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 OPPOSITION TO NOTRE DAME'S RENEWED MOTION FOR INJUNCTION PENDING APPEAL

Defendants-appellees, the Secretary of Health and Human Services, *et al.*, respectfully oppose the University of Notre Dame's Renewed Motion For Injunction Pending Appeal. The sole basis offered by plaintiff for asking the Court to reconsider its denial of an injunction is the Supreme Court's order in *Little Sisters of the Poor Home for the Aged* v. *Sebelius*, No. 13A691 (Jan. 24, 2014). Notre Dame asserts that, "[a]s the facts underlying *Little Sisters of the Poor* are nearly identical to those in the instant case, there is no legitimate basis upon which an injunction could be granted to the Little Sisters of the Poor but denied to Notre Dame." Motion at 2. As discussed below, the relevant facts underlying *Little Sisters of the Poor* are not "nearly identical" to those presented here, and the Supreme Court's order provides no reason for this Court to revisit its denial of an injunction pending the University's appeal of the denial of a preliminary injunction.

A. Background

The University challenges regulations that were issued in July 2013 and went into effect for its employee group health plan on January 1, 2014. The district court noted that, although the University was aware of the regulations for several months, it did not file suit until December 3, and did not move for a preliminary injunction until December 9. On December 20, after conducting a hearing, the district court denied the University's motion for a preliminary injunction, and, on December 30, this Court denied the University's motion for an injunction pending appeal from that order. The University did not seek Supreme Court review.

Instead, the University exercised its right under the challenged regulations to opt out of providing contraceptive coverage. Its third party administrator, Meritain Health, Inc., is providing separate payments for contraceptives, for which the University does not bear any direct or indirect costs, for University employees and their covered dependents during the course of this litigation. *See Notre Dame Revives Bid for Injunction Over Contraception*, Wall Street Journal, Law Blog, January 28, 2014, *available at* http://blogs.wsj.com/law/2014/01/28/notre-dame-revives-bid-for-injunction-over-contraception (last visited Feb. 4, 2014).

Although the University had sought expedited resolution of its appeal from the denial of a preliminary injunction, on January 20 it moved for a limited remand, or, in the alternative, to dismiss its preliminary injunction appeal on the ground that it needs discovery with regard to the intervention of three Notre Dame students. *See* Motion

For Limited Remand To Seek Discovery And Supplement The Record, Or In The Alternative, To Dismiss, ECF No. 27. This Court has deferred action on that motion pending oral argument in the preliminary injunction appeal, which is scheduled for February 12.

B. *Little Sisters of the Poor* Litigation

On January 28, the University filed its Renewed Motion for Injunction Pending Appeal. The sole ground for the renewed motion is the Supreme Court's order in *Little Sisters of the Poor* v. *Sebelius Home for the Aged*, No. 13A691 (Jan. 24, 2014).

The employers in that case provide group health coverage through the Christian Brothers Employee Benefit Trust, a self-insured "church plan." A "church plan" is a statutory category of employee benefit plan, *see* 26 U.S.C. § 414(e), that is exempt from the Employee Retirement Income Security Act (ERISA). 29 U.S.C. § 1003(b)(2). Because there is no statutory authority to regulate a church plan's third party administrator, the administrator is not required to assume responsibility for contraceptive coverage if an eligible organization declines to provide coverage. *See* 29 C.F.R. § 2590.715-2713A(b)(2). *See also* Order, *Little Sisters of the Poor* v. *Sebelius*, No. 13-1540 (10th Cir. Dec. 31, 2013) (explaining that "because the Trust is a self-insured 'church plan' exempt from ERISA, the third-party administrator, Christian Brothers Services, would not be subject to fines or penalties"). Moreover, Christian Brothers Services made clear that it "does not intend" to provide payments for contraceptive services voluntarily. *See Little Sisters of the Poor*, __ F. Supp. 2d __, No. 13-cv-2611,

2013WL6839900, at *10-*11, *13 (D. Colo. Dec. 27, 2013), Op. 23-24, 29 (citing 29 U.S.C. § 1003(b)(2)); *see also id.* at *15 (explaining that, if plaintiffs certify that they are eligible for the accommodation, "[i]t is clear that these services will not be offered to the[ir] employees").

The district court denied a motion by plaintiffs in that case for a preliminary injunction. After the Tenth Circuit denied their motion for an injunction pending appeal, Justice Sotomayor granted a temporary injunction and referred the matter to the full Court. On January 24, the Supreme Court issued the following order:

> If the employer applicants inform the Secretary of Health and Human Services in writing that they are non-profit organizations that hold themselves out as religious and have religious objections to providing coverage for contraceptive services, the respondents are enjoined from enforcing against the applicants the challenged provisions of the Patient Protection and Affordable Care Act and related regulations pending final disposition of the appeal by the United States Court of Appeals for the Tenth Circuit. To meet the condition for injunction pending appeal, applicants need not use the form prescribed by the Government and need not send copies to third-party administrators. The Court issues this order based on all of the circumstances of the case, and this order should not be construed as an expression of the Court's views on the merits.

Little Sisters of the Poor v. *Sebelius,* No. 13A691 (Jan. 24, 2014).

C. The Order in *Little Sisters of the Poor* Does Not Indicate That an Injunction Pending Appeal is Appropriate Here.

Notre Dame's argument that this Court should revisit its denial of an injunction reduces to a single sentence: "As the facts underlying *Little Sisters of the Poor* are nearly identical to those in the instant case, there is no legitimate basis upon which an

injunction could be granted to the Little Sisters of the Poor but denied to Notre Dame." Motion at 2.

As relevant here, the facts and procedural histories of the two cases are not similar, much less "nearly identical." In *Little Sisters of the Poor,* employees had not received contraceptive coverage and would not receive contraceptive coverage whether or not an injunction issued. Because the employers provided insurance through a church plan, the third-party administrator was not required to provide coverage and it had made clear that it would not do so.

First, in sharp contrast to the circumstances of Little Sisters of the Poor, thousands of individuals are already beneficiaries of the coverage at issue in this case, and an injunction here would deprive them of that coverage that they are already receiving. Notre Dame, unlike the employers in *Little Sisters of the Poor*, does not provide insurance through a church plan; it offers insurance to its employees through a self-insured plan administered by Meritain Health, Inc., an Aetna subsidiary. Meritain Health, unlike the third party administrator in *Little Sisters of the Poor,* is required to provide or arrange separate payments for contraceptive services for plan participants and beneficiaries. *See* 29 C.F.R. § 2590.715- 2713A(b)(2). And, unlike the third party administrator in *Little Sisters of the Poor,* Meritain Health is not only required to provide coverage—it is, in fact, doing so.

Second, Notre Dame chose not to seek Supreme Court relief after this Court denied the University's request for an injunction pending appeal. It cannot now seek

relief based on an order in a different case in which the organization sought and obtained temporary relief before its plan year began. The order in *Little Sisters,* which was "based on all of the circumstances of th[at] case," and, in the words of the Supreme Court, is not to be "construed as an expression of the Court's views on the merits," does not require entry of injunction here.

Third, the University's claim to the extraordinary relief of an injunction pending its preliminary injunction appeal is now weaker, not stronger, than at the time the Court denied the University's earlier request for such an injunction.

An injunction now would not preserve the status quo. Employees and other beneficiaries are currently receiving contraceptive coverage through Meritain. Plaintiff offers no reason why this Court should disrupt the status quo by entering an injunction pending appeal while it is considering the merits of the appeal on a highly expedited basis.

Moreover, the University claimed that it required an injunction by January 1, 2014 because that date marked the commencement of the plan year for its employee group health plan. (The plan year for its student plan does not begin until August). But the University has now taken the only action required by the challenged regulations, which was to certify to its third party administrator that it objects to providing contraceptive coverage. Indeed, the University's current motion underscores that its underlying objection is not to any act that it must take. The University seeks, instead, to preclude third parties from independently providing coverage to its employees.

Finally, the University's renewed motion for an injunction pending its preliminary injunction appeal reflects an abrupt about-face from its January 20 motion to this Court that asks for a remand or dismissal. Although plaintiff had previously sought expedited appellate review of the preliminary injunction denial, its January 20 motion asks the Court to delay its appeal by remanding for discovery or else dismissing the appeal entirely. Any urgency or demand for early resolution and relief is notably absent from that request.

In sum, plaintiff has identified no reason for this Court to reconsider its denial of an injunction pending the preliminary injunction appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 4, 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