No. 19-10754

In the United States Court of Appeals for the Fifth Circuit

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

Plaintiffs-Appellees,

v.

STATE OF NEVADA,

Movant-Appellant.

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

ANSWERING BRIEF OF APPELLEES RICHARD W. DEOTTE, ET AL.

H. DUSTIN FILLMORE III
CHARLES W. FILLMORE
The Fillmore Law Firm, LLP
201 Main Street, Suite 801
Fort Worth, Texas 76102
(817) 332-2351 (phone)
(817) 870-1859 (fax)
dusty@fillmorefirm.com
chad@fillmorefirm.com

JONATHAN F. MITCHELL
Mitchell Law PLLC
111 Congress Avenue, Suite 400
Austin, Texas 78701
(512) 686-3940 (phone)
(512) 686-3941 (fax)
jonathan@mitchell.law

Counsel for Plaintiffs-Appellees

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.

Plaintiffs	Plaintiffs' Counsel
• Richard W. DeOtte • Yvette DeOtte • John Kelley • Alison Kelley • Hotze Health & Wellness Center • Braidwood Management Inc.	Jonathan F. Mitchell MITCHELL LAW PLLC Charles W. Fillmore H. Dustin Fillmore THE FILLMORE LAW FIRM LLP

Defendants	Defendants' Counsel
• Alex M. Azar II, in his official capacity as Secretary of Health and Human Services • Steven T. Mnuchin, in his official capacity as Secretary of the Treasury • Eugene Scalia, in his official capacity as Secretary of Labor • United States of America	Daniel M. Reiss James M. Burnham UNITED STATES DEPARTMENT OF JUSTICE

Proposed Intervenor	Proposed Intervenor's Counsel
• State of Nevada	Heidi Stern Craig Newby OFFICE OF THE NEVADA ATTORNEY GENERAL

/s/ Jonathan F. Mitchell
JONATHAN F. MITCHELL
Counsel for Plaintiffs-Appellees

STATEMENT REGARDING ORAL ARGUMENT

The plaintiffs-appellees believe oral argument is unnecessary because Nevada's motion to intervene should be denied as moot, as all litigation between the plaintiffs and defendants has ended, and the Court lacks jurisdiction over the remainder of Nevada's appeal. For these reasons, the plaintiffs-appellees believe that the Court can dispose of this appeal without oral argument. If, however, the Court decides to hold oral argument, the plaintiffs-appellees respectfully ask to participate.

TABLE OF CONTENTS

Certificate of interested persons i

Statement regarding oral argument ii

Table of contents iii

Table of authorities v

Statement of jurisdiction 2

Statement of the issues 2

Statement of the case 3

Summary of argument 13

Argument 14

I. Nevada lacks standing to appeal the classwide injunction because it failed to introduce evidence that it will suffer injury from this classwide relief 14

A. Nevada cannot establish standing to appeal by alleging injury to the state's fisc 15

B. Nevada cannot establish standing to appeal by alleging that the injunction will increase abortions 28

C. Nevada cannot establish standing to appeal by alleging injury to its residents 30

D. Nevada alleges no injury from the protections conferred on objecting individuals 30

E. The "special solicitude" doctrine does not absolve Nevada of its duty to introduce evidence of injury in fact 31

II. Nevada's injuries from the classwide injunction cannot be redressed now that the Trump Administration's rule is in effect 31

III. The district court correctly denied intervention 32

A. The motion to intervene should be denied as moot because the litigation between the plaintiffs and defendants has ended 32

B. The motion to intervene should be denied because Nevada failed to include a pleading, as required by Rule 24(c) 34

C. The motion to intervene should be denied because Nevada failed to identify a "claim or defense for which intervention is sought," as required by Rule 24(c) 37

D. The motion to intervene as of right should be denied because Nevada does not have a "direct, substantial, and legally protectable interest" in the outcome of this litigation 38

E. The Court lacks jurisdiction to review the denial of permissive intervention 46

IV. The district court correctly rejected Nevada's arguments in defense of the Contraceptive Mandate 47

A. The Contraceptive Mandate substantially burdens the plaintiffs' exercise of religion 47

B. The courts may not consider Nevada's argument that the contraceptive mandate is the "least restrictive means" of furthering a "compelling governmental interest" 50

V. Nevada waived any challenge to class certification 52

VI. This court lacks jurisdiction to consider Nevada's lack-of-adversity arguments 52

Conclusion 54

Certificate of service 55

Certificate of compliance 56

Certificate of electronic compliance 57

TABLE OF AUTHORITIES

Cases

Alden v. Maine,
527 U.S. 706 (1999) 45

Babb v. Wilkie,
140 S. Ct. 1168 (2020) 31

Babbitt v. Farm Workers,
442 U.S. 289 (1979) 23

Barber v. Bryant,
860 F.3d 345 (5th Cir. 2017) 24, 25, 29

Bennett v. Spear,
520 U.S. 154 (1997) 25

Black v. Central Motor Lines, Inc.,
500 F.2d 407 (4th Cir. 1974) 33

Bostock v. Clayton County,
140 S. Ct. 1731 (2020) 46

Burwell v. Hobby Lobby Stores, Inc.,
573 U.S. 682 (2014) 4, 48, 49

Bush v. Viterna,
740 F.2d 350 (5th Cir. 1984) 34

California v. Health and Human Services,
281 F. Supp. 3d 806 (N.D. Cal. 2017) 7

Catholic Benefits Association LCA v. Azar,
No. 5:14-cv-00240-R (W.D. Okla.) 18

Catholic Benefits Association LCA v. Azar,
No. 5:14-cv-00685-R (W.D. Okla.) 18

Christian Employers Alliance v. Azar,
No. 3:16-cv-00309-DLH-ARS, 2019 WL 2130142 (D.N.D. May 15, 2019) 18

Clapper v. Amnesty International USA,
568 U.S. 398 (2013) 23

DeShaney v. Winnebago County Dept. of Social Services,
489 U.S. 189 (1989) 27

Diamond v. Charles,
476 U.S. 54 (1986) 30

Disability Advocates, Inc. v. New York Coalition for Quality Assisted Living, Inc., 675 F.3d 149 (2d Cir. 2012) 33

Donaldson v. United States,
400 U.S. 517 (1971) 39, 40

East Texas Baptist University v. Burwell,
793 F.3d 449 (5th Cir. 2015) 49

Edwards v. City of Houston,
78 F.3d 983 (5th Cir. 1996) 2, 32

Energy Transportation Group, Inc. v. Maritime Administration,
956 F.2d 1206 (D.C. Cir. 1992) 33

Farina v. Mission Investment Trust,
615 F.2d 1068 (5th Cir. 1980) 36

Flory v. United States,
79 F.3d 24 (5th Cir. 1996) 32

FW/PBS, Inc. v. City of Dallas,
493 U.S. 215 (1990) 24

Hardman v. Colvin,
820 F.3d 142 (5th Cir. 2016) 17

Hollingsworth v. Perry,
570 U.S. 693 (2013) 3, 14, 31

Huss v. Gayden,
571 F.3d 442 (5th Cir. 2009) 28

In re Abbott,
954 F.3d 772 (5th Cir. 2020) 11

Kneeland v. Nat'l Collegiate Athletic Ass'n,
806 F.2d 1285 (5th Cir. 1987) 2, 32, 46

Kunz v. New York State Commission on Judicial Misconduct,
155 F. App'x 21 (2d Cir. 2005) 33

Levenson v. Little,
75 F. Supp. 575 (S.D.N.Y. 1948) 34

Little Sisters of the Poor v. Pennsylvania,
140 S. Ct. 918 (2020) 13

Little Sisters of the Poor v. Pennsylvania,
140 S. Ct. 2367 (2020) ..... passim

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 25, 32

Massachusetts v. EPA,
549 U.S. 497 (2007) 30, 31

Massachusetts v. Mellon,
262 U.S. 447 (1923) 30

New Orleans Public Service, Inc. v. United Gas Pipe Line Co.,
732 F.2d 452 (5th Cir. 1984) (en banc) ..... passim

Non Commissioned Officers Ass'n of U.S. v. Army Times Publishing Co.,
637 F.2d 372 (5th Cir. 1981) 32

Okpalobi v. Foster,
244 F.3d 405 (5th Cir. 2001) (en banc) 14

Pennsylvania v. New Jersey,
426 U.S. 660 (1976) 28

Pennsylvania v. Trump,
281 F. Supp. 3d 553 (E.D. Pa. 2017) 7

Pennsylvania v. Trump,
351 F. Supp. 3d 791 (E.D. Pa. 2019) 8–9

Pin v. Texaco, Inc.,
793 F.2d 1448 (5th Cir. 1986) 34, 37

Public Citizen v. Liggett Group, Inc.,
858 F.2d 775 (1st Cir. 1988) 35

Rhode Island Federation of Teachers v. Norberg,
630 F.2d 850 (1st Cir. 1980) 35

Richardson v. Wells Fargo Bank, N.A.,
839 F.3d 442 (5th Cir. 2016) 52

RTM Media, L.L.C. v. City Of Houston,
584 F.3d 220 (5th Cir. 2009) 52

Seila Law LLC v. Consumer Financial Protection Bureau,
140 S. Ct. 2183 (2020) 53

Shevlin v. Schewe,
809 F.2d 447 (7th Cir. 1987) 35

Simon v. Eastern Kentucky Welfare Rights Org.,
426 U.S. 26 (1976) 23

Sommers v. Bank of America, N.A.,
835 F.3d 509 (5th Cir. 2016) 52–53

Susan B. Anthony List v. Driehaus,
573 U.S. 149 (2014) 23

Texas v. United States,
805 F.3d 653 (5th Cir. 2015) 24

Texas v. United States,
809 F.3d 134 (5th Cir. 2015) 31

Tosco Corp. v. Hodel,
804 F.2d 590 (10th Cir. 1986) 34

Trump v. Hawaii,
138 S. Ct. 2392 (2018) 11

Truvillion v. King's Daughters Hospital,
614 F.2d 520 (5th Cir. 1980) 33

United States v. Ford,
650 F.2d 1141 (9th Cir. 1981) 34

United States v. National Treasury Employees Union,
513 U.S. 454 (1995) 11

West Coast Seafood Processors Ass'n v. Natural Resources Defense Council, Inc., 643 F.3d 701 (9th Cir. 2011) 34

Wheaton College v. Burwell, 573 U.S. 958 (2014) 4

Wittman v. Personhuballah, 136 S. Ct. 1732 (2016) 2, 14, 17, 24

Yazdchi v. Am. Honda Fin. Corp., No. 3:05-cv-0737-L, 2005 WL 1943611 (N.D. Tex. Aug. 12, 2005) 35

Zepeda v. INS, 753 F.2d 719 (9th Cir. 1983) 11

Zubik v. Burwell, 136 S. Ct. 1557 (2016) (per curiam) 49

Statutes

42 U.S.C. § 2000bb-1(b) 51

42 U.S.C. § 2000bb-2 51

42 U.S.C. § 300gg-13(a)(4) 3

Rules

26 C.F.R. § 54.9815-2713(a)(1)(iv) 3

29 C.F.R. § 2590.715-2713(a)(1)(iv) 3

45 C.F.R. § 147.130(a)(1)(iv) 3

Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870 (July 2, 2013) 4

Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. 41,318 (July 14, 2015) 5

Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,792 (October 13, 2017) 6, 7

Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,536 (November 15, 2018) 8

Executive Order 13,798 5

Fed. R. Civ. P. 24(a) 38

Fed. R. Civ. P. 24(c) 10, 34, 35, 37

Fed. R. Evid. 602 16

Fed. R. Evid. 702 16

N.D. Tex. Local Rule 7.1(e) 10, 12

Other Authorities

Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417 (2017) 11

Caleb Nelson, *Intervention*, 106 Va. L. Rev. 271 (2020) 37

Amy J. Sepinwall, *Conscience and Complicity: Assessing Pleas for Religious Exemptions in Hobby Lobby's Wake*, 82 U. Chi. L. Rev. 1897 (2015) 48

In 2017 and 2018, the Trump Administration issued rules that exempt religious objectors from the Obama Administration's Contraceptive Mandate. After a judge in Philadelphia enjoined the implementation of those rules, the plaintiffs brought a class-action lawsuit to enjoin the continued enforcement of Contraceptive Mandate against religious objectors. The district court certified the classes and issued a classwide injunction that tracks the protections for religious objectors in the Trump Administration's rule. Nevada moved to intervene after the close of briefing, but the court denied intervention.

Nevada has appealed the order denying intervention. It has also appealed the final judgment, the class-certification orders, and the order granting the plaintiffs' motion for summary judgment and permanent injunction. The defendants initially appealed, but dismissed their appeal on December 10, 2019. Meanwhile, on July 8, 2020, the Supreme Court vacated the nationwide injunction against the Trump Administration's rule and allowed its protections to take effect. *See Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367 (2020).

Nevada lacks standing to appeal the classwide injunction because it is not suffering injury from the protections conferred on religious objectors—and even if it were, those injuries are non-redressable now that the Trump Administration's rule independently requires the protections that appear in the classwide injunction. Nevada's motion to intervene should be denied as moot because all litigation between the plaintiffs and defendants ended when the defendants abandoned their appeal.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the order denying intervention as of right. *See Edwards v. City of Houston*, 78 F.3d 983, 992 (5th Cir. 1996) ("The denial of a motion to intervene of right is an appealable final order"). This Court lacks jurisdiction to review the denial of permissive intervention because Nevada has not alleged or shown a "clear abuse of discretion." *Kneeland v. Nat'l Collegiate Athletic Ass'n*, 806 F.2d 1285, 1290 (5th Cir. 1987) ("In the absence of a clear abuse of discretion, this court lacks jurisdiction over an appeal from a denial of permissive intervention").

Nevada lacks standing to appeal the final judgment, the orders granting class certification, and the order granting the plaintiffs' motion for summary judgment and permanent injunction, and this Court lacks jurisdiction to review them. *See* Motion to Dismiss Appeal in Part (Sept. 6, 2019); Renewed Motion to Dismiss Appeal in Part (July 24, 2020). And Nevada would lack standing to appeal those rulings even if the district court had granted intervention and allowed Nevada to become a party.

STATEMENT OF THE ISSUES

1. To establish standing to appeal the classwide injunction, Nevada must identify "record evidence establishing [its] alleged harm." *See Wittman v. Personhuballah*, 136 S. Ct. 1732, 1737 (2016). Does the record show that Nevada is suffering injury from the classwide injunction?
2. To establish standing to appeal the classwide injunction, Nevada must show that its alleged injuries are "likely to be redressed" by a favorable

ruling on appeal. *See Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013). Can Nevada establish redressability with the Trump Administration's rule in effect, which requires the same protections that appear in the classwide injunction?

3. Should Nevada's motion to intervene be denied as moot, now that the defendants have abandoned their appeal and there is no pending lawsuit into which Nevada can intervene?
4. If Nevada's motion to intervene is not moot, did the district court correctly deny intervention?
5. If the Court decides that Nevada has standing to appeal the classwide injunction, did the district court correctly reject Nevada's arguments in defense of the Contraceptive Mandate?

STATEMENT OF THE CASE

The Affordable Care Act requires private insurance to cover "preventive care" for women without cost sharing, and it empowers the Health Resources and Services Administration (HRSA) to unilaterally determine the "preventive care" that insurers must cover. *See* 42 U.S.C. § 300gg-13(a)(4); ROA.817.

In 2011, HRSA decreed that all FDA-approved contraceptive methods must be covered as "preventive care." This "Contraceptive Mandate" is codified at 45 C.F.R. § 147.130(a)(1)(iv), 29 C.F.R. § 2590.715-2713(a)(1)(iv), and 26 C.F.R. § 54.9815-2713(a)(1)(iv). As originally enacted, the Mandate

exempted church employers.[1] It also offered an "accommodation"—not an exemption—to religious non-profits who object to covering contraception.[2] To use this accommodation, a religious non-profit had to certify that it objects to covering some or all contraceptive methods on religious grounds.[3] Then the issuer of the group health insurance had to exclude contraceptive coverage from that employer's plan, but the issuer would pay for any contraception used by the non-profit's employees.[4] If a religious non-profit was self-insured, then its third-party administrator would pay for the employees' contraception, without shifting costs on to the non-profit, its insurance plan, or its employee beneficiaries.[5]

In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), the Supreme Court held that the Contraceptive Mandate violated the Religious Freedom Restoration Act (RFRA) because it failed to exempt or accommodate for-profit corporations that oppose contraceptive coverage for religious reasons. And in *Wheaton College v. Burwell*, 573 U.S. 958 (2014), the Supreme Court enjoined federal officials from requiring a religious non-profit to directly noti-

1. *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,896 (July 2, 2013) (ROA.861).
2. *Id.* at 39,896-97 (describing provisions formerly codified at 45 C.F.R. § 147.131(c)) (ROA.861-862).
3. *Id.* at 39,896 (describing provisions formerly codified at 45 C.F.R. § 147.131(b)) (ROA.861).
4. *Id.* (describing provisions formerly codified at 45 C.F.R. § 147.131(c)).
5. *Id.* at 39,893 (July 2, 2013) (describing provisions formerly codified at 26 C.F.R. § 54.9815-2713A(b)(2)) (ROA.858).

fy its health-insurance issuers or third-party administrators about its religious objections to the Contraceptive Mandate.

In response to *Hobby Lobby* and *Wheaton College*, the Obama Administration amended the Contraceptive Mandate in two ways. First, it allowed for-profit corporations to use the "accommodation" offered to religious non-profits.[6] Second, it allowed employers using this accommodation to choose whether to directly notify their health-insurance issuer or third-party administrator—or whether to notify the Secretary of Health or Human Services, who would then inform the health-insurance issuers or third-party administrators of the employer's religious objections and their need to directly pay for the employees' contraception.[7]

On May 4, 2017, President Trump ordered his cabinet secretaries to amend the Contraceptive Mandate to fully protect the rights of religious objectors. *See* Executive Order 13,798. In response, the Administration issued an interim final rule that categorically exempts any employer from the Man-

6. *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. 41,318, 41,346 (July 14, 2015) (describing provisions formerly codified at 45 C.F.R. § 147.131(b)); *id.* at 41,345 (describing provisions formerly codified at 29 C.F.R. § 2590.715-2713A(a)); *id.* at 41,343 (describing provisions formerly codified at 26 C.F.R. § 54.9815-2713A(a)) (ROA.904-905).

7. *Id.* at 41,346 (July 14, 2015) (describing provisions formerly codified at 45 C.F.R. § 147.131(b)(3)); *id.* at 41,345 (describing provisions formerly codified at 29 C.F.R. § 2590.715-2713A(a)(3)); *id.* at 41,344 (describing provisions formerly codified at 26 C.F.R. § 54.9815-2713A(b)(ii)) (ROA.903-905).

date if it opposes contraceptive coverage for religious reasons.[8] Under this interim rule, objecting employers were no longer required to use the "accommodation" that causes their health-insurance issuer or third-party administrator to pay for their employees' contraception.[9] And it eliminated any requirement that objecting employers notify the government or take any steps that would facilitate the provision of objectionable contraception.[10] The interim rule concluded that RFRA compelled these exemptions, because the "accommodation" process made employers complicit in providing contraception that violates their religious beliefs.[11]

The interim rule also accommodated individual insurance beneficiaries who object to contraceptive coverage for religious reasons.[12] The original Contraceptive Mandate forced these individuals to choose between purchasing insurance that covers contraception or forgoing health insurance entirely—unless they had a grandfathered or church-sponsored plan that was exempt from the Mandate. The interim rule ensured that individuals would have the option to obtain insurance that excludes contraception from any willing issuer. The interim rule concluded that RFRA compelled these pro-

8. *See* Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,792 (October 13, 2017) (ROA.920-963).
9. *Id.* at 47,835 (codified at 45 C.F.R. § 147.132(a)) (ROA.963).
10. *Id.* at 47,835 (codified at 45 C.F.R. § 147.132(a)(2)) (ROA.963).
11. *Id.* at 47,800-06 (ROA.928-934).
12. *Id.* at 47,835 (creating new provision in 45 C.F.R. § 147.132(b)) (ROA.963).

tections, because otherwise individuals must forego health insurance to avoid subsidizing practices that violate their religious faith.[13]

Several states challenged the interim rule. In *Pennsylvania v. Trump*, 281 F. Supp. 3d 553 (E.D. Pa. 2017), a district court issued a nationwide injunction against the interim rule's enforcement. And in *California v. Health and Human Services*, 281 F. Supp. 3d 806 (N.D. Cal. 2017), a court issued a second nationwide injunction against its enforcement. These injunctions left the Obama-era Contraceptive Mandate in effect, which compelled religious objectors to subsidize or facilitate the use of abortifacient contraception.

In response to these injunctions, the plaintiffs filed a class-action lawsuit that challenged the continued enforcement of the Contraceptive Mandate against religious objectors. ROA.38-47.[14] The plaintiffs alleged that the Obama-era Mandate violates RFRA by preventing religious objectors from purchasing health insurance that excludes contraceptive coverage, just as the Trump Administration had claimed in its interim rule. ROA.282-83; ROA.928-934. The plaintiffs also alleged that the so-called "accommodation" for objecting employers violates RFRA—just as the Trump Administration had claimed[15]—because it requires employers to execute a form that

13. *Id.* at 47,800-06 (ROA.928-934).

14. The *only* defendants in this lawsuit are Secretary Azar, Secretary Mnuchin, Secretary Scalia, and the United States. Nevada misleadingly refers to them as the "Federal Defendants," implying that there were other defendants.

15. *Id.* at 47,800-06 (ROA.928-934).

leads directly to the provision of contraception by others, thereby making the employer complicit in the provision of objectionable contraception. ROA.283-86. The plaintiffs sought to enjoin the enforcement of the Mandate against any of the religious objectors protected by the Trump Administration's interim rule.

The plaintiffs filed their complaint on October 6, 2018. On November 15, 2018, the Trump Administration issued a final rule that reiterated the interim rule's exemptions for objecting employers and individuals, claiming that these protections were compelled by RFRA.[16] The final rule was scheduled to take effect on January 14, 2019. But on January 14, 2019, a district judge issued a nationwide injunction against its enforcement. *See Pennsylvania v.*

16. *See* Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,536, 57,546-52 (November 15, 2018) (ROA.975-981); *see also id.* at 57,536 (ROA.975) ("[T]he Mandate imposes a substantial burden on the religious beliefs of an individual employee who opposes coverage of some (or all) contraceptives in his or her plan on the basis of his or her religious beliefs, and would be able to obtain a plan that omits contraception from a willing employer or issuer (as applicable), but cannot obtain one solely because the Mandate requires that employer or issuer to provide a plan that covers all FDA-approved contraceptives."); *id.* at 57,536 (ROA.975) ("The Mandate and accommodation under the previous regulation forced certain non-exempt religious entities to choose between complying with the Mandate, complying with the accommodation, or facing significant penalties. . . . The Departments have concluded that withholding an exemption from those entities has imposed a substantial burden on their exercise of religion, either by compelling an act inconsistent with that observance or practice, or by substantially pressuring the adherents to modify such observance or practice.").

Trump, 351 F. Supp. 3d 791 (E.D. Pa. 2019); ROA.473-539. This ruling left the Obama-era Contraceptive Mandate in effect, without any of the protections for religious objectors that the Trump Administration had sought.

On February 5, 2019, the plaintiffs moved for class certification and a preliminary injunction. ROA.540-557; ROA.561-592. The defendants opposed class certification. ROA.1133-1152. On March 30, 2019, the district court certified two classes. ROA.1368-1389; ROA.1407-1408. The employer class (or "Braidwood class") consists of:

> Every current and future employer in the United States that objects, based on its sincerely held religious beliefs, to establishing, maintaining, providing, offering, or arranging for: (i) coverage or payments for some or all contraceptive services; or (ii) a plan, issuer, or third-party administrator that provides or arranges for such coverage or payments.

ROA.1407. The individual class (or "DeOtte class") consists of:

> All current and future individuals in the United States who: (1) object to coverage or payments for some or all contraceptive services based on sincerely held religious beliefs; and (2) would be willing to purchase or obtain health insurance that excludes coverage or payments for some or all contraceptive services from a health insurance issuer, or from a plan sponsor of a group plan, who is willing to offer a separate benefit package option, or a separate policy, certificate, or contract of insurance that excludes coverage or payments for some or all contraceptive services.

Id.

On April 1, 2019, the plaintiffs moved for summary judgment[17] and sought a permanent, classwide injunction that incorporates the protections for religious objectors in the Trump Administration's rule. ROA.1432-1435. The defendants' response stated that they "are not raising a substantive defense of the Mandate or the accommodation process with respect to Plaintiffs' [RFRA] challenge." ROA.1411. At the same time, the defendants made clear that they "oppose Plaintiffs' motion to the extent it seeks additional relief beyond the named plaintiffs at this time." ROA.1412 (emphasis removed).

The district court set the motion for hearing on May 20, 2019. ROA.1439. At the defendants' request, the court continued the hearing to May 29, 2019. ROA.1443.

On May 24, 2019, Nevada moved to intervene. ROA.1575-1697. Nevada did not attach a pleading to its motion, as required by the rules of civil procedure.[18] And Nevada did not request a continuance of the hearing set for May 29, 2019. Nor did Nevada ask for expedited consideration—even though the local rules gave the plaintiffs three weeks to file their brief in opposition.[19]

17. ROA.1390-1392. The district court never ruled on the motion for preliminary injunction, and the plaintiffs asked the Court to convert the supporting papers into documents supporting their motion for summary judgment.
18. *See* Fed. R. Civ. P. 24(c) ("A motion to intervene must be . . . accompanied by a pleading").
19. *See* N.D. Tex. LR 7.1(e).

And Nevada did not ask the Court to delay its ruling on the motion for summary judgment until after ruling on Nevada's motion to intervene.

On June 5, 2019, the district court granted the plaintiffs' motion for summary judgment and enjoined the defendants from enforcing the Contraceptive Mandate against the class members. ROA.1845-1879. Nevada describes this remedy as a "nationwide injunction," but that is inaccurate. The term "nationwide injunction" describes the controversial practice of awarding relief that extends beyond the named parties in the absence of a certified class. *See, e.g.*, *Trump v. Hawaii*, 138 S. Ct. 2392, 2425-26 & n.1 (2018) (Thomas, J., concurring). This practice has become "increasingly common," *id.* at 2425, but its legality is dubious. *See United States v. National Treasury Employees Union,* 513 U.S. 454, 477-78 (1995) ("[W]e neither want nor need to provide relief to nonparties when a narrower remedy will fully protect the litigants"); *In re Abbott*, 954 F.3d 772, 786 n.19 (5th Cir. 2020); Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417 (2017). The plaintiffs obtained "nationwide" relief, but they did it the lawful way—by obtaining certification of a nationwide class, and then seeking an injunction that protects *only* the members of those certified classes. The "nationwide injunction" epithet should be reserved for remedies that convert lawsuits into de facto class actions without any need to satisfy the procedures or requirements of Rule 23. *See Trump*, 138 S. Ct. at 2424-25 & n.1 (Thomas, J., concurring); *Zepeda v. INS*, 753 F.2d 719, 727-28 (9th Cir. 1983)

("[An] injunction must be limited to apply only to the individual plaintiffs unless the district judge certifies a class").

On June 14, 2019, the plaintiffs filed their brief opposing intervention. ROA.1880-1904. Nevada filed its reply on June 28, 2019, taking the full 14 days allotted under the local rules.[20] ROA.1926-1935. On July 29, 2019, the district court denied intervention,[21] but it nevertheless considered the arguments in Nevada's proposed brief "out of an abundance of caution" and rejected them on the merits. ROA.2079-2082. That same day, the district court entered final judgment in favor of the plaintiff classes. ROA.2083-2086.

Nevada has appealed the order denying intervention, along with the final judgment,[22] the class-certification orders,[23] and the order granting the plaintiffs' motion for summary judgment and permanent injunction.[24] *See* Amended Notice of Appeal (Aug. 27, 2019). The defendants initially appealed the final judgment and related orders, but they voluntarily dismissed their appeal on December 10, 2019.

On September 6, 2019, the plaintiffs moved to dismiss Nevada's appeal in part, claiming that Nevada lacked standing to appeal the final judgment, the class-certification orders, and the order granting summary judgment and

20. *See* N.D. Tex. LR 7.1(f).
21. ROA.2061-2082.
22. ROA.2083-2086.
23. ROA.1368-1389; ROA.1406-1408.
24. ROA.1845-1879.

permanent injunction. *See* Motion to Dismiss Appeal in Part (Sept. 6, 2019). The Court carried that motion with the case. *See* Court Order (Oct. 10, 2019). After Nevada submitted its opening brief, the Supreme Court granted certiorari in *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 918 (2020), and this Court stayed the appeal pending the Supreme Court's ruling.

On July 8, 2020, the Supreme Court announced its ruling in *Little Sisters* and dissolved the nationwide injunction against the Trump Administration's final rule. 140 S. Ct. at 2373. On July 22, 2020, the plaintiffs renewed their motion to dismiss Nevada's appeal in part, claiming that *Little Sisters* eliminated any possible standing to appeal the classwide injunction because the Trump Administration's final rule independently requires the same protections. *See* Renewed Motion to Dismiss Appeal in Part (July 22, 2020). The Court carried that motion with the case. *See* Court Order (August 14, 2020).

SUMMARY OF ARGUMENT

Nevada lacks standing to appeal the classwide injunction because it is not suffering injury from the protections conferred on religious objectors. Nevada failed to present any evidence that the injunction will harm the State's fisc. And even if Nevada had introduced the necessary evidence, this alleged harm is too speculative and too dependent on choices made by others to support standing. Finally, Nevada *chooses* the amount that it spends on social-welfare programs, and any choice to increase this spending is a self-inflicted injury.

Even if Nevada had produced evidence of Article III injury, it cannot establish redressability now that the Trump Administration's rule is in effect. The rule confers the same protections that appear in the injunction, so any "injuries" that Nevada asserts will remain after the injunction is vacated. *See Okpalobi v. Foster*, 244 F.3d 405, 426-27 (5th Cir. 2001) (en banc).

The only issue that this Court has jurisdiction to resolve is whether the district court correctly denied intervention as of right. But any request to intervene should be denied as moot. The lawsuit between the plaintiffs and defendants came to an end when the defendants abandoned their appeal on December 10, 2019, so there is no longer a case into which Nevada can intervene.

ARGUMENT

I. Nevada Lacks Standing To Appeal The Classwide Injunction Because It Failed To Introduce Evidence That It Will Suffer Injury From This Classwide Relief

To establish standing to appeal, Nevada must demonstrate "a concrete and particularized injury that is fairly traceable" to the classwide injunction. *Hollingsworth*, 570 U.S. at 704. And Nevada must identify *evidence in the district-court record* that establishes the alleged injury. *See Wittman*, 136 S. Ct. at 1737 (intervenors lack standing to appeal unless they identify "record evidence establishing their alleged harm.").

Nevada's brief never makes clear what it regards as the "injury" that confers standing to appeal, although it gestures toward several alleged

"harms" and "interests" without explaining whether these support its argument for standing or intervention. Opening Br. 14-18. We understand Nevada to be offering three candidates for "injury in fact": (1) Injuries to the state's fisc; (2) An alleged increase in abortions; and (3) Injuries to Nevada residents. None of this allows Nevada to appeal the classwide injunction, because there is no record evidence showing or even suggesting that *any* of these harms will occur. And that is especially true now that the injunction's protections for religious objectors are independently required by the Trump Administration's final rule.

A. Nevada Cannot Establish Standing To Appeal By Alleging Injury To The State's Fisc

Nevada suggests that the injunction will cause some religious employers to limit contraceptive coverage, which will in turn lead Nevada to increase spending on: (1) contraception access; and (2) hospital costs for unplanned pregnancies. Opening Br. 21. But there is no record evidence showing that the injunction will harm the state's fisc. More importantly, any effects that the injunction might have on the state's fisc are too attenuated—and too dependent on choices made by third parties not before the Court—to support Article III standing. Finally, any injuries to Nevada's fisc would be self-inflicted, because nothing requires Nevada to spend money on social-welfare programs.

1. Nevada Failed To Introduce Evidence That The Injunction Will Harm The State's Fisc

In the district court, Nevada asserted that "between 600 and 1,200 Nevadan women would be harmed from implementation of Plaintiffs' proposed class relief." ROA.1587. But Nevada refused to explain how it came up with these numbers. 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. ROA.1596. Handler's declaration never even explains what it meant by the word "harmed."

The district court refused to credit Handler's estimate because the State refused to explain how these numbers were derived. ROA.2074 ("The Court . . . is unable to discern the basis for the calculations contained in Handler's Declaration."). An unexplained and unsupported "estimate" does not establish Article III injury—indeed, it does not even qualify as admissible evidence. *See* Fed. R. Evid. 602 ("A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."); Fed. R. Evid. 702 (requiring expert testimony to be "the product of reliable principles and methods" and "based on sufficient facts or data"). Handler's declaration provides no foundation for how she came up with these numbers, nor does it explain the "principles and methods" or the "facts or data" on which she relied. ROA.1596. And Nevada refused to provide an explanation or offer a supplemental declaration after

the plaintiffs called out these patent deficiencies.[25] A litigant cannot establish standing by blurting out a number and providing no explanation for how it was derived.

Nevada's brief in *this* Court attempts to explain Handler's methodology,[26] but it is too late for that. *See Hardman v. Colvin*, 820 F.3d 142, 152 (5th Cir. 2016) ("'Arguments not raised in the district court cannot be asserted for the first time on appeal.'" (citation omitted)). To establish standing to appeal, Nevada must rely on evidence *in the record*. *See Wittman*, 136 S. Ct. at 1737 (intervenors lack standing to appeal unless they identify "*record evidence establishing* their alleged harm." (emphasis added)). Nevada was content to produce nothing more than a bald assertion in the district court that "between 600 to 1,200 Nevada women would be harmed"—without even explaining what it meant by the word "harmed," and without deigning to explain how these numbers were derived other than to say "simple math." ROA.1929. That is not acceptable evidence in any court of law.

But even if this Court were to consider Nevada's belated explanation, Nevada has utterly failed to show that the injunction would cause 600 to 1,200 Nevada women to lose contraceptive coverage. To begin, the number of women affected by the injunction has dropped to *zero* now that the Trump

25. *Compare* ROA.1891-1892 ("Handler's declaration . . . contains nothing more than a bald assertion that 'between 600 to 1,200 Nevada women would be harmed'"); *with* ROA.1929 (refusing to elaborate on Handler's methodology other than to say "simple math").

26. Opening Br. 16-17.

Administration's rule has taken effect, which allows employers to limit contraceptive coverage irrespective of the injunction in this case. Nevada also failed to account for the employers who are already exempted from the Contraceptive Mandate by *other* injunctions. *See Christian Employers Alliance v. Azar*, No. 3:16-cv-00309-DLH-ARS, 2019 WL 2130142 (D.N.D. May 15, 2019); *Catholic Benefits Association LCA v. Azar*, No. 5:14-cv-00240-R (W.D. Okla.) (ECF No. 184), *Catholic Benefits Association LCA v. Azar*, No. 5:14-cv-00685-R (W.D. Okla.) (ECF No. 79). Finally, there is no basis for Nevada's assumption that affected employees are distributed evenly across the 50 states in accordance with the state's population. Opening Br. 16-17. The number of affected women *in Nevada* depends on the number of objecting employers *in Nevada* and the number of women of child-bearing age that they employ. One cannot obtain this number by multiplying a nationwide estimate of affected women by Nevada's percentage of the U.S. population.

But even if this Court were to assume, solely for the sake of argument, that there really are 600 to 1,200 women in Nevada who will lose employer-sponsored contraceptive coverage on account of the injunction, and even if one were to imagine that Nevada had introduced competent evidence to establish this fact, there is *still* no evidence in the record—and no basis in reason to believe—that *any* of these women will make demands on the state's treasury in response to their employer's decisions.

Nevada's claim that that the State will spend extra money on hospitalization costs is preposterous.[27] Even if one were to assume that some of these 600 to 1,200 women will actually become pregnant on account of the injunction, those women all have employer-sponsored health insurance, and those private insurance plans—rather than the State—will pay for the hospital costs of an unplanned pregnancy. More importantly, Nevada failed to produce evidence that the injunction will cause any of these 600 to 1,200 women to become pregnant in the first place. Nevada made no effort to account for:

- The women who can access contraceptive coverage through their husbands' insurance.
- The women under age 26 who have contraceptive coverage through their parents' insurance.
- The women whose employers object only to abortifacients and will continue to cover non-abortifacient contraception.
- The women who share the religious beliefs of their employer, and would never use contraception (or abortifacients) regardless of whether their employer covers them.
- The women who can obtain contraception through Title X (a federally funded program) if they can no longer get contraception through their employer's plan.
- The women who will purchase insurance on the exchanges if their employer limits contraceptive coverage.

27. ROA.1586 (asserting that the injunction will "necessitate[e] significant additional spending in Nevada on contraception access and corresponding increased hospital costs for said unplanned pregnancies.").

- The women who will buy their own contraception if their employer drops contraceptive coverage. (The pill costs between $15 and $50 per month, which is easily affordable for women who hold jobs with employer-provided health insurance.)

- The women who will abstain from sexual intercourse.

- The women whose 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 already have long-term IUDs and no longer need contraceptive coverage.

- The women who have had tubal ligations or hysterectomies and are incapable of becoming pregnant.

- The women whose employers who are already exempted from the Contraceptive Mandate by an injunction entered in a different lawsuit.

After accounting for the women in these categories, the "600 to 1,200" number that Nevada touts could 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 classwide injunction. Nevada's claim that the injunction will increase unintended pregnancies is nothing but rank speculation unsupported by evidence, and it insults the women of Nevada by assuming that they are incapable of avoiding unwanted pregnancy unless their employer pays for every FDA-approved contraceptive method.

Nevada's claim that the injunction will increase state spending on contraception access is equally far-fetched. Opening Br. 17. The only way this

can happen is if a woman who works for an objecting employer is unable or unwilling to obtain contraception from other sources. Yet there are *many* ways for women to obtain contraception (or use other birth-control strategies) that do not impose any costs on state taxpayers. Those include:

- For married women, obtaining contraception through their husbands' health plans.
- For women under age 26, obtaining contraception through their parents' health plans.
- For women whose employers object only to abortifacients, obtaining and using non-abortifacient contraception through their employer's plan.
- Obtaining contraception through Title X, which is federally funded and does not use state money.
- Purchasing insurance on the exchanges that covers contraception.
- Purchasing their own contraception.
- Undergoing a tubal ligation.
- Insisting that their partners undergo vasectomies or use condoms.
- Abstaining from sexual intercourse.

There is no evidence and no basis in reason for believing that *any* woman in Nevada 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 to practice birth control that do not involve the State.

More importantly, Nevada has failed to show that *any* of the allegedly affected women would qualify for state-funded contraception. In Nevada, a woman cannot receive Medicaid if her annual household income exceeds 138% of the federal poverty level. ROA.1666. That amounts to $16,753 per year for an individual, and $34,638 per year for a family of four.[28] 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 that any such individual exists. And Nevada failed to introduce evidence of any state-funded program apart from Medicaid that provides contraception at taxpayer expense, nor did it provide evidence of the eligibility requirements for such a program. According the Guttmacher Institute, the amount that Nevada spends on family-planning services outside Medicaid is practically non-existent.[29]

Nevada's brief relies on declarations that public-insurance programs pay for 60% of unintended pregnancies that end in birth. ROA.1597-98 ("Of those unintended pregnancies that ended in birth, 60% were paid for by Medicaid and other public insurance programs."); ROA.1625 (same). Nevada claims this is "evidence" that women who lose contraceptive coverage will qualify for state-funded public-insurance programs,[30] but it is nothing of the

28. https://www.nevadahealthlink.com/start-here/about-the-aca/medicaid; ROA.1895.
29. https://www.guttmacher.org/sites/default/files/factsheet/nv_13.pdf; ROA.1896.
30. Opening Br. 21.

sort. The observation that taxpayers pay for 60% of childbirths resulting from unintended pregnancies has *nothing* to do with the income levels of women who hold jobs with employer-sponsored health insurance. It is unfathomable to think that a job with employer-sponsored health insurance pays less than $16,753 per year, and there is no evidence in the record to suggest otherwise.

Finally, Nevada cannot possibly demonstrate injury to its fisc after *Little Sisters*, which vacated the nationwide injunction against the Trump Administration's rule. The exemptions in the classwide injunction track the protections in the rule, and they do not extend beyond what the rule independently requires. *Compare* ROA.1877-1879 *with* ROA.1018-1019. Nevada cannot suffer fiscal "injury" from an injunction that merely repeats protections for religious objectors that are already enshrined in an agency rule.

Nevada tries to overcome its evidentiary deficiencies by claiming that it needs only to prove a "substantial risk" of fiscal injury. Opening Br. 18 (citing *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014)). But there still must be *evidence* in the record to support a finding of "substantial risk"; a litigant cannot establish "substantial risk" of injury through rank speculation. *See Simon v. Eastern Kentucky Welfare Rights Org.,* 426 U.S. 26, 44 (1976) ("[U]nadorned speculation will not suffice to invoke the federal judicial power."); *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979) ("A plaintiff who challenges a statute *must demonstrate a realistic danger* of sustaining a direct injury as a result of the statute's operation or enforcement." (emphasis added)); *Clapper v. Amnesty International USA*, 568 U.S. 398, 414 n.5 (2013)

("[P]laintiffs bear the burden of . . . *proving concrete facts showing* that the defendant's actual action has caused the substantial risk of harm."); *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. Such allegations also must be contained in the record." (citations and internal quotation marks omitted)). Nevada has failed to prove a "substantial risk" of fiscal injury because: (1) Nevada failed to introduce competent evidence of the number of women who will lose contraceptive coverage; (2) Nevada produced *no* evidence that *any* woman who loses contraceptive coverage will seek and qualify for taxpayer assistance; and (3) Nevada cannot be suffering fiscal injury from the classwide injunction now that the Trump Administration's rule is in effect.

Nevada also claims that this Court must accept its "factual allegation[s]" as true "for purposes of considering intervention." Opening Br. 14 n.6 (citing *Texas v. United States*, 805 F.3d 653, 657 (5th Cir. 2015)). But a Court *cannot* accept mere allegations when determining *standing to appeal*, which *must* be supported with record evidence showing injury in fact. *See Wittman*, 136 S. Ct. at 1737 (intervenors lack standing to appeal unless they can identify "record evidence establishing their alleged harm."); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) ("It is a long-settled principle that standing cannot be 'inferred argumentatively from averments in the pleadings,' but rather 'must affirmatively appear in the record.'" (citations omitted)).

Nevada falsely accuses the plaintiffs of arguing that Nevada must identify "a specific woman" who will lose contraceptive coverage. Opening Br. 19. The plaintiffs have never argued that Nevada must identify a particular individual who will make demands on the state's fisc. What the plaintiffs are contending is that Nevada must produce *evidence*—and not rank speculation—that the injunction will increase state spending on hospital costs and contraception access, and Nevada has produced *nothing* in the way of evidence to support those claims.

2. The Causal Connection Between The Injunction And The Alleged Harm To Nevada's Fisc Is Too Speculative And Too Dependent On Choices Made By Others

Even if Nevada could establish injury, it *still* lacks standing to appeal because it cannot satisfy the causation requirement. Nevada must show that the 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 v. Spear*, 520 U.S. 154, 167 (1997) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)); *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 requirement because the chain of causation that leads from the injunction to additional state spending depends 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 injunction:

1. Some religious employers in Nevada will limit contraceptive coverage.

2. The female employees of child-bearing age who work for those employers will choose not to obtain contraception from other sources such as Title X, Planned Parenthood, their family members' health insurance, or purchasing contraception with their own money, 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 risks an unintended pregnancy.

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; 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; and (iii) become pregnant; will also (iv) choose not to abort, even though abortion remains available on demand before viability and even though abortion does not affect Nevada's fisc because Nevada does not pay for elective abortions.[31]

6. The female employees of child-bearing age who work for objecting employers and (i) choose not to obtain contraception

31. https://www.guttmacher.org/state-policy/explore/state-funding-abortion-under-medicaid.

> from other sources; (ii) choose to engage in unprotected sex; (iii) become pregnant; and (iv) choose not to abort; will also (v) drop their employer-sponsored health insurance and switch to Medicaid after becoming pregnant.
>
> 7. Nevada will choose to increase public spending in response to these choices made by others, rather than capping its spending on social-welfare programs.

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 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.

3. Any Injury To Nevada's Fisc Is Self-Inflicted

Finally, even if one imagines that the injunction will lead Nevada to increase spending on contraceptive access and hospital costs, any such "injury" is self-inflicted. Nevada acts as though it is *compelled* to increase spending in response to women who want taxpayers to pay for their birth control. But Nevada is not required to accommodate these demands. *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"). Nevada *chooses* the amount that it spends on family planning and health-related services, and Nevada will retain its prerogative to make these choices no matter what happens on this appeal.

Self-inflicted injuries to a State's fisc cannot establish standing. As the Supreme Court has explained:

> The injuries to the plaintiffs' fiscs were self-inflicted, resulting from decisions by their respective state legislatures. . . . 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 state, and nothing in the injunction threatens Nevada's right to decide the amount of money it will spend. Indeed, Nevada's brief admits that it pays for only 10% of "needed" family-planning services,[32] so Nevada obviously does not feel *compelled* to satisfy its constituents' demands for taxpayer-funded contraception.

B. Nevada Cannot Establish Standing To Appeal By Alleging That The Injunction Will Increase Abortions

Nevada also tries to establish standing by suggesting that the injunction will increase abortions. Opening Br. 14-15. But there is no evidence in the record that this will happen, and even if there were it would not inflict injury on Nevada.

Nevada observes that its abortion rate dropped after the Contraceptive Mandate took effect. Opening Br. 14-15; ROA.1598. But correlation is not evidence of causation. *See Huss v. Gayden*, 571 F.3d 442, 459 (5th Cir. 2009).

32. Opening Br. 17 ("[I]n 2014, 194,000 women were in need of publicly funded family planning in Nevada, with the existing state family planning network only able to meet 10% of this need.").

The abortion rate had been dropping for *decades* before the Contraceptive Mandate,[33] and its continued decline after the Mandate is attributable to factors that Nevada makes no attempt to account for. More importantly, the district-court injunction leaves the Mandate in place; it exempts only a small *subset* of employers who object on religious grounds. Nevada must produce evidence that a *religious exemption* will increase abortion; the mere observation that abortion rates continued their decades-long decline after the Mandate took effect does nothing to establish this.

Nevada has not introduced evidence that *any* woman in Nevada will lose contraceptive coverage on account of the injunction—especially now that the Trump Administration's final rule has taken effect. *See supra* at 16-20. And Nevada's claim that one or more of these hypothetical women will fail to obtain contraception through other sources, engage in unprotected sex, become pregnant on account of those choices, and then choose to abort is nothing but rank speculation. *See Barber*, 860 F.3d at 357 ("An injury that is based on a speculative chain of possibilities does not confer Article III standing.").

In all events, Nevada would not suffer injury if a woman becomes pregnant and aborts. Abortion is legal in Nevada, so Nevada would not suffer a violation of its laws, and Nevada's dismay over a woman's decision to abort

33. https://www.guttmacher.org/sites/default/files/factsheet/fb_induced_abortion_3.pdf ("In 2011, the U.S. abortion rate reached its lowest level since 1973").

does not confer standing to appeal. *See Diamond v. Charles*, 476 U.S. 54, 66 (1986) (denying litigant standing to appeal as a "protector of the unborn.").

C. Nevada Cannot Establish Standing To Appeal By Alleging Injury To Its Residents

Nevada does not go so far as to assert *parens patriae* standing, but it repeatedly complains about "harm" to Nevada residents. Opening Br. 15. None of these alleged harms give the State standing to appeal, because a State cannot assert standing to protect its residents from the operation of federal statutes such as RFRA. *See Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923) ("It cannot be conceded that a state, as *parens patriae*, may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof."); *Massachusetts v. EPA*, 549 U.S. 497, 520 n.17 (2007) ("*Mellon* prohibits" a State from suing "to protect her citizens from the operation of federal statutes").

D. Nevada Alleges No Injury From The Protections Conferred On Objecting Individuals

The injunction protects more than objecting employers; it also allows objecting *individuals* to purchase plans that exclude contraceptive coverage from any willing issuer. ROA.2083, 2085. Nevada does not explain how it is injured by *this* portion of the injunction. So Nevada lacks standing seek vacatur of the protections for objecting individuals—even if it could somehow establish standing to appeal the protections for employers.

E. The "Special Solicitude" Doctrine Does Not Absolve Nevada Of Its Duty To Introduce Evidence Of Injury In Fact

Nevada claims it should receive "special solicitude" in the standing analysis,[34] but neither *Massachusetts* nor *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), liberates a State from its obligation to show injury in fact. Massachusetts had established indisputable Article III injury from the erosion of land that it owned. *See Massachusetts*, 549 U.S. at 522 ("These rising seas have already begun to swallow Massachusetts' coastal land."). And Texas had established injury by "demonstrating that it would incur significant costs in issuing driver's licenses to DAPA beneficiaries." *Texas*, 809 F.3d at 155. Nevada has not produced evidence of any Article III injury, and nothing in the "special solicitude" doctrine allows courts to confer standing on states that fail to demonstrate injury in fact.

II. Nevada's Injuries From The Classwide Injunction Cannot Be Redressed Now That The Trump Administration's Rule Is In Effect

With the Trump Administration's rule in effect, Nevada is incapable of showing that any injuries from the injunction are "likely to be redressed" by a favorable ruling on appeal. *See Hollingsworth*, 570 U.S. at 704 (requiring appellants to satisfy each component of the Article III standing test, including redressability); *Babb v. Wilkie*, 140 S. Ct. 1168, 1177 (2020) ("It is bedrock law that 'requested relief' must 'redress the alleged injury.'" (citation omit-

34. Opening Br. 18.

ted)); *Lujan*, 504 U.S. at 561 ("[I]t must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" (citation omitted)). If this Court vacated the classwide injunction, the protections for religious objectors will continue to exist in the agency rule—and so will any "injury" that Nevada might allege. There is no possible relief from this Court that can redress the injuries that Nevada asserts.

III. The District Court Correctly Denied Intervention

The denial of intervention should be affirmed for multiple independent reasons, each of which, standing alone, is fatal to Nevada's motion.[35]

A. The Motion To Intervene Should Be Denied As Moot Because The Litigation Between The Plaintiffs And Defendants Has Ended

The defendants voluntarily dismissed their appeal on December 10, 2019, and all litigation between the plaintiffs and defendants has ended. There is no longer a case into which Nevada can intervene, so the motion to intervene should be denied as moot. *See Flory v. United States*, 79 F.3d 24, 26 (5th Cir. 1996); *Non Commissioned Officers Ass'n of U.S. v. Army Times Publishing Co.*, 637 F.2d 372, 373 (5th Cir. 1981) ("A prerequisite of an intervention (which is an ancillary proceeding in an already instituted suit) is an exist-

35. A denial of intervention as of right is reviewed de novo. *See Edwards v. City of Houston*, 78 F.3d 983, 995 (5th Cir. 1996). A denial of permissive intervention cannot be reviewed absent a "clear abuse of discretion." *Kneeland v. Nat'l Collegiate Athletic Ass'n*, 806 F.2d 1285, 1290 (5th Cir. 1987) ("In the absence of a clear abuse of discretion, this court lacks jurisdiction over an appeal from a denial of permissive intervention").

ing suit within the Court's jurisdiction"); *Truvillion v. King's Daughters Hospital*, 614 F.2d 520, 526 (5th Cir. 1980) ("[A]n existing suit within the court's jurisdiction is a prerequisite of an intervention, which is an ancillary proceeding in an already instituted suit." (citation and internal quotation marks omitted)).

Nevada filed its opening brief on December 19, 2019—nine days *after* the defendants abandoned their appeal and allowed the district court's judgment to become final between the parties. Yet Nevada does not explain how a party can intervene in a case that has come to a complete end, and it does not address any of the authorities that disallow intervention when there is no longer a pending lawsuit.[36] We were unable to find any case that allows someone to

36. *See also Energy Transportation Group, Inc. v. Maritime Administration*, 956 F.2d 1206, 1210 (D.C. Cir. 1992) ("We first dismiss as moot the appeals from the district court orders denying intervention. The complaints in the underlying litigation were dismissed by agreement of the parties pursuant to the settlement, so there is no longer any action in which to intervene."); *Disability Advocates, Inc. v. New York Coalition for Quality Assisted Living, Inc.*, 675 F.3d 149, 160 (2d Cir. 2012) ("[S]ince intervention contemplates an existing suit in a court of competent jurisdiction and because intervention is ancillary to the main cause of action, intervention will not be permitted to breathe life into a 'nonexistent' law suit." (citation and internal quotation marks omitted)); *Kunz v. New York State Commission on Judicial Misconduct*, 155 F. App'x 21, 22 (2d Cir. 2005) ("[W]here the action in which a litigant seeks to intervene has been discontinued, the motion to intervene is rendered moot."); *Black v. Central Motor Lines, Inc.,* 500 F.2d 407, 408 (4th Cir. 1974) ("Intervention is ancillary and subordinate to a main cause and whenever an action is terminated, for whatever reason, there no longer remains an action in which there can be intervention. By its very nature intervention presupposes pendency of an action in a court of competent jurisdic-

intervene as a defendant after the underlying lawsuit has concluded and the losing party has abandoned its appeal.

B. The Motion To Intervene Should Be Denied Because Nevada Failed To Include A Pleading, As Required By Rule 24(c)

A motion to intervene must be "accompanied by a pleading that sets out the claim or defense for which intervention is sought." Fed. R. Civ. P. 24(c). No such pleading was included with Nevada's motion. ROA.1575-1697. And when the plaintiffs flagged this violation of Rule 24(c), ROA.1883-1884, Nevada refused to cure the deficiency—even though it could have easily done so by attaching a pleading to its reply brief. ROA.1926-1936.

That alone warrants denial of Nevada's motion. *See Bush v. Viterna*, 740 F.2d 350, 357 (5th Cir. 1984) ("Rule 24(c) requires that a motion for intervention 'be accompanied by a pleading setting forth the claim or defense for which intervention is sought.'"); *Pin v. Texaco, Inc.*, 793 F.2d 1448, 1450 (5th Cir. 1986) ("'[I]ntervention under Rule 24 is conditioned by the Rule 24(c)

---

tion." (citation omitted)); *West Coast Seafood Processors Ass'n v. Natural Resources Defense Council, Inc.*, 643 F.3d 701, 704 (9th Cir. 2011) ("Because the underlying litigation is over, we cannot grant WCSPA any 'effective relief' by allowing it to intervene now."); *United States v. Ford*, 650 F.2d 1141, 1143 (9th Cir. 1981) ("Since there is no longer any action in which appellants can intervene, judicial consideration of the [intervention] question would be fruitless."); *Tosco Corp. v. Hodel*, 804 F.2d 590, 592 (10th Cir. 1986) (settlement prevents courts from considering pending motions for intervention); *Levenson v. Little*, 75 F. Supp. 575, 576 (S.D.N.Y. 1948) ("There can be no intervention if there is no pending lawsuit.").

requirement that the intervenor state a *well-pleaded* claim or defense to the action'" (quoting *Rhode Island Federation of Teachers v. Norberg*, 630 F.2d 850, 854-55 (1st Cir. 1980) (emphasis added)); *Yazdchi v. Am. Honda Fin. Corp.*, No. 3:05-cv-0737-L, 2005 WL 1943611, at *2 n.4 (N.D. Tex. Aug. 12, 2005) ("Yazdchi's Motion to Intervene should be denied because he has failed to satisfy . . . Rule 24(c), which requires that the motion to intervene be 'accompanied by a pleading setting forth a claim or defense for which intervention is sought.'"). The text of Rule 24(c) says that a motion to intervene "must" be accompanied by a pleading. Not "may," "should," or "ought to be." "Must." There is no allowance for any litigant to depart from this requirement. *See Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 783-84 (1st Cir. 1988) ("'The motion *shall* state the grounds therefor and *shall* be accompanied by a pleading setting forth the claim or defense for which intervention is sought.' Fed. R. Civ. P. 24(c) (emphasis added). The language of the rule is mandatory, not permissive"); *Shevlin v. Schewe*, 809 F.2d 447, 450 (7th Cir. 1987) ("Federal Rule of Civil Procedure 24(c) is unambiguous. . . . It requires that the motion to intervene shall be 'accompanied by a pleading setting forth the claim or defense for which intervention is sought.'"). Rules exist to be followed; they are not options for litigants to ignore whenever they think compliance unnecessary.

The district court acknowledged Nevada's violation of Rule 24(c) but declined to deny the motion on that basis. ROA.2070-2071 (footnote 5). The Court wrote:

> [T]he Fifth Circuit has permitted intervention even in the absence of a motion to intervene. *Farina v. Mission Inv. Tr.*, 615 F.2d 1068, 1075 (5th Cir. 1980). . . . In light of what appears to be a permissive interpretation of Rule 24(c) by the Fifth Circuit, the Court declines to preclude the State of Nevada's intervention on this basis.

ROA.2070-2071 (footnote 5). But there is no authority from this Court that allows intervention when the opposing party has timely raised and preserved its objections to a would-be intervenor's noncompliance with Rule 24(c). In *Farina v. Mission Investment Trust*, 615 F.2d 1068 (5th Cir. 1980), the opposing party had defaulted by waiting until after final judgment to object to the intervenor's Rule 24 violations:

> Farina argues that the FDIC never made a formal petition to intervene, as specified by Rule 24(c) nor did the Federal District Court make a formal motion to add it as a party. . . . *Since Farina failed to raise this point until after a final judgment*, jurisdiction will be determined at the point of final judgment. If the federal court could have exercised original jurisdiction over the subject matter at the time final judgment was entered, *Farina will be estopped from asserting* there was no right to remove initially.

Id. at 1074-75 (emphasis added)). In this case, the plaintiffs immediately objected to Nevada's non-compliance with Rule 24(c),[37] and they fully preserved their objection.

If this Court allows Nevada to intervene despite its noncompliance with Rule 24(c)—and despite the plaintiffs' repeated demands that Nevada comply with the rule's requirements—then its holding will effectively delete Rule 24(c) from the rules of civil procedure. There is nothing that distinguishes

37. ROA.1883.

Nevada's situation from any other attempted intervenor who refuses to submit a pleading. And if this Court holds that Nevada can intervene without a pleading, then any future movant can omit the pleading and demand that a court allow intervention on the authority of this Court's decision.

C. The Motion To Intervene Should Be Denied Because Nevada Failed To Identify A "Claim Or Defense For Which Intervention Is Sought," As Required By Rule 24(c)

Rule 24(c) not only requires the submission of a pleading, it requires a pleading that "sets out the claim or defense for which intervention is sought." Fed. R. Civ. P. 24(c). An intervenor who is unable to assert such a "claim or defense" is not a proper party—even if it has an "interest" in the litigation sufficient to satisfy Rule 24(a). *See Pin*, 793 F.2d at 1450 ("'[I]ntervention under Rule 24 is conditioned by the Rule 24(c) requirement that the intervenor state a *well-pleaded claim or defense to the action*'" (citation omitted) (emphasis added)).

There is no "claim" or "defense" asserted anywhere in Nevada's motion to intervene. ROA.1575-1697. Nor is any "claim" or "defense" described in Nevada's opening brief. Nevada obviously has no "claim" in this litigation, because it is not seeking judicial relief (such as damages or an injunction). And there is no conceivable "defense" for Nevada to assert, because Nevada will not be required to do anything—nor will it be restrained from doing anything—by the relief that the plaintiffs are seeking. *See* Caleb Nelson, *Intervention*, 106 Va. L. Rev. 271, 274 (2020) ("[A] 'defense' is a particular type of

legal argument that the targets of a claim assert to explain why the court should not grant relief against them.").

Nevada's refusal to identify its "claim or defense"—and its refusal to acknowledge its obligation to identify a claim or defense under Rule 24(c)—require denial of its motion.

D. The Motion To Intervene As Of Right Should Be Denied Because Nevada Does Not Have A "Direct, Substantial, And Legally Protectable Interest" In The Outcome Of This Litigation

The district court denied intervention as of right because Nevada failed to establish a "direct, substantial, and legally protectable interest" in outcome of this litigation, as required by *New Orleans Public Service, Inc. (NOPSI) v. United Gas Pipe Line Co.*, 732 F.2d 452, 463-66 (5th Cir. 1984) (en banc). ROA.2071-2075. The district court's holding is unassailable, especially now that the Trump Administration's rule independently confers the protections for religious objectors that appear in the district court's injunction.

To intervene as of right, Nevada must show that it:

> (1) is given an unconditional right to intervene by a federal statute; or
>
> (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a). Nevada seeks intervention under Rule 24(a)(2), so it must describe an "interest" in the litigation sufficient to warrant interven-

tion. And Nevada may not rely on "interests" of its residents or "interests of women nationwide."[38] Nevada must rely exclusively upon its *own* interests; it cannot intervene by relying on harms to others. *See NOPSI*, 732 F.2d at 464 ("[I]ntervention has been held subject to the prudential standing requirement that 'the presence of harm to a party does not permit him to assert the rights of third parties in order to obtain redress for himself.'" (citation omitted)).

And it is not enough for an intervenor to show that it will be adversely affected by the outcome of a lawsuit. In *Donaldson v. United States*, 400 U.S. 517 (1971), the Supreme Court refused to allow a taxpayer to intervene in proceedings that the IRS had brought against his employer and accountant. The IRS sought to compel the employer and accountant to disclose payments made to the taxpayer, and the taxpayer sought intervention to protect those records from disclosure. The taxpayer assuredly had an "interest" in preventing disclosures of documents that could land him in trouble with the IRS. Yet the Supreme Court held that this "interest" was insufficient to allow intervention:

> This asserted interest, however, is nothing more than a desire by Donaldson to counter and overcome Mercurio's and Acme's willingness, under summons, to comply and to produce records. . . . This interest cannot be the kind contemplated by Rule

38. Opening Br. 13 ("Nevada seeks intervention to protect its interests *and the interests of women nationwide*." (emphasis added)); *id.* at 14 ("The District Court's Judgment Creates a Substantial Risk of Harm for Women in the United States Generally and for Nevada Specifically.").

> 24(a)(2) when it speaks in general terms of "an interest relating to the property or transaction which is the subject of the action." What is obviously meant there is a *significantly protectable interest*.

Id. at 530-31 (emphasis added). So a mere "interest" in the outcome of the litigation is not enough under Rule 24(a)(2); the proposed intervenor must establish a "significantly protectable interest."

This Court has expounded on *Donaldson*'s "significantly protectable interest" requirement, and it holds that Rule 24(a)(2) requires a "direct, substantial, legally protectable interest in the proceedings." *NOPSI*, 732 F.2d at 463 (citation and internal quotation marks omitted):

> The Supreme Court in *Donaldson* . . . stated that the applicant's interest had to be "a significantly protectable interest." . . . *Donaldson* used "protectable" in the sense of legally protectable, and it is difficult to conceive of any other sense in which the Court might have been employing "protectable" in that context.
>
> By requiring that the applicant's interest be not only "direct" and "substantial," but also "legally protectable," it is plain that something more than an economic interest is necessary. What is required is that the interest be one which the *substantive* law recognizes as belonging to or being owned by the applicant. . . .
>
> We hold that an economic interest alone is insufficient, as a legally protectable interest is required for intervention under Rule 24(a)(2), and such intervention is improper where the intervenor does not itself possess the only substantive legal right it seeks to assert in the action.

Id. at 463-64, 466.

Nevada's brief asserts two "interests" in the outcome of this litigation: (1) "to preserve resulting public health gains"; and (2) "to conserve financial

resources that were previously expended attempting to address unplanned pregnancies." Opening Br. 24.[39] Neither of these represents a "direct, substantial, and legally protectable" interest under *NOPSI*.

1. Nevada Failed To Establish A "Direct" Interest In The Outcome Of These Proceedings

Nevada fears that a classwide injunction will lead others to make choices that harm public health and burden the State's fisc. ROA.1586-1588; Opening Br. 24-25. These effects on public health and the State's fisc—even if one assumes that they will occur—are far too attenuated to qualify as a "direct" interest in the outcome of this lawsuit. And that is especially true now that the Trump Administration's rule has taken effect.

The chain of causation that leads from the district court's injunction to the decline in public health and the fiscal costs that Nevada fears is anything but "direct"—and it depends on rank speculation about a host of independent choices made by others. In asserting an interest in preserving "public

39. Nevada criticizes the district court for claiming that it had asserted only a financial interest. Opening Br. 24. But Nevada's district-court brief did not make clear that it was asserting an interest in "public health" distinct from its fiscal interests. ROA.1586 (asserting that a classwide injunction would "revers[e] significant reductions in unplanned pregnancies and abortions in Nevada, necessitating significant additional spending in Nevada on contraception access and corresponding increased hospital costs for said unplanned pregnancies. *This increase in spending constitutes a sufficiently adequate injury to establish Nevada's interest in this litigation*." (emphasis added)).

health," Nevada speculates that women who work for objecting employers will:

> (i) choose not to obtain contraception from other sources;
> (ii) choose to engage in unprotected sex;
> (iii) become pregnant on account of those choices;
> (iv) choose not to abort; *and*
> (v) choose to delay prenatal care, despite having employer-provided health insurance.

Opening Br. 25. In asserting an interest in protecting its fisc, Nevada speculates that women who work for objecting employers will:

> (i) choose not to obtain contraception from other sources;
> (ii) choose to engage in unprotected sex;
> (iii) become pregnant on account of those choices;
> (iv) choose not to abort; *and*
> (v) choose to drop their employer-sponsored health insurance and switch to Medicaid after becoming pregnant.

Id. It would be an understatement to say that any adverse effects on public health and the State's fisc would not be a "direct" result of the classwide injunction—even if one accepts Nevada's dubious contention that these effects will actually occur. Instead, these outcomes will be the product of *many* independent choices made by others along the way—including choices made by Nevada itself, which is under no compulsion to fund social-welfare programs that pay for its residents' contraception or health care. If this can qualify as a "direct" interest in the proceedings, then it is hard to imagine an asserted interest that would fail the directness requirement. Nevada does not even present an argument for how these interests qualify as "direct" interests under *NOPSI*.

Nevada must also explain how it can have a "direct" interest in the outcome of this litigation now that the Trump Administration's rule is in effect, which independently confers the protections for religious objectors that appear in the classwide injunction. Nevada has *no* interest—let alone a "direct" interest—in thwarting an injunction that merely reiterates the protections in an agency rule that is in full force and effect.

2. Nevada Failed To Establish A "Substantial" Interest In The Outcome Of These Proceedings

Nevada has also failed to demonstrate a "substantial" interest in the proceedings, because any effects on public health or the state's fisc are negligible or non-existent. *See NOPSI*, 732 F.2d at 463 (requiring intervenors to establish a "substantial . . . interest in the proceedings."). And that is especially true now that the Trump Administration's rule is in effect.

Nevada has made no effort to calculate or estimate the effects on public health or the amount of additional state spending. When Nevada asserts that "between 600 and 1,200 Nevadan women would be harmed,"[40] it is claiming only that there are "600 to 1,200" women of childbearing age who work for objecting employers. Opening Br. 14-15. That does not show how Nevada has a "substantial" interest in the outcome of this lawsuit. To show a "substantial" interest in public health, Nevada must provide an estimate of those who will:

40. Opening Br. 15.

(1) Lose contraceptive coverage on account of the classwide injunction;
(2) Choose not to obtain contraception from other sources;
(3) Choose to engage in unprotected sex;
(4) Become pregnant unintentionally;
(5) Choose not to abort; *and*
(6) Choose to delay prenatal care, thereby harming public health.

And to show a "substantial" interest in its fisc, Nevada must provide an estimate of those who:

(1) Will lose contraceptive coverage on account of the district court's injunction;
(2) Will choose not to obtain contraception from other sources;
(3) Are eligible for Medicaid (or some other state-funded program that Nevada has yet to identify); *and*
(4) Will enroll in Medicaid and cause state taxpayers to pay for their contraception or the medical costs of an unintended pregnancy.

The most serious problem for Nevada is that the number of women in these categories is *zero* now that the Trump Administration's rule is in effect. The classwide injunction will not cause *any* woman to lose contraceptive coverage—let alone delay prenatal care or make demands on the state's fisc—because the agency rule independently allows objecting employers to drop contraceptive coverage. Any negative effects on "public health" or the state's fisc will continue on account of the final rule, so Nevada cannot have a "substantial" interest in the outcome of this litigation.

But even apart from the final rule, it is implausible to think that a woman who holds a job with employer-sponsored health insurance will qualify for state-funded contraception. Nevada limits Medicaid eligibility to 138% of the

federal poverty level, which is $16,753 per year for an individual and $34,638 per year for a family of four.[41] And Nevada has failed to identify any other state-funded program that might pay for these employees' contraception or hospital-delivery costs, nor has it described the eligibility requirements. The possibility of *any* woman making demands on the state's treasury in response to the classwide injunction is exceedingly low. And any additional money that the State might spend would amount to a rounding error in the state's budget, which hardly establishes a "substantial" interest in these proceedings. ROA.2073-2075.

3. Nevada Failed To Establish A "Legally Protectable" Interest In The Outcome Of These Proceedings

Finally, Nevada has failed to show that its interests in public health or the state's fisc are "legally protectable." *See NOPSI*, 732 F.2d at 463 (requiring intervenors to establish a "legally protectable interest in the proceedings."); *id.* at 464 ("What is required is that the interest be one which the *substantive* law recognizes as belonging to or being owned by the applicant." (emphasis in original)).

There is no "law" of any sort that "protects" Nevada from increased expenditures on social-welfare programs. Indeed, no such law can exist. Whether and how much a State should spend on welfare programs is a sovereign prerogative. *See Alden v. Maine*, 527 U.S. 706, 750-51 (1999). And Nevada will retain its prerogative to make these choices no matter what relief is

41. https://www.nevadahealthlink.com/start-here/about-the-aca/medicaid

awarded. Nevada has yet to explain how its supposed "interest" in avoiding state expenditures is "legally protected" when Nevada has total control over the amount of money that it chooses to spend on health care and contraceptive access.

Nor has Nevada explained how it has a "legally protectable" interest in public health. There is no law that prevents Nevada residents from delaying prenatal care, becoming pregnant unintentionally, or aborting a pre-viability fetus. And Nevada has failed to identify any law that even discourages these behaviors. Nevada suggests that the Affordable Care Act confers a "legally protectable" interest in preserving the public-health and fiscal benefits of the Contraceptive Mandate. Opening Br. 24. But the ACA is silent on contraceptive coverage,[42] and in all events the requirements of RFRA trump the ACA. *See Bostock v. Clayton County*, 140 S. Ct. 1731, 1754 (2020) ("RFRA operates as a kind of super statute, displacing the normal operation of other federal laws"). If RFRA requires the protections in the classwide injunction, then Nevada cannot assert that the ACA gives it a "legally protectable" interest in having those protections withdrawn.

E. The Court Lacks Jurisdiction To Review The Denial Of Permissive Intervention

This Court lacks jurisdiction to review a denial of permissive intervention absent a "clear abuse of discretion." *Kneeland*, 806 F.2d at 1290. Nevada

42. *See Little Sisters*, 140 S. Ct. at 2373 ("[C]ontraceptive coverage is not required by (or even mentioned in) the ACA").

does not even argue, let alone demonstrate, that the district court abused its discretion by denying permissive intervention. It has therefore waived any contention that the abuse-of-discretion standard can be satisfied, and the Court should not consider this issue.

IV. The District Court Correctly Rejected Nevada's Arguments In Defense Of The Contraceptive Mandate

The district court considered and rejected Nevada's arguments in defense of the Contraceptive Mandate, despite its denial of Nevada's intervention. ROA.2079 ("[T]he Court will consider Nevada's Proposed Brief . . . as if its motion [to intervene] were granted out of an abundance of caution."). This Court lacks jurisdiction to consider these arguments because Nevada lacks standing to appeal the classwide injunction. *See* Sections I-II, *supra*. But if the Court concludes that it has jurisdiction to consider Nevada's defense of the Contraceptive Mandate, it should affirm the district court's rejection of these arguments. ROA.2079-2082.

A. The Contraceptive Mandate Substantially Burdens The Plaintiffs' Exercise Of Religion

Nevada's arguments on the "substantial burden" issue are flatly incompatible with the Supreme Court's treatment of complicity-based objections in *Hobby Lobby* and *Little Sisters*. Each of those decisions holds that courts *must* accept a religious objector's complicity-based objections to contraceptive coverage—no matter how implausible those objections may seem to an

opposing party or a federal judge. The Court's *only* task is to determine whether a complicity-based objection is sincere:

> [I]n these cases, the Hahns and Greens and their companies sincerely believe that providing the insurance coverage demanded by the HHS regulations lies on the forbidden side of the line, and *it is not for us to say that their religious beliefs are mistaken or insubstantial*. Instead, our "narrow function . . . in this context is to determine" whether the line drawn reflects "an honest conviction," and there is no dispute that it does.

Hobby Lobby, 573 U.S. at 725 (emphasis added) (citation omitted); *id.* at 724 ("[C]ourts have no business addressing . . . whether the religious belief asserted in a RFRA case is reasonable." (parentheses omitted)).[43] The Court emphatically reaffirmed this stance in *Little Sisters*, declaring that courts "*must* accept the sincerely held complicity-based objections of religious entities" no matter how "attenuated" the complicity may seem:

> [I]n *Hobby Lobby*, . . . we made it abundantly clear that, under RFRA, the Departments must accept the sincerely held complicity-based objections of religious entities. That is, they could not "tell the plaintiffs that their beliefs are flawed" because, in the Departments' view, "the connection between what the objecting parties must do . . . and the end that they find to be morally wrong . . . is simply too attenuated."

Little Sisters, 140 S. Ct. at 2383 (quoting *Hobby Lobby*, 573 U.S. at 723-24).

---

43. *See also* Amy J. Sepinwall, *Conscience and Complicity: Assessing Pleas for Religious Exemptions in Hobby Lobby's Wake*, 82 U. Chi. L. Rev. 1897, 1900 (2015) ("[T]he mere fact that Hobby Lobby *believed* that it would be complicit, no matter how idiosyncratic its belief, sufficed to qualify it for an exemption." (emphasis in original)).

The employer plaintiff sincerely believes that the "accommodation" process makes employers complicit in providing objectionable contraception by executing a form that leads directly to the provision of contraception by others. ROA.1124-1125. And the individual plaintiffs sincerely believe the Contraceptive Mandate makes individual consumers of health insurance complicit in the use of contraception by causing them to subsidize its provision. ROA.814. That is all that is needed to establish a "substantial burden" under *Hobby Lobby* and *Little Sisters*.

Nevada does not deny the sincerity of these complicity objections. Instead, Nevada contests the factual premises of the plaintiffs' complicity objections, and demands that the plaintiffs produce "evidence" to support their complicity claims. Opening Br. 35-39. That is precisely what *Hobby Lobby* and *Little Sisters* forbid courts to do. Nevada also cites the vacated opinion in *East Texas Baptist University v. Burwell*, 793 F.3d 449 (5th Cir. 2015), *vacated by Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (per curiam), which held that an employer was simply wrong for believing that its execution and submission of EBSA Form 700 facilitates the provision of abortifacient contraception. *See id.* at 459 ("Although the plaintiffs have identified several acts that offend their religious beliefs, the acts *they* are required to perform do not include providing or facilitating access to contraceptives." (emphasis in original)). The analysis in *East Texas Baptist* cannot be squared with *Hobby Lobby* and *Little Sisters*, which establish a rule of absolute deference to complicity-based objections under RFRA. *See Hobby Lobby*, 573 U.S. at 725; *Little Sisters*, 140

S. Ct. at 2383. It *does not matter* whether a court (or an opposing litigant) thinks a litigant's complicity concerns are "too attenuated" to warrant protection under RFRA. And it does not even matter whether the factual beliefs that undergird a litigant's complicity objection are correct. A Court's *only* task is to assess whether a complicity objection is sincere.[44]

B. The Courts May Not Consider Nevada's Argument That The Contraceptive Mandate Is The "Least Restrictive Means" Of Furthering A "Compelling Governmental Interest"

The district court refused to consider Nevada's arguments that the Contraceptive Mandate advances a "compelling government interest," or that it represents the "least restrictive means" of furthering such an interest. ROA.2081-82. And for good reason: the Religious Freedom Restoration Act assigns the burden of proof on these questions to the federal government alone. The statute provides:

> Government may substantially burden a person's exercise of religion *only if it demonstrates* that application of the burden to the person —
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

44. A theory of complicity might be so fantastical or delusional as to call into question the sincerity of the objection, but Nevada is not questioning the sincerity of the plaintiffs' complicity objections.

42 U.S.C. § 2000bb-1(b) (emphasis added). The "it" that must "demonstrate" a compelling governmental interest (and the least restrictive means of furthering that interest) is the federal government. *See* 42 U.S.C. § 2000bb-2 ("The term 'government' includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity"). The federal government is the *only* entity that may "demonstrate" that its burden is justified under the strict-scrutiny standard described in 42 U.S.C. § 2000bb-1(b).

If the federal government fails to carry its burden of proof, then it does not matter whether a would-be intervenor or an amicus can "demonstrate" the existence of a "compelling governmental interest." *Only* the federal government can make this "demonstration" under the text of section 2000bb-1(b). So when the federal government declined to contest the plaintiffs' claim that the Contraceptive Mandate fails to advance a "compelling governmental interest," that concession is final and conclusive. The same goes for the government's concession on the "least restrictive means" prong. An intervenor's arguments or evidence on "compelling governmental interests" *cannot even be considered* by a court, and neither can any of its arguments or evidence about the "least restrictive means."

Nevada does not contest the district court's application of section 2000bb-1(b), so it has waived any objection to the district court's resolution of these issues.

V. Nevada Waived Any Challenge To Class Certification

Nevada did not move to intervene until May 24, 2019—nearly two months after the district court certified the employer and individual classes. Nevada never presented *any* arguments against class certification in the district court, and its proposed brief did not contest class certification or ask the district court to de-certify the classes. ROA.1650-1674. It is too late for Nevada to pursue de-certification for the first time on appeal. *See RTM Media, L.L.C. v. City Of Houston*, 584 F.3d 220, 228 (5th Cir. 2009) ("We will not reverse a district court based on issues not presented to it.").

Nevada suggests that the Court limit relief to the representative plaintiffs without de-certifying the classes. Opening Br. 44-45. But a denial of classwide relief will forever preclude the absent class members from challenging the Contraceptive Mandate in another court proceeding. *See Richardson v. Wells Fargo Bank, N.A.*, 839 F.3d 442, 449 (5th Cir. 2016) ("[A]bsent class members are also bound by the doctrine of res judicata."). It is indefensible to limit relief to the representative plaintiffs *after* a class has been certified.

VI. This Court Lacks Jurisdiction To Consider Nevada's Lack-Of-Adversity Arguments

Because Nevada lacks standing to appeal the classwide injunction, this Court lacks jurisdiction to consider Nevada's lack-of-adversity objections to the proceedings below. *See* Sections I-II, *supra*. Appellate jurisdiction is a prerequisite to considering even jurisdictional objections to a district court's judgments or orders. *See Sommers v. Bank of America, N.A.*, 835 F.3d 509,

511-12 (5th Cir. 2016) ("Because the notice of appeal was filed well over thirty days after the order granting the stipulation of dismissal, we have no jurisdiction to review that order even though the appellant's objections go to the district court's jurisdiction."). And this Court has no authority to vacate district-court rulings that have not been "lawfully brought before [this Court] for review." 28 U.S.C. § 2106.

Even if this Court had jurisdiction to consider Nevada's lack-of-adversity arguments, they are meritless. The parties were adverse because the defendants were *enforcing* the Contraceptive Mandate against the plaintiffs when the lawsuit was filed, and they continued enforcing the Mandate until the district court enjoined them. The defendants' failure to contest the plaintiffs' RFRA arguments does not present justiciability problems if they were still enforcing the Mandate. *See Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 2196-97 (2020); *id.* at 2196 ("[A] lower court order that presents real-world consequences for the Government and its adversary suffices to support Article III jurisdiction—even if 'the Executive may welcome' an adverse order that 'is accompanied by the constitutional ruling it wants.'" (citation omitted)).

CONCLUSION

The order denying Nevada's motion to intervene should be affirmed. The remainder of Nevada's appeal should be dismissed for lack of appellate jurisdiction.

Respectfully submitted.

/s/ Jonathan F. Mitchell

JONATHAN F. MITCHELL
Mitchell Law PLLC
111 Congress Avenue, Suite 400
Austin, Texas 78701
(512) 686-3940 (phone)
(512) 686-3941 (fax)
jonathan@mitchell.law

H. DUSTIN FILLMORE III
CHARLES W. FILLMORE
The Fillmore Law Firm, LLP
201 Main Street, Suite 801
Fort Worth, Texas 76102
(817) 332-2351 (phone)
(817) 870-1859 (fax)
dusty@fillmorefirm.com
chad@fillmorefirm.com

Dated: October 12, 2020

Counsel for Plaintiffs-Appellees

CERTIFICATE OF SERVICE

I certify that on October 12, 2020, 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:

HEIDI PARRY STERN
Solicitor General
CRAIG A. NEWBY
Deputy Solicitor General
Office of the Nevada Attorney General
555 East Washington Avenue
Las Vegas, Nevada 89101
(702) 486-3594
hstern@ag.nv.gov
cnewby@ag.nv.gov

/s/ Jonathan F. Mitchell
JONATHAN F. MITCHELL
Counsel for Plaintiffs-Appellees

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 13,000 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
JONATHAN F. MITCHELL
Counsel for Plaintiffs-Appellees

Dated: October 12, 2020

CERTIFICATE OF ELECTRONIC COMPLIANCE

Counsel also certifies that on October 12, 2020, 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.

/s/ Jonathan F. Mitchell
JONATHAN F. MITCHELL
Counsel for Plaintiffs-Appellees