No. 19-10754

In the United States Court of Appeals for the Fifth Circuit

RICHARD W. DEOTTE, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED; YVETTE DEOTTE, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED; JOHN KELLEY, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED; ALISON KELLEY, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED; HOTZE HEALTH & WELLNESS CENTER, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED; BRAIDWOOD MANAGEMENT, INCORPORATED,

Plaintiffs-Appellees,

v.

STATE OF NEVADA,

Appellants.

On Appeal from the United States District Court
for the Northern District of Texas, Fort Worth Division
Case No. 4:18-cv-00825-O

APPELLEES' MOTION TO DISMISS NEVADA'S APPEAL IN PART FOR LACK OF JURISDICTION

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CERTIFICATE OF INTERESTED PERSONS

Counsel of record certifies that the following persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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/s/ Jonathan F. Mitchell
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The appellees respectfully move to dismiss Nevada's appeal in part for lack of jurisdiction.[1] Nevada was not a party to the proceedings below, and the district court denied its motion to intervene. Nevada, however, has decided to appeal not only the order denying intervention (ECF No. 97, ROA.19-10754.2061-2082), but also the district's final judgment (ECF No. 98, ROA.19-10754.2083-2086), its class-certification orders (ECF Nos. 33 & 37, ROA.19-10754.1368-1389, ROA.19-10754.1406-1408), and its order granting the plaintiffs' motion for summary judgment and permanent injunction (ECF No. 76, ROA.19-10754.1845-1879).

Nevada unquestionably has standing to appeal the order denying its motion to intervene. But it lacks standing to appeal the final judgment and the remaining orders because it is not suffering Article III injury on account of those rulings. *See, e.g.*, *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013). More importantly, Nevada would lack standing to appeal those district-court rulings *even if* this Court were to reverse the denial of intervention and allow Nevada to become a party to this litigation. *See id.* (a successful intervenor must nevertheless show a "concrete and particularized injury" and a "personal and tangible harm" to appeal a district court's judgment). The Court should dismiss this portion of Nevada's appeal at the outset, before the parties (and this Court) are forced spend resources briefing and litigating issues that this Court has no authority to consider.

1. Nevada opposes this motion and will file a written response.

I. Nevada Lacks Standing To Appeal The Final Judgment, The Class-Certification Orders, And The Order Granting The Plaintiffs' Motion For Summary Judgment And Permanent Injunction

Federal regulations require health insurance to cover all FDA-approved contraceptive methods—including contraceptive methods that act as abortifacients—without any cost-sharing arrangements such as co-pays or deductibles. *See* 45 C.F.R. § 147.130(a)(1)(iv); 29 C.F.R. § 2590.715-2713(a)(1)(iv); 26 C.F.R. § 54.9815-2713(a)(1)(iv).[2] The district court's final judgment enjoins federal officials from enforcing this "Contraceptive Mandate" against employers who object to providing or arranging for such coverage on account of their sincere religious beliefs. *See* ROA.19-10754.2083-2086. It also enjoins federal officials from enforcing the Contraceptive Mandate in a manner that prevents individual religious objectors from purchasing health insurance that excludes contraceptive coverage from a willing health-insurance issuer or plan sponsor. *See id.*

The district court's injunction does not order the state of Nevada to do anything, and it does not preempt any provision of Nevada law. The district court's ruling merely immunizes *other* people from federal penalties if they decline to provide or purchase contraceptive coverage that violates their reli-

2. The Trump Administration recently issued a final rule that would exempt religious objectors from the Contraceptive Mandate, but a federal judge in Philadelphia has issued a nationwide injunction against the enforcement of that rule. *See Pennsylvania v. Trump*, 351 F. Supp. 3d 791 (E.D. Pa. 2019), *aff'd Pennsylvania v. President United States*, 930 F.3d 543 (3d Cir. 2019).

gious beliefs. A ruling of that sort does not inflict injury on the State of Nevada. Nevada's officials may believe that the Contraceptive Mandate *should* be enforced against religious objectors, but an unfulfilled desire to see others punished for following the dictates of their conscience is not a legally cognizable harm. *See Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) ("[A] private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.").

In the district court, Nevada claimed that the district court's injunction could adversely affect the State's fisc. *See* ROA.19-10754.1586-1588. But Nevada failed to present any evidence that this harm will occur. *See Wittman v. Personhuballah*, 136 S. Ct. 1732, 1737 (2016) (intervenors lack standing to appeal unless they can identify "record evidence establishing their alleged harm."); *id.* ("[T]he party invoking federal jurisdiction bears the burden of establishing that he has suffered an injury by submitting affidavit[s] or other evidence." (citation and internal quotation marks omitted)). And even if Nevada had introduced the necessary evidence, this alleged harm is far too speculative and too dependent on the independent choices of others to support Article III standing. *See Bennett v. Spear*, 520 U.S. 154, 167 (1997) (an Article III injury must "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)); *Barber v. Bryant*, 860 F.3d 345, 357 (5th Cir. 2017) ("An injury that is based on a speculative chain of possibilities does not confer Article III

standing." (citations and internal quotation marks omitted)). Finally, if Nevada chooses to increase its spending on social-welfare programs in response to the district court's injunction, that is a self-inflicted injury which cannot support Article III standing. *See Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976). Each of these reasons, standing alone, is sufficient to defeat Nevada's standing to appeal. When combined, they present an insurmountable jurisdictional obstacle.

A. Nevada Has Failed To Show Injury In Fact

Nevada must show that it will suffer "injury in fact" on account of the district court's injunction—and that injury must be "(a) concrete and particularized, and (b) 'actual or imminent, not "conjectural" or "hypothetical."'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (citations omitted)). Nevada claims that the district court's injunction will lead to increased state spending on: (1) contraception access; and (2) hospital costs for unplanned pregnancies. *See* ROA.19-10754.1586. But there is no evidence in the record showing that even a single woman will demand that the State pay for her contraception or hospital costs in response to the district court's injunction. *See Wittman*, 136 S. Ct. at 1737 (intervenors must identify "record evidence establishing their alleged harm.").

In its motion to intervene, Nevada asserted that "between 600 and 1,200 Nevadan women would be harmed from implementation of Plaintiffs' pro-

posed class relief." *See* ROA.19-10754.1587.[3] But Nevada did not explain how it came up with this number. Nevada cited a declaration from Beth Handler, but that contains nothing more than a bald assertion that "between 600 to 1,200 Nevada women would be harmed"; it is unsupported by any citation or explanation. *See* ROA.19-10754.1596. And while Nevada claims that this number was "based on the calculations in the Federal Government's proposed Final Rules," ROA.19-10754.1586-1587, there is nothing in the Final Rule that purports to calculate the number of women in Nevada who work for objecting employers.[4]

The district court refused to credit Nevada's estimate—and its decision on this point is unassailable given the State's repeated failures to explain how these numbers were derived. *See* ROA.19-10754.2073 ("The Court is unable to determine the basis for this estimate."); ROA.19-10754.2074 ("The Court

3. Nevada never explained what it meant by the word "harmed," but we believe that it meant to assert that "600 to 1,200" women of childbearing years in Nevada work for objecting employers and will no longer have full contraceptive coverage provided in their employer's health plan.

4. The Final Rule does state that the proposed religious and moral exemptions will affect "*no more than* 126,400 women of childbearing age who use contraceptives," but there is no Nevada-specific calculation. *See* Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,536, 57,550 (November 15, 2018) (emphasis added). And this nationwide number was not an estimate but an estimated *ceiling* on the number of women who *could* be affected; it is not a number from which anyone can extrapolate state-specific data on the number of women who actually *will* be affected by exempting objecting employers from the Contraceptive Mandate.

. . . is unable to discern the basis for the calculations contained in Handler's Declaration."). An unexplained and unsupported "estimate" cannot be used to establish an Article III injury.

But even if this Court were to assume, solely for the sake of argument, that there really are 600 to 1,200 women of childbearing years in Nevada who work for objecting employers and will no longer have full contraceptive coverage provided in their employer's health plan, there is no evidence in the record—and no reason to believe—that *any* of these women will make demands on the state's treasury in response to their employer's decisions.

The notion that the State will be spending extra money on hospitalization costs is especially far-fetched. Even if one were to assume that some of these 600 to 1,200 women will actually become pregnant on account of the district court's injunction, those women all have employer-sponsored health insurance, and those private insurance plans—rather than the State of Nevada—will pay for the hospital costs associated with pregnancy and delivery. For any of these costs to fall on the State, one would have believe that a woman who is employed by an objecting employer would suddenly terminate her employer-sponsored insurance after becoming pregnant and switch to Medicaid, a course of action that is entirely irrational for a pregnant woman who knows that she is facing a litany of upcoming health-care expenses. In addition, Medicaid in Nevada is limited to individuals whose annual household incomes fall below 138% of the federal poverty level, and individuals of this

sort are not to be found among the ranks of those who hold jobs with employer-sponsored health insurance.

More importantly, Nevada has not even shown that the district court's injunction will cause any of these 600 to 1,200 women to become pregnant in the first place. Nevada has made no effort to account for:

- The women who will be able access full contraceptive coverage through their husbands' health plans.
- The women under the age of 26 who will be able access full contraceptive coverage through their parents' health plans.
- The women whose employers object only to abortifacient contraception, and who will continue to provide non-abortifacient contraception at zero marginal cost.
- The women who share the religious beliefs of their employer, and who would never use contraceptive methods (or abortifacients) regardless of whether their employer provides coverage for them.
- The women who will obtain contraception through Title X (a federally funded program) if they can no longer get free contraception through their employer's health plan.
- The women who will purchase health insurance on the exchanges in response to their employer's decision to limit contraceptive coverage.
- The women who will buy their own contraception if they can no longer obtain it through their employer's health plan. (The pill costs between $15 and $50 per month, which is easily affordable for most women who have jobs with employer-provided health insurance.)

- The women who will refrain from sexual intercourse if they are unable or unwilling to obtain contraception through other means, rather than risking an unintended pregnancy by choosing to engage in unprotected sex.

- The women whose sexual partners will undergo vasectomies or use condoms if contraception is no longer provided free of charge in their employer's health plan.

- The women who work for objecting employers in Nevada who are already protected from the Contraceptive Mandate by an injunction entered in a different lawsuit.

By the time that one accounts for the women in these categories, the "600 to 1,200" number that Nevada touts could very well drop to zero—and even if it does not drop that far Nevada still has not shown that any of the remaining women will *actually become pregnant* on account of the relief issued by this Court. Nevada's claim that the district court's injunction will increase unintended pregnancies is nothing more than rank speculation, and it assumes that the women of Nevada are incapable of avoiding unwanted pregnancy through other means.

Nevada also claims that the district court's injunction will cause it to increase spending on contraception access. But this will happen only if a woman who works for an objecting employer is unable or unwilling to obtain contraception from other sources. And there are *many* other ways for women to obtain contraception (or use other birth-control strategies) that do not impose any costs on the taxpayers of Nevada. Those include:

- For married women, obtaining contraception through their husbands' health plans.

- For women under the age of 26, obtaining contraception through their parents' health plans.
- For women whose employers object only to abortifacients, obtaining and using the non-abortifacient contraception that remains available through their employer's plan.
- Obtaining contraception through Title X, which is federally funded and does not use state money.
- Purchasing health insurance on the exhanges that covers contraception.
- Paying for their own contraception.
- Insisting that their sexual partners undergo vasectomies or use condoms.
- Refraining from sexual intercourse.

There is no basis for Nevada to assume that *any* woman who works for an objecting employer will go on the dole and demand that state taxpayers pay for her contraception, when there are countless other ways for women to obtain contraception and practice birth control that do not involve the State in any way.

More importantly, Nevada failed to show that *any* of the allegedly affected women would qualify for state-funded contraception under Medicaid or other means-tested programs. In Nevada, a woman cannot receive Medicaid benefits if her annual household income exceeds 138% of the federal poverty level. In 2018, that amounted to $16,753 per year for an individual, and

$34,638 per year for a family of four.[5] A woman who holds a job with employer-provided health insurance is exceedingly unlikely to have an annual household income below these amounts, and Nevada failed to produce evidence showing that any such individuals exist. And Nevada failed to identify any state-funded program apart from Medicaid that provides contraception at taxpayer expense, nor did it describe the eligibility requirements for such a program. According the Guttmacher Institute, the amount that Nevada spends on family-planning services outside of Medicaid is practically non-existent.[6]

Nevada failed to produce any evidence that the district court's injunction will harm the state's fisc, and there is no reason to believe that these harms will occur. Because Nevada cannot identify "record evidence establishing its alleged harm," *Wittman*, 136 S. Ct. at 1737, it lacks standing to appeal the district court's final judgment, its class-certification orders, and its order granting the plaintiffs' motion for summary judgment and permanent injunction.

5. *See* https://www.nevadahealthlink.com/start-here/about-the-aca/medicaid (last visited on September 6, 2019).
6. *See* https://www.guttmacher.org/sites/default/files/factsheet/nv_13.pdf (last visited on September 6, 2019).

B. The Causal Connection Between The District Court's Injunction And The Alleged Harms To Nevada's Fisc Is Too Speculative And Too Dependent On Choices Made By Others To Support Article III Standing

Even if Nevada could somehow establish injury in fact, it *still* lacks standing to appeal because it cannot satisfy the causation prong of Article III standing. Nevada must show that the alleged injury to its fisc is "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Bennett*, 520 U.S. at 167 (citing *Lujan*, 504 U.S. at 560); *see also Barber*, 860 F.3d at 357 ("An injury that is based on a speculative chain of possibilities does not confer Article III standing." (citations and internal quotation marks omitted)). Nevada cannot satisfy this test because the chain of causation that would lead from the district court's injunction to additional state spending depends entirely on a series of independent (and speculative) choices made by others.

Nevada speculates that each of the following events will happen in response to the district court's injunction:

1. Religious employers in Nevada will choose to terminate coverage of some or all contraceptive methods in their insurance or self-insured health plans.

2. The female employees of child-bearing age who work for these objecting employers will choose not to obtain contraception from other sources such as Title X, Planned Parenthood, their family members' health insurance, purchasing contraception with their own money, or purchasing health insurance that covers contraception through the exchanges, and will instead seek contraception at the expense of Nevada taxpayers.

3. The female employees of child-bearing age who work for objecting employers and choose not to obtain contraception from other sources will also choose to engage in unprotected sex that puts themselves at risk of an unintended pregnancy, rather than avoiding the risk of unintended pregnancy by refraining from sexual intercourse.

4. The female employees of child-bearing age who work for objecting employers and (i) choose not to obtain contraception from other sources; and (ii) choose to engage in unprotected sex after failing to obtain contraception; will also (iii) become pregnant on account of those choices.

5. The female employees of child-bearing age who work for objecting employers and (i) choose not to obtain contraception from other sources; (ii) choose to engage in unprotected sex after failing to obtain contraception; and (iii) become pregnant on account of those choices; will also (iv) choose not to abort their pregnancy, even though abortion remains available on demand before viability and even though elective abortion does not affect Nevada's fisc because Nevada does not permit taxpayer funding of elective abortions.[7]

6. The female employees of child-bearing age who work for objecting employers and (i) choose not to obtain contraception from other sources; (ii) choose to engage in unprotected sex after failing to obtain the necessary contraception; (iii) become pregnant on account of those choices; and (iv) choose not to abort their pregnancy; will also (v) drop their employer-sponsored health insurance and switch to Medicaid or some other form of state-provided health insurance shortly after becoming pregnant, causing the "increased hospital

7. Nevada prohibits taxpayer funding of abortion except in cases of rape, incest, or when the mother's life is endangered. *See* https://www.guttmacher.org/state-policy/explore/state-funding-abortion-under-medicaid (last visited on September 6, 2019).

costs" for unplanned pregnancies to fall on the State of Nevada rather than a private insurance company.

7. Nevada will choose to increase public spending in response to these choices made by others, rather than capping its spending—or cutting or eliminating its social-welfare programs—in response to this increased demand.

Suffice it to say that any "injury" to Nevada's fisc will be the result of *many* independent decisions made by others—including choices made by Nevada itself, which is under no compulsion to establish or fund social-welfare programs that pay for its residents' contraception or health care. This exceedingly attenuated chain of causation—which turns on a multitude of choices made by independent actors—does not satisfy the causation requirement of Article III standing.

C. Any Injury To Nevada's Fisc Will Be Self-Inflicted

Finally, even if one imagines that the district court's injunction will lead Nevada to increase state spending on contraceptive access and hospitalization costs, any such "injury" to Nevada will be self-inflicted.

Nevada acts as though it will be *compelled* to increase public spending if the district court's injunction increases the number of women who want state taxpayers to pay for their birth control. But Nevada is not obligated to accommodate these demands. Nevada is not required to establish a welfare state, and Nevada is under no compulsion to tax its citizens and redistribute that money toward those want others to pay for their contraception and health care. *See DeShaney v. Winnebago County Dept. of Social Services*, 489

U.S. 189, 196 (1989) ("[T]he Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."); Robert H. Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 Wash. U. L. Q. 695. Nevada *chooses* to establish these programs, and Nevada *chooses* the amount of taxpayer money that it will direct toward family planning and health-related services when it enacts its biennial budget. Nevada will retain its prerogative to make these choices no matter what happens in this case.

Self-inflicted injuries to a State's fisc cannot serve as the basis for Article III standing. As the Supreme Court has explained:

> The injuries to the plaintiffs' fiscs were self-inflicted, resulting from decisions by their respective state legislatures. Nothing required Maine, Massachusetts, and Vermont to extend a tax credit to their residents for income taxes paid to New Hampshire, and nothing prevents Pennsylvania from withdrawing that credit for taxes paid to New Jersey. No State can be heard to complain about damage inflicted by its own hand.

Pennsylvania v. New Jersey, 426 U.S. 660, 664 (1976). So too here. Whether and how much Nevada should spend on its social-welfare programs is a sovereign prerogative that rests entirely with the people of Nevada, and nothing in the district court's injunction threatens Nevada's right to decide the amount of money that it will spend on these matters.

II. The Court Should Dismiss This Portion Of Nevada's Appeal Before Briefing Is Submitted

By appealing the district court's final judgment and merits-related orders, Nevada has signaled its intent to brief and argue the merits of the district court's rulings on class-certification and its interpretation of the Religious Freedom Restoration Act. The Court should not allow these issues to proceed to briefing and oral argument when it lacks jurisdiction to review the district court's rulings on these matters. It is a waste of this Court's time—and a waste of the litigants' resources—to brief and argue issues that this Court has no jurisdiction to consider.

Allowing these issues to proceed to briefing will also distract the litigants and the Court from the important issues surrounding Nevada's attempted intervention—which the Court unquestionably has jurisdiction to resolve. Rather than submitting briefs focused on the intervention issue, the parties' briefs will instead be discussing issues beyond this Court's jurisdiction, and the plaintiffs-appellees will have to spend large portions of their brief defending the merits of the district court's class-certification ruling and its final judgment even though Nevada has no business appealing those decisions. It would greatly serve judicial economy to dismiss these portions of Nevada's appeal before briefing is submitted, rather than carrying the motion with the case.

CONCLUSION

The Court should dismiss Nevada's appeal of the district's final judgment (ECF No. 98), its class-certification orders (ECF Nos. 33 & 37), and its order granting the plaintiffs' motion for summary judgment and permanent injunction (ECF No. 76), for lack of appellate jurisdiction.

Respectfully submitted.

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Dated: September 6, 2019

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CERTIFICATE OF CONFERENCE

I certify that I conferred with Craig A. Newby, counsel for Nevada, and he informed me that Nevada opposes this motion and will file a written opposition.

/s/ Jonathan F. Mitchell
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CERTIFICATE OF COMPLIANCE

with type-volume limitation, typeface requirements,
and type-style requirements

1. This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because it contains 3,683 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This motion complies with the typeface and type-style requirements of Fed. R. App. P. 27(d)(1)(E), 32(a)(5), and Fed. R. App. P. 32(a)(6) because it uses Equity Text B 14-point type face throughout, and Equity Text B is a proportionally spaced typeface that includes serifs.

/s/ Jonathan F. Mitchell
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CERTIFICATE OF ELECTRONIC COMPLIANCE

Counsel also certifies that on September 6, 2019, this brief was transmitted to Mr. Lyle W. Cayce, Clerk of the United States Court of Appeals for the Fifth Circuit, via the court's CM/ECF document filing system, https://ecf.ca5.uscourts.gov/.

Counsel further certifies that: (1) required privacy redactions have been made, 5th Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5th Cir. R. 25.2.1; and (3) the document has been scanned with the most recent version of VirusTotal and is free of viruses.

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CERTIFICATE OF SERVICE

I certify that on September 6, 2019, this document was electronically filed with the clerk of the court for the U.S. Court of Appeals for the Fifth Circuit and served through CM/ECF upon:

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