ., dissenting).

In January 2017, 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/h2ojy5>. Granting the exemption that Notre Dame and the other plaintiffs in these cases seek would impermissibly harm Intervenors and other employees and students by depriving them of the critical and seamless health coverage that Congress guaranteed to them under the Affordable Care Act.

The same would be true should the government eventually issue the leaked draft rule. That rule would leave Intervenors and women across the country without seamless access to crucial medical coverage, and the costs and burdens of universities’ and employers’ religious beliefs would be shifted onto students, faculty, and staff—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*, 136 S. Ct. at 1560. Thus, 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.

7. 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: August 31, 2017

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Certificate of Service

On August 31, 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 CM/ECF system.

/s/ Richard B. Katskee

Richard B. Katskee