Case 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
Case No. 4:18-CV-825-O

APPELLANT STATE OF NEVADA'S REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES, cont.

Page

TABLE OF AUTHORITIES, cont.

Page

STATUTES:

TABLE OF AUTHORITIES, cont.

Page

INTRODUCTION

Nevada seeks to defend this Circuit's prior analysis of the Affordable Care Act ("ACA"). The Federal Government did not do so in this case, instead cooperating with Appellees Richard W. DeOtte, Yvette DeOtte, John Kelley, Alison Kelley, Hotze Health & Wellness Center, and Braidwood Management, Incorporated ("DeOtte") to seek summary judgment and a permanent injunction. ROA.1406. It took the parties only one week (the week of April 15th) to complete the briefing. ROA.1409, 1420. The Federal Government did not oppose, instead filing a "response" stating it did "not oppose an order by this Court entering partial summary judgment on the legal question whether any employers or individuals who in fact fall within the certified classes have stated a valid RFRA claim." ROA.1411. This position runs contrary to this Court's previous conclusion that parties similarly situated to DeOtte have not shown—and are not likely to show—that the ACA's contraception provisions substantially burden their religious exercise. *See East Texas Baptist Univ. v. Burwell*, 793 F.3d 449 (5th Cir. 2015).

Nevada has standing to pursue this appeal on its merits and a significant, protectable interest warranting intervention. On the merits, this Court should rely on its prior analysis of the identical issue. Alternatively, based on the Federal Government's non-adversity, this Court should vacate the nationwide class judgment, allowing DeOtte to have their individual relief while allowing Nevada

and any other sovereign state to represent its interests in the appropriate forum where all parties may be heard.

ARGUMENT

I. Nevada Has Standing Based Upon the Evidence and Allegations Provided at This Time, Prior to Any Defendant Answering the Complaint.

This Court requires each standing element to be supported "with the manner and degree of evidence required at the successive stages of litigation." *Stallworth v. Bryant*, 936 F.3d 224, 230 (5th Cir. 2019). Here, no defendant has yet answered the complaint and no discovery has been initiated. At this stage, "general factual allegations of injury resulting from the defendant's conduct may suffice" to establish standing. *Id.*; *Texas v. United States*, 805 F.3d 653, 657 (5th Cir. 2015). This Court "will not dismiss for lack of standing if we reasonably can infer from the plaintiffs' *general allegations*" that they have standing. *Id.* (quoting *Hotze v. Burwell*, 784 F.3d 984, 992 (5th Cir. 2015)) (emphasis added).

The Supreme Court likewise requires only that Nevada show a *substantial risk* of injury to satisfy the imminence component of Article III. *See, e.g., Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014); *Clapper v. Amnesty Int'l, USA*, 568 U.S. 398, 414 n. 5 (2013) (stating that plaintiffs are not required "to demonstrate that it is literally certain that the harms they identify will come about"). Depending on the stage of the proceeding, such a showing can be made with allegations or facts.

In an attempt to avoid this precedent, DeOtte cites to a case that is inapposite because standing was evaluated at a much more advanced procedural stage. Ans. Br. at 24 (citing *Wittman v. Personhuballah*, 136 S. Ct. 1732, 1737 (2016)). In *Wittman*, members of Congress intervened to defend a congressional redistricting plan. *Id.* at 1735. "After a bench trial" in which they participated, the members of Congress appealed. *Id.* After two years of litigation, one remand from the Supreme Court and further consideration by the district court, the Supreme Court determined that the members "have not identified record evidence establishing their alleged harm." *Id.* at 1737. *Wittman* does not require that Nevada prove the same level of record evidence to establish standing.

DeOtte citation to *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), further supports Nevada's argument that it need only *allege* facts at this stage, rather than prove each fact. In *FW/PBS, Inc.*, the Supreme Court stated this plainly, holding that it was plaintiff's burden "clearly to *allege* facts demonstrating that he is a proper party to invoke judicial resolution of the dispute" and that "petitioners in this case must *allege* ... facts essential to show jurisdiction." *Id.* (internal citations omitted) (emphasis added). Nevada need only *allege* facts at this stage to establish standing, rather than prove each fact.

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A. Nevada Has Proffered Sufficient Facts and Allegations to Establish Substantial Risk of Fiscal Impact.

Though it could prove standing with only allegations, Nevada has actually proffered facts as justification for standing. Nevada, following adoption of the ACA's contraception mandate resulted in a *35% decrease* in Nevada's abortion rate among women aged 15 to 19 and a *10% decrease* in women aged 20 to 24 between 2012 to 2017. ROA.1598. Further, based on the Federal Government's own records and math, Nevada has concluded that between 600 to 1,200 Nevadan women would be harmed from implementation of DeOtte's proposed class relief. ROA.1596. Of those unintended pregnancies that ended in birth, 60% were paid for by Medicaid and other public insurance programs, costing Nevada $37 million and the federal government $66 million in 2010. ROA.1596. DeOtte's proposed class action would increase Nevada expenditures while harming the public health of Nevadan women. ROA.1596. At this stage, the declarations strongly support that Nevada faces a substantial risk of fiscal injury.[1] DeOtte provided no evidence to contest those declarations, and the evidence in them must therefore "be taken to be true." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

[1] Multiple amicus curiae have also identified facts supporting Nevada's injury and interest in this case. *See* Br. of Massachusetts et al. at 11-21; Br. of Planned Parenthood Federation of America et al. at 5-8; Br. of American Federation of State, County, and Municipal Employees et al. at 5-16*;* Br. of National Women's Law Center et al. at 7-30.

DeOtte's "specific woman" argument is thus irrelevant to this Court's analysis of Nevada's standing. In this argument, DeOtte merely provides unsupported analysis of various factors it contends Nevada must prove. Ans. Br. at 18-22 (emphasis in original). None of this is necessary, however, pursuant to this Court's own precedent. *See Stallworth*, 936 F.3d at 230.

More importantly, DeOtte ignores *Texas v. United States*, 945 F.3d 355, 386 n.30 (5th Cir. 2019), where this Court accepted this *exact* standing theory. There, this Court rejected arguments that standing requires proof pertaining to at least one specific person. *Id.* This Court thus avoided a split with the First, Third, and Ninth Circuits on *Nevada's argument here*. This Court should do so again and reject DeOtte's "specific woman" argument.

Rejecting DeOtte's argument is also consistent with this Court's decision in *Texas v. United States*, 809 F.3d 134, 155-56, 162 (5th Cir. 2015), *aff'd*, *United States v. Texas*, 136 S. Ct. 2271 (2016) (*per curiam*). There, this Court found, in a case challenging DAPA, that Texas had standing even where it did not identify particular noncitizens who had applied, or would likely apply, for driver's licenses "because driving is a practical necessity in most of the state," and there was thus a sufficient likelihood that "some DAPA beneficiaries would apply." Based on the administrative record for the final rules, it is highly likely that Nevada employers, such as Hobby Lobby Stores, Inc., will use the nationwide class judgment to avoid

providing contraceptive coverage. *Compare with Massachusetts v. United States Dept. of Health & Human Services*, 923 F.3d 209, 224 (1st Cir. 2019) (containing identical analysis pertaining to Hobby Lobby).[2] This Court should recognize Nevada's standing.

B. The Causal Connection Is Sufficient to Support Article III Standing.

Nevada's ability to trace its alleged injury to the nationwide class judgment does not require absolute certainty. *Department of Commerce v. New York*, 139 S. Ct. 2551, 2565-66 (2019). Article III requires no more than *de facto* causality. DeOtte's contention that Nevada cannot fairly trace its alleged injury to the nationwide class judgment must fail. Ans. Br. at 27-28.

In *Department of Commerce*, the Supreme Court recognized that future injuries associated with seeking citizenship information from Census participants "may suffice if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur." *Id.* at 2565. The Court rejected causation arguments that speculated about the decisions of independent actors. *Id.* Instead, based on trial evidence, the Court held that traceability was satisfied "on the predictable effect of

[2] Both *Texas v. United States* cases also support rejection of DeOtte's "speculative" harm argument. Ans. Br. at 25-27. For instance, it is foreseeable that Nevadan women would be more likely to become pregnant with less contraceptive coverage, similar to assuming at least some DAPA recipients would apply for driver licenses.

Government action on the decisions of third parties. Because Article III requires no more than *de facto* causality, traceability is satisfied here." *Id.* at 2566. The Federal Defendants have not yet responded to the class complaint, but Nevada has proffered evidence pertaining to the number of Nevadan women at risk from the nationwide injunction and the measurable harm resulting to those affected by such a judgment. At minimum, at this early stage, there is a "substantial risk" that at least some Nevada residents will lose contraceptive coverage because of the nationwide injunction.

This Court similarly rejected traceability in *Texas v. United States*, 809 F.3d 134, 150–62 (5th Cir. 2015). There, this Court also held that Texas' DAPA challenge was entitled to the same "special solicitude" as was Massachusetts. Specifically, this Court quoted the Supreme Court's holding that "Massachusetts had satisfied the causation requirement because the possibility that the effect of the EPA's decision was *minor* did not negate standing, and the evidence showed that the effect was significant in any event." *Massachusetts v. E.P.A.*, 549 U.S. 497, 524–25 (emphasis added).

Under these very similar circumstances, Nevada is entitled to this same "special solicitude."

C. The District Court's Orders Inflicted Nevada's Injury.

Contrary to DeOtte's assertion, Nevada's injuries would not be self-inflicted. Ans. Br. at 27-28.

First, DeOtte's argument relies on *Pennsylvania v. New Jersey*, 426 U.S. 660, 96 S.Ct. 2333, 49 L.Ed.2d 124 (1976), which did not concern Article III standing at all. Instead, the Supreme Court exercised its significant discretion when managing a dispute among states that was subject to its original jurisdiction. *Id.*

Second, this Court rejected the applicability of *Pennsylvania v. New Jersey* to state standing in *Texas v. United States*, 809 F.3d 134, 150–62 (5th Cir. 2015) for multiple reasons, including the challenged litigation arising in response to major policy changes where a State has limited options for maintaining existing policy absent intervention. *Id.* at 158-59.

Third, DeOtte's argument ignores the Supreme Court's recognition of standing in other situations where parties arguably have "self-inflicted" injuries. *See, e.g.*, *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 154-55 (2010). In *Monsanto*, the Court held that conventional alfalfa farmers had standing to challenge a federal agency decision to deregulate genetically engineered alfalfa. *Id.* Even where it was uncertain whether conventional alfalfa farms would be infected by nearby genetically engineered alfalfa farms but chose to undertake costly precautions against such infection. *Id.*

Finally, taken to its extreme, DeOtte's "self-inflicted" standard makes no sense in light of landmark Supreme Court precedent. For instance, Jane Roe, utilizing DeOtte's analysis, could have chosen not to become pregnant in the first

instance, or gone to another state where abortion was then legal. *See Roe v. Wade*, 410 U.S. 113 (1973). Instead, the Supreme Court reached the merits of that constitutional dispute.

D. Nevada Is Entitled to "Special Solicitude" as a Sovereign State.

This Court owes Nevada "special solicitude in [the] standing analysis"—not heightened skepticism. *See Massachusetts v. EPA*, 549 U.S. at 520. This is particularly true here, where Nevada is a sovereign state that has quasi-sovereign interests, regardless of whether it causes Nevada any financial injury. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982) (finding that Puerto Rico has a "quasi-sovereign interest in the health and well-being . . . of its residents").

This Court similarly recognizes the importance of states' quasi-sovereign interests. *See Texas v. United States*, 809 F.3d 134, 150–62 (5th Cir. 2015). This Court has noted that states surrendered certain sovereign prerogatives when entering the Union. *Id.* at 151-53. Additionally, this Court held that actions affect "the states' "quasi-sovereign" interests by imposing substantial pressure on them to change their laws." *Id.* at 153. The ability to avoid injury by changing applicable law was rejected by this Court. "States have a sovereign interest in the power to create and enforce a legal code," and the possibility that a plaintiff could avoid injury by incurring other costs does not negate standing. *Id.* at 156-57 (internal quotations omitted).

Here, Nevada has asserted its public health and financial interests in maintaining the existing balance under federal law for providing Nevadans equal access to preventive care without regard to their sex. Existing Nevada statutes highlight Nevada's support for this balance, as they also balance access to preventive care with the religious liberty interests of insurers who are "affiliated with a religious organization." *See* NEV. REV. STAT. §§ 689A.0418, 689B.0378, 689C.1676, 695A.1865, 695B.1919, and 695C.1696. Nevada's efforts to preserve the existing balance is consistent with these Nevada statutes.

II. Nevada's Injury Remains, Notwithstanding the Supreme Court's Decision in *Little Sisters of the Poor*.

The Supreme Court decision in *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020) ("*Little Sisters*"), does not affect the ability of this Court to redress Nevada's injuries. DeOtte's argument to the contrary can be rejected on multiple bases.

First, the Supreme Court did not resolve the merits of the Trump Administration's rulemaking. *Little Sisters,* 140 S. Ct. at 2386. Instead, the cases were remanded to the lower courts. As noted by Justice Alito in his concurrence, it is "all but certain [that Pennsylvania and New Jersey will] pursue their argument that the current rule is flawed on yet another ground, namely, that it is arbitrary and capricious and thus violates the APA. *Id.* at 2387. "This will prolong the legal battle" against the rulemaking. *Id.* Should the challenging states succeed in demonstrating

that the rulemaking was arbitrary and capricious, or obtain injunctive relief on that basis, Nevada would remain harmed by the district court's nationwide injunction and class judgment.

Further, changes in presidential administrations have resulted in significant changes in rulemaking on these provisions. There is no dispute that the federal government has the authority to conduct rulemaking on the contraception coverage issues. The Supreme Court held "that the ACA gives HRSA broad discretion to define preventive care and screenings and to create the religious and moral exemptions." *Little Sisters of the Poor Saints Peter & Paul Home*, 140 S. Ct. at 2381. Should there be further change on contraception coverage rulemaking while the current cases continue, Nevada suffers harm should its citizens be subject to the district court's nationwide injunction and permanent judgment.

Second, DeOtte's assertions, taken to their logical conclusion, make the district court's nationwide class action judgment moot, which would also moot this appeal. DeOtte did not have a case or controversy if the federal rulemaking was effective and need no nationwide class injunction or judgment. Nevada has already argued that the lack of adversity warranted vacating the nationwide class action judgment. Opening Br. at 45-48. This allows courts to avoid deciding "abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial

intervention may be unnecessary to protect individual rights." *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

Either Nevada's injury can be redressed by this Court or DeOtte lacked standing to obtain its nationwide class action judgment. Nevada submits that this Court can redress the injury. Alternatively, because these circumstances are not due to the actions of any current party, this Court should vacate the district court's nationwide class action judgment as moot. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950).

III. The District Court Erred When Denying Intervention.

A. Intervention Is Liberally Construed as a Legal Question.

Rule 24 is "liberally construed" in favor of intervention. *Blumfield v. Dodd*, 749 F.3d 339, 341 (5th Cir. 2014). "[D]oubts [are] resolved in favor of the proposed intervenor." *In re Lease Oil Antitrust Litig.*, 570 F.3d 244, 248 (5th Cir. 2009). For purposes of Nevada's motion for intervention, this Court must accept Nevada's factual allegations as true. *Texas v. United States*, 805 F.3d 653, 657 (5th Cir. 2015). Intervention as a matter of right "must be measured by a practical rather than a technical yardstick," and the inquiry is a "flexible one" focused on the "particular facts and circumstances" of each case. *Edwards v. City of Houston*, 78 F.3d 983, 999 (5th Cir. 1996) (*en banc*). "Federal courts should allow intervention where no one

would be hurt and the greater justice could be obtained." *Texas v. United States*, 805 F.3d at 657; *Sierra Club v. Espy*, 18 F.3d 1202, 1206 (5th Cir. 1994).

Here, the district court held that Nevada met its burden as to the timeliness, impairment, and adequate representation prongs of the intervention test. ROA.2069-70, 2075-79. DeOtte's Answering Brief does not challenge the district court's determination on those prongs.

Instead, DeOtte challenges Nevada's provision of a substantive opposition to the pending motion for summary judgment in lieu of an answer and reiterates arguments challenging Nevada's protectable interest. These arguments fail to defeat Nevada's intervention.

B. Nevada's Inclusion of a Substantive Opposition to Summary Judgment, Rather Than a Pleading, Substantially Complies with Rule 24.

Nevada attached a substantive opposition to the then-pending motion for summary judgment, rather than submitting an answer to a pleading that the Federal Defendants had not answered. The district court rejected DeOtte's argument against intervention on this basis. ROA.2070-2071.

Here again, DeOtte argues that the motion should be denied because no pleading was attached when Nevada filed a detailed opposition to the then-pending motion for summary judgment. Ans. Br. at 34-38. This ignores the Fifth Circuit's liberal intervention pleading standards.

In *Farina v. Mission Inv. Trust*, 615 F.2d 1068, 1074 (5th Cir. 1980), intervention was permitted even in the absence of a motion to intervene, construing a motion to remove (which would not have contained a pleading) as a motion to intervene. *Id.* (emphasis added). The Fifth Circuit is not alone in eschewing overly technical readings of Rule 24(c); it has been joined by the First, Sixth, Eighth, Ninth, and D.C. Circuits in eschewing overly technical readings of Rule 24(c) where it is clear what arguments a proposed intervener intends to make. *See, e.g.*, *Peaje Investments LLC v. García–Padilla*, 845 F.3d 505, 515 (1st Cir. 2017) (identifying supportive precedent from the First, Sixth, Eighth, and D.C. Circuit); *Beckman Indus., Inc. v. International Ins. Co.*, 966 F.2d 470, 474 (9th Cir. 1992). The Northern District of Texas has similarly interpreted Rule 24(c). *See Bituminous Gas. Corp. v. Garcia*, 223 F.R.D. 308, 311 n. 4 (N.D. Tex. 2004) (granting motion to intervene where no pleading was provided, subject to subsequent provision of a proposed pleading, based on it being "abundantly clear from Intervenors' motion [what Intervenor intended to defend]").

Here, Nevada provided a substantive opposition to the pending motion for summary judgment, explaining clearly why it sought intervention and what it would seek to do if allowed to intervene, rather than an answer that no actual defendant had

filed. Under such circumstances, the district court did not err in concluding that Nevada should be allowed to intervene upon such a proposed filing.[3]

C. Nevada Has a Direct, Substantial, and Legally Protectable Interest.[4]

Nevada satisfies Rule 24's requirement that intervenors must have a "direct, substantial, legally protectable interest in the proceedings." *Texas v. United States*, 805 F.3d at 657. Property or pecuniary interests are the "most elementary type[s] of right[s]" protected by Rule 24(a) and "are almost always adequate." *Id.* at 658. This is Nevada's primary interest.

Rule 24(a) safeguards less tangible interests as well, however, such as a right to vote. *See, e.g.*, *League of United Latin American Citizens, District 19 v. City of Boerne*, 659 F.3d 421, 434 (5th Cir. 2011). This Court has recognized that intervention as of right does not require proof of a property right in the context of a

[3] There appears to be no basis for DeOtte's assertion that it has made "repeated demands" on this issue. Ans. Br. at 36. Filing an opposition with the district court and seeking reversal of the district court's determination on that issue is an opposition by DeOtte, not "repeated demands." When intervention is allowed, Nevada will submit the appropriate responsive pleading.

[4] Additionally, DeOtte claims that Nevada has not identified a "Claim or Defense For Which Intervention is Sought." Ans. Br. at 37-38. Nevada's "claim or defense" in this case is simple and clear from the face of its filings: DeOtte is not entitled to the nationwide class action relief it seeks because the challenged ACA preventive health care coverage provisions comply with RFRA, as previously analyzed by the Fifth Circuit in *East Texas Baptist Univ. v. Burwell*, 793 F.3d 449 (5th Cir. 2015). Instead, DeOtte's argument appears to be a repackaged "standing" or "interest" argument, each of which has already been addressed by Nevada in its briefing.

public-law case. Further, "although an asserted interest must be 'legally protectable,' it need not be legally *enforceable*." *Id.* at 658-59 (emphasis in original). "In other words, an interest is sufficient if it is of the type that the law deems worthy of protection, even if the intervener does not have an enforceable legal entitlement or would not have standing to pursue her own claim." *Id.*

DeOtte's reliance on *Donaldson v. United States*, 400 U.S. 517 (1971), to establish what constitutes a "significantly protectable interest" is unavailing because—among other reasons—it is no longer good law. Ans. Br. at 39-40. Congress disagreed with the Supreme Court, abrogating *Donaldson* by statute to specifically allow intervention. *See Tiffany Fine Art, Inc. v. United States*, 469 U.S. 310, 315-17 (1985).

DeOtte's reliance is further misplaced for other reasons. First, *Donaldson* addressed an ongoing Internal Revenue Service investigation, not a lawsuit involving a sovereign State. Second, even if *Donaldson* remained good law, DeOtte fails to provide the full quote, thus distorting its meaning. The next sentence states that:

> And the taxpayer, to the extent that he has such a protectable interest, as, for example, by way of privilege, or to the extent he may claim abuse of process, may always assert that interest or that claim in due course at its proper place *in any subsequent trial*.

Donaldson, 400 U.S. at 531, 91 S. Ct. at 542 (emphasis added).

Unlike the potential criminal trial faced by the *Donaldson* taxpayer, Nevada has no subsequent trial where it can assert its interests against this judgment.

Rather than address Nevada's evidence or specific allegations made at the beginning stage of the case, DeOtte instead reiterates its "specific woman" and "chain of causation" already addressed in the standing context by all sides. Ans. Br. at 42-44. Here, Nevada, a sovereign state, seeks to defend existing ACA provisions, from which Nevada achieved concrete public health gains in reducing unintended pregnancies and abortions. Nevada has provided declarant testimony supporting its asserted interest, which courts are obligated to treat as true for purposes of adjudicating intervention. *Texas v. United States*, 805 F.3d at 657. The ACA intended to provide Nevada these public health benefits, along with potential fiscal benefits. This provides Nevada with a legally protectable interest in this case.

Nevada's determination that its citizens face a substantial risk of harm is not speculative. The determination is based squarely on the facts detailed above. This Court should thus reject the district contention that Nevada's interest is not "direct" because "Nevada argues that the class-wide injunction Plaintiffs seek will have ripple effects." ROA.2072. In making this finding, the district court inappropriately substitutes a test for certainty instead of risk at the pleading stage of this case. *See Department of Commerce v. New York*, 139 S. Ct. 2551, 2565-66 (2019). The Supreme Court has explained the concept of risk, recognizing that future injuries

associated with seeking citizenship information from Census participants, for example, "may suffice if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur." *Id.* at 2565 (citing *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (*SBA List*)). The Court rejected causation arguments that asserted speculation about the decisions of independent actors. *Id.* The Court held that traceability was satisfied "on the predictable effect of Government action on the decisions of third parties." *Id.* at 2566.

This Court has recognized that "a party within the zone of interests protected by a statute may possess a type of substantive right not to have the statute violated." *New Orleans Pub. Serv., Inc. v. United Gas Pipeline Co. (NOPSI)*, 732 F.2d 452, 465 (5th Cir. 1984) (*en banc*). This Court did not further "determine the zone of interests protected or regulated by a constitutional provision or statute of general application" in *NOPSI* because that dispute did "not involve such a public law question," instead centering on a breach of contract claim.[5] *Id.*

[5] DeOtte's citation to *Bostock v. Clayton County*, 140 S.Ct. 1731, 1754 (2020) excluded "it might supersede Title VII's commands in appropriate cases." Whether RFRA requires the protections in this case is an open one, should Nevada be allowed to intervene. Being unable to intervene to provide adversity to DeOtte's arguments where the Federal Government made none does not constitute proof that Nevada lacks a "legally protectable" interest. This argument puts the chicken before the egg.

This Court should recognize Nevada's direct, substantial, and legally-protectable interest warranting intervention into this case.

D. Nevada Is Entitled to Special Solicitude in Order to Protect Its Quasi-Sovereign Interests.

In addition to its proprietary injuries, Nevada has a quasi-sovereign interest in the physical and economic well-being of its residents. *See, e.g., Alfred L. Snapp & Son v. Puerto Rico*, 458 U.S. 592, 607-608 (1982); *Massachusetts v. E.P.A.*, 549 U.S. 497, 519-20 (2007). Nevada has demonstrated the harm to itself and its residents that would flow from DeOtte's judgment. "States are not normal litigants for the purposes of invoking federal jurisdiction." *Massachusetts*, 549 U.S. at 518. This Circuit similarly recognizes the importance of states' quasi-sovereign interests. *See Texas v. United States*, 809 F.3d at 150–62 (5th Cir. 2015).

Here, Nevada has demonstrated the extensive harm to itself and its residents. Nevada has asserted its public health and financial interests in maintaining the existing balance under federal law for providing Nevadans equal access to preventive care without regard to their sex. Existing Nevada statute highlights Nevada's support for this balance, as they also balance access to preventive care with the religious liberty interests of insurers who are "affiliated with a religious organization." *See* NEV. R. STAT. 689A.0418, 689B.0378, 689C.1676, 695A.1865, 695B.1919, and 695C.1696. Nevada here seeks to preserve this balance.

Nevada's quasi-sovereign interests further justify intervention into this case.

IV. The District Court's Nationwide Class Judgment Must be Reversed and Vacated.

A. This Circuit's Precedent Applies Here, Requiring Application of the Substantial Burden and Least Restrictive Means Test.

This Court has already determined that "RFRA does not entitle [objectors] to block third parties from engaging in conduct with which they disagree." *East Texas Baptist University*, 793 F.3d at 461. It has also previously analyzed the acts required to comply with the "accommodation" provided for under the contraception mandate. *Id.* This Circuit held that "the acts [objectors] are required to perform do not include providing or facilitating access to contraceptives." *Id.* at 459. Accordingly, because "RFRA confers no right to challenge the independent conduct of third parties," [this Circuit joined other circuits] in concluding that the plaintiffs have not shown a substantial burden on their religious exercise." *Id.* Without any opportunity for discovery, the district court erred in when attempting to distinguish this case from what this Circuit already considered in *East Texas Baptist University.*

DeOtte misstates Nevada's position regarding the named parties' objections. Nevada does not demand "that plaintiffs produce 'evidence' to support their complicity claims." Ans. Br. at 49. Instead, Nevada simply argues fact and legal issues addressed by this Court *after Zubik*'s initial consideration of "complicity." *East Texas Baptist Univ. v. Burwell*, 793 F.3d 449 (5th Cir. 2015). Quick review

demonstrates that none violate DeOtte's reliance on the "rule of absolute deference to complicity-based objections under RFRA." Ans. Br. at 49.

First, Nevada argues that the contraception coverage would not be provided through DeOtte's plan if it opts for the accommodation. Op. Br. at 36-37. It does not implicate DeOtte's "complicity objection." Second, Nevada argues that the ACA itself already requires contraceptive coverage and that nothing "suggests that insurers' or third-party administrators' obligations would be waived in the plaintiffs refused to apply for the accommodation." *Id.* at 38. It does not implicate DeOtte's "complicity objection." Third, nothing within the record suggests "that an individual's purchase of health insurance necessarily subsidizes another's contraception." *Id.* at 39. It does not implicate DeOtte's "complicity objection."

DeOtte's "rule of absolute deference to complicity-based objections under RFRA" does not swallow the arguments set forth above. Such a rule does not resolve those fact or legal questions, with which our judicial system is tasked.

Because DeOtte does not substantively explain how this "rule of absolute deference to complicity-based objections under RFRA" resolves the fact and legal questions above, this Court should rely on its prior analysis of the identical legal issue in *East Texas Baptist Univ. v. Burwell* to reverse the district court's judgment or, alternatively, remand to allow Nevada to defend as an intervening party.

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B. The Federal Government Has a Compelling Interest in the ACA's Contraception Provisions.

The district court's order presumed "without finding" that there was a compelling government interest. RA.1864. This is consistent with the Supreme Court's recognition in *Hobby Lobby* that the contraceptive-coverage requirement "serves the Government's compelling interest in providing insurance coverage that is necessary to protect the health of female employees, coverage that is significantly more costly than for a male employee." *Id.* at 2785-86 (Kennedy, J., concurring); accord *id.* at 2799-2800 & n.23 (Ginsburg, J., dissenting).

To avoid this, DeOtte contends that the Federal Government's lack of adversity in this case means the issue is resolved conclusively. Ans. Br. at 51. Nevada instead submits that this lack of adversity *justifies Nevada's* intervention and remand to the district court. Further, Nevada has consistently opposed DeOtte's analysis on this issue, both regarding the compelling governmental interest and how the Federal Government's lack of adversity has harmed Nevada's interests.

Here, Nevada would only be "demonstrating" what the federal government has already determined to be a "compelling government interest" by the "least restrictive means" available. The federal government demonstrated that the existing methods were the "least restrictive means" available for implementing the existing provisions during the post-*Zubik* administrative process, while maintaining the

seamlessness of providing equal preventive health care. *See, generally,* RA.1661, 1664-65.

This Court should similarly assume the compelling governmental interest or, alternatively, remand to the district court for further consideration.

C. The Accommodation Constitutes the Least Restrictive Means for Achieving the Compelling Interest.

DeOtte, notwithstanding the heading title within its Answering Brief, does not address the "least restrictive means" argument proffered by Nevada. Instead, it relies entirely on the Federal Government's lack of adversity throughout this case to argue that no one can make this argument. Ans. Br. at 50-51. This Court should not reward the gamesmanship associated with this lack of adversity that Nevada seeks to address with intervention. Instead, this Court should rely on its prior analysis in *East Texas Baptist Univ. v. Burwell*.

D. Ordering a Nationwide Class Judgment Was Improper, Regardless of the Merits Asserted by the Individual Plaintiffs.

DeOtte "won" its judgment against a completely non-adverse Federal Government. The sole step the Federal Government undertook to defend existing law was opposing DeOtte's vague, nationwide class certification. Only after Nevada appealed to this Court was the Federal Government's fecklessness fully revealed. First, the Federal Government chose not to appeal until after DeOtte sought its first dismissal of this appeal. *See* Notice of Appeal (Sept. 27, 2019). Subsequently, the

Federal Defendants sought leave to stay the appeal pending the Court's determination of standing. See Motion (Oct. 1, 2019). In a joint motion with DeOtte, the Federal Defendants also sought leave to stay this appeal pending the Court's determination of intervention. See Joint Motion (Oct. 11, 2019). Following this Court's denial of that request, the Federal Defendants voluntarily dismissed their appeal on December 6, 2019.

It is in this convoluted posture that DeOtte argues that Nevada should have challenged class certification sooner. Ans. Br. at 52. Nevada submits that it should be allowed to intervene into this case on remand to the district court, which would allow the district court to address that issue.

Alternatively, this Court should limit RFRA relief to the named Appellees who have provided proof to a court, rather than "unnamed class members [that] have not yet established that they in fact have a sincere religious objection to the Mandate." ROA.1412. No one specifically knows who these class members are and even DeOtte recognizes that a "theory of complicity might be so fantastical as to call into question the sincerity of the objection." Ans. Br. at 50 n.44.

E. Alternatively, This Court Should Vacate the Nationwide Class Judgment for Lack of Adversity Among the Original Parties.

In the event this Court denies Nevada's intervention, it should recognize the lack of Article III "case or controversy" between the original parties and vacate the

nationwide class judgment. The district court judgment occurred without the "concrete adverseness" considered by the Supreme Court when determining it was prudent to proceed to the merits in *United States v. Windsor*, 570 U.S. 744, 759-62 (2013), where the federal government refused to defend the Defense of Marriage Act.

Here, if Nevada is not permitted to intervene, there will never be sufficient adversity on this issue in this case. As a result, "nonparties" will suffer from poorly considered decisions in this case, including the lack of factual distinctions with this Court's prior analysis of the identical legal issue. Even before this Court, the Federal Defendants have demonstrated inadequate (and perplexing) mixed motives for effectively defending the ACA. They appealed the judgment solely to force Nevada to engage in a three-part appeal consisting of 1) demonstrating standing, 2) obtaining reversal on the denial of intervention, and then 3) addressing the merits of the underlying judgment. The Federal Defendants forced these contortions—all while insisting that they would not actually appeal should Nevada be defeated during the first two stages of the process. *See* Joint Motion (October 11, 2019). In short, the Federal Defendants wanted the nationwide class judgment as a backstop, should they not be able to succeed with administrative rulemaking process. The rulemaking process, in fact, would be more competent at addressing the underlying issue in this case, as it does provide interested parties such as DeOtte *and* Nevada to participate

and to seek judicial relief. The Supreme Court held "that the ACA gives HRSA broad discretion to define preventive care and screenings and to create the religious and moral exemptions." *Little Sisters of the Poor Saints Peter & Paul Home*, 140 S. Ct. at 2381.

Even if Nevada is not allowed to intervene as a matter of right, this Court has the authority to vacate the nationwide class judgment. It should recognize that the district court acted imprudently in exercising jurisdiction and awarding a nationwide judgment where there was insufficient adversity. 28 U.S.C. § 2106. This would allow any other objector to file suit for individual judgment while the courts address the overarching administrative rulemaking dispute. If individual objectors sought class relief, they could provide appropriate notice to any and all interested parties, such that the interplay between RFRA and the ACA's contraception provisions can be litigated with sufficient adversity.

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CONCLUSION

Nevada requests that this Court reverse and vacate the district court's judgment and order the district court to permit Nevada to intervene in the action below.

Dated: November 16, 2020,

SUBMITTED BY:

s/Heidi Parry Stern
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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF System on November 16, 2020. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: November 16, 2020.

s/Heidi Parry Stern
An employee of the Office of the Nevada Attorney General

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Dated: November 16, 2020.

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