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
No. 4:18-cv-825-O

APPELLANT STATE OF NEVADA'S RESPONSE TO APPELLEES' PETITION FOR PANEL REHEARING AND PETITION FOR REHEARING EN BANC

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INTRODUCTION

Plaintiffs filed this case as a collateral attack against administrative rulemaking cases to support the Federal Defendants' proposed new rules on the Affordable Care Act's contraception provisions. Without adversity typical of civil litigation, the Federal Defendants cooperated with Plaintiffs' efforts to quickly obtain a nationwide class judgment as an end run around injunctions from the administrative rulemaking cases.

Nevada moved to intervene to defend then-existing law as previously interpreted by this court, asserting fiscal interests recognized by three sister circuits on the same legal dispute. The district court erred in denying Nevada's motion to intervene. Nevada timely appealed the denial of intervention and the district court's nationwide class judgment.

Subsequently, the Supreme Court set aside the injunctions from the administrative rulemaking cases that inspired this case and this case's resulting nationwide class judgment. There is no dispute that had the Federal Defendants maintained their initial appeal of this case, they would have had the right to seek vacatur. Likewise, there is no reason why Nevada—who would have been a defendant but for the district court's error—should be denied vacatur.

The panel decision represents a well-reasoned effort to unwind the procedural tangle created by the lack of adversity from the Federal Defendants and the district

court's erroneous denial of intervention. Nothing argued by Plaintiffs identifies a conflict with a decision of the United States Supreme Court, this court, or a sister circuit court that necessitates en banc consideration under applicable rule.

The petitions for rehearing and for en banc rehearing should be denied.

STATEMENT OF FACTS

I. Procedural Background

Disheartened that "a federal judge in Philadelphia issued a preliminary injunction against the enforcement of [final rules issued by the Federal Defendants], Plaintiffs filed this case to "seek an injunction against [the] enforcement [of the Affordable Care Act's contraception provisions]." ROA.277. Plaintiffs sought a nationwide class action against the ACA's contraceptive provisions because of alleged RFRA violations.

Similarly disheartened by this and another preliminary injunction issued against their preferred "final rules," the Federal Defendants provided little adversity to this case. They filed no responsive pleading, notwithstanding the district court's order to do so. *See* Panel Op. at 5; ROA.266. The Federal Defendants never opposed Plaintiffs' request for a temporary restraining order. *See* ROA.1117. Rather than seek a stay or appeal following class certification, the Federal Defendants expedited "briefing" on the merits, making no reference to this Circuit's recent analysis of the same legal question. Instead, the Federal Defendants agreed to convert a motion for

preliminary injunction into a motion for permanent injunction and summary judgment. *See* Panel Op. at 6; ROA.1392. The Federal Defendants also agreed to brief summary judgment on an expedited basis. ROA.1395. Plaintiffs circumvented ongoing administrative rulemaking litigation by obtaining a permanent nationwide class judgment.

It is in this context that Nevada timely sought to intervene to protect its fiscal and sovereign interests. Rather than consider intervention, the district court granted summary judgment and a permanent injunction on June 5, 2019. Panel Op. at 6.

Only after awarding Plaintiffs' final relief did the district court deny Nevada's motion to intervene – without hearing – on July 29, 2019. ROA.2061-82. The court denied intervention due to its erroneous conclusion that Nevada does not have a protectable interest, resulting in issuance of a nationwide class judgment. ROA.2071-75.

Nevada timely appealed, first by filing a notice of protective appeal within thirty days of summary judgment. ROA.1937. Plaintiffs moved this Court to dismiss the appeal on standing grounds. *See* Motion (Sept. 6, 2019). Prior to Nevada's opposition being due, the Federal Defendants appealed the judgment. *See* Notice of Appeal (Sept. 27, 2019). Subsequently, the Federal Defendants sought leave to stay the appeal pending the Court's standing determination. *See* Motion (Oct. 1, 2019). In a joint motion, the Federal Defendants also sought leave to stay this appeal

pending the Court's intervention determination. *See* Motion (Oct. 11, 2019). The Federal Defendants did "not intend to proceed with their appeal if Nevada is not permitted to intervene and proceed with its merits appeal." *See* Motion (Oct. 11, 2019) at 5. Following denial of the motion, the Federal Defendants voluntarily dismissed their appeal. *See* Motion for Voluntary Dismissal (Dec. 6, 2019).

In a July 2020 decision, the Supreme Court vacated the nationwide injunctions that prevented enforcement of the 2017 Rules. *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S.Ct. 2367 (2020). Subsequently, Plaintiffs renewed their motion to dismiss Nevada's appeal in part. *See* Motion (July 22, 2020). Argument and the panel's opinion followed.

II. Review of the Panel's Correct Opinion in this Case

The panel correctly unwound the procedural issues in this case to determine (1) whether Nevada should have been granted intervention in May 2019, months before the Federal Government changed its mind and withdrew its appeal and (2) the effect of Nevada's intervention had it been granted in May 2019 on its standing to appeal. Further explanation of the panel opinion continues below.

A. The Court has Jurisdiction to Determine whether Nevada Could Intervene

The panel determined it "may examine the merits of the denial of intervention to determine our jurisdiction to vacate the district court injunction." Panel Op. at 11. It noted this court, consistent with other circuits, has "held that intervention can be

permitted even after dismissal of the case." *Id.* at 13. The panel held that the rationale for allowing such an appeal is that "the intervention is still alive" because the now-successful intervenor "would have standing to appeal the district court's judgment." *Id.* (citing *DBSI/TRI IV Ltd. P'ship v. United States*, 465 F.3d 1031, 1037 (9th Cir. 2006)). It also cited *United Airlines v. McDonald*, 432 U.S. 385, 395 n.16 (1977), where the Supreme Court noted that courts were allowed to consider intervention on appeal even if judgment had been entered. *Id.* at 13-14.

B. The District Court Erred in Denying Intervention to Nevada

The panel determined Nevada should have been granted intervention in May 2019, holding that Nevada had a legally protectable interest.[1] Panel Op. at 18-19.

The panel noted that the First, Third, and Ninth Circuits held that states had standing to challenge the 2017 Rules. *Id.* at 16. Specifically, the panel held that "the states established standing because they demonstrated with reasonable probability that the 2017 Rules would case the state financial injury through strain on its healthcare programs." *Id.* Upon evaluation, the panel determined that Nevada's declarant support had established Nevada's "financial interest in federally mandated contraceptive provisions to its state fisc interests do not have to fill the void if

[1] The district court concluded that Nevada established all other requirements for Rule 24(a) intervention, leaving the panel to consider whether Nevada had "an interest relating to the property or transaction which is the subject of the action." ROA.2071-75.

exceptions are carved out of the mandate," consistent with the sister circuit holdings. *Id.* at 19.

The panel did not note that this court approvingly cited to said sister circuit opinions when determining that Texas had standing to challenge the Affordable Care Act's constitutionality. *See Texas v. United States*, 945 F.3d 355, 386 n.30 (5th Cir. 2019). By doing so, the panel did not have to resolve further arguments as to Nevada's quasi-sovereign interests. Panel Op. at 19.

C. Nevada has Standing to Appeal

After determining that Nevada should have been allowed to intervene, the panel determined that Nevada had standing to appeal the district court judgment at the time it filed its notice of appeal. "Appellate standing is measured at the time of filing the notice of appeal." Panel Op. at 20. Subsequently during Nevada's timely appeal, the Supreme Court's July 2020 decision in *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S.Ct. 2367 (2020) mooted the underlying ACA challenge.

Consistent with treatment of other parties who could no longer pursue appellate relief from no fault of their own, the panel held that "Nevada suffers the preclusive effect of the district-court order with equal force as a party to the lawsuit because of *the nationwide scope of the injunction and the resulting inability to relitigate* the issue of whether the 2017 Rules violate RFRA." Panel Op. at 20

(emphasis added). "The *Munsingwear*[2] doctrine is a remedy for the preclusive effect of an unappealable district-court judgment, making the preclusive injury sufficient for jurisdiction to vacate." *Id.* at 21 (citation omitted). In "all *Munsingwear* situations, the underlying case is moot." *Id.* at 20. The panel subsequently held that vacatur was appropriate under *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994) because 1) Nevada did not cause the case to become moot and 2) "vacatur serves public interests in that it vacates a permanent injunction that Nevada never had proper opportunity to litigate the merits of before the district court." *Id.*

Plaintiffs' petitions for panel rehearing and en banc rehearing followed.

ARGUMENT

I. Legal Standard for En Banc Rehearing and Panel Rehearing

"As is noted in Fed. R. App. P. 35, en banc hearing or rehearing is not favored." Fifth Cir. R. 35.1. A petition "is intended to bring to the attention of the entire court an error of exceptional public importance or an opinion that directly conflicts with prior Supreme Court, Fifth Circuit or state law precedent." Rule 35 IOP. "Alleged errors in the facts of the case (including sufficiency of the evidence) or in the application of correct precedent to the facts of the case are generally matters for panel rehearing but not for rehearing en banc. *Id.* "Petitions for rehearing en banc are the most abused prerogative of appellate advocates in the Fifth Circuit." *Id.*

[2] *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).

Panel rehearing requires Plaintiffs to "state with particularity each point of law or fact [Plaintiffs believe] the court has overlooked or misapprehended." Fed. R. App. P. 40(a)(2).

Plaintiffs do not establish the necessity of en banc consideration to "secure and maintain uniformity of the court's decisions" under Federal Rule 35, Fifth Circuit Rule 35, and this court's Internal Operating Procedures. This Court should deny the petitions.[3]

II. The Panel Properly Determined that the Underlying Dispute Became Moot Only After Nevada's Timely Intervention and Timely Appeal.

If the Federal Defendants had maintained their appeal, the underlying Affordable Care Act dispute would be moot from the July 2020 *Little Sisters* opinion, after consideration of a *Munsingware* argument. Plaintiffs concede this in their petition for panel rehearing. Pet. for Panel Rehearing at 8 (citing Oral Arg. at 32:59).

Similarly, had intervention been allowed in June 2019, Nevada would have been a party to the appeal. Indeed, Nevada filed a protective appeal of the district

[3] Plaintiffs' concurrent petition for panel rehearing makes the same arguments set forth in the petition for en banc rehearing, additionally arguing that the panel should amend or omit the following sentence from its opinion: "Regardless, the Plaintiffs conceded Nevada was entitled to vacatur at oral argument." Panel Op. at 21. Nevada takes no position on whether the panel opinion should be modified or omitted for that one sentence, subject to the hearing transcript, given that the sentence is dicta as written for reaching the panel's determination in this case.

court's award of summary judgment pending resolution of the intervention motion. ROA.1937. Nevada appealed final judgment, class certification, granting of summary judgment and permanent injunction, and the denial of intervention to this court. Pet. Op. at 6. Under these circumstances, Nevada would have had the same right to make a *Munsingware* argument against the nationwide class judgment.

The case was not closed when the Federal Defendants dismissed their appeal on December 10, 2019, because Nevada had timely appealed the district court's judgment and denial of intervention. Notwithstanding the Federal Government's non-adverse position in this case, Nevada still had a timely dispute on the merits of the nationwide class judgment. The substantive Affordable Care Act dispute between Nevada and Plaintiffs only became moot after the *Little Sisters* opinion.

Accordingly, the panel did not err in noting that the Affordable Care Act dispute between Nevada and Plaintiffs became moot after Nevada's timely intervention motion and notice of appeal.

III. The Panel Properly Allowed Nevada to Intervene.

Nevada timely sought intervention. This case was open and summary judgment had not been fully briefed by the parties when Nevada moved to intervene.

Plaintiffs' two arguments seeking reconsideration on intervention ignore when such determinations are made.

A. The Case Was Not Moot When Nevada Timely Moved to Intervene.

Plaintiffs' own citations provide further support for the panel opinion, undermining their argument that Nevada cannot intervene into a moot case. Pet. at 11-12.

In *Kendrick v. Kendrick*, 16 F.2d 744, 745 (5th Cir. 1926), this court examined intervention "at the time the petition to intervene was presented," not some later time after judgment was entered. *Id.* at 745. Implying otherwise ignores this court's recognition that intervention could be appealed after judgment. *Ford v. City of Huntsville*, 242 F.3d 235, 239-41 (5th Cir. 2001); *Gaines v. Dixie Carriers, Inc.*, 434 F.2d 52, 54 (5th Cir. 1970).

In *Non Commissioned Officers Ass'n of U.S. v. Army Times Publishing Company*, 637 F.2d 372, 373 (5th Cir. 1981), this court considered an intervention attempt to reopen orders entered four years earlier, in likely contravention of Rule 24's requirement of a "timely motion" to intervene.[4] *Id.* at 373. Inexplicably, Plaintiffs omit citation to this court's subsequent en banc consideration of the case. *Non Commissioned Officers Ass'n of U.S. v. Army Times Publishing Co.*, 650 F.2d 83, 83-84 (5th Cir. 1981). There, when upholding the panel decision, the court noted

[4] Indeed, the proper way to police untimely intervention efforts is to enforce the Rule 24 "timely motion" requirement. Plaintiffs did not challenge timeliness on appeal. ROA.2069-70, 2075-79.

it did not conflict with *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977). *Id.* at 83-84. There, the Supreme Court noted that appellate courts were allowed to consider intervention *on appeal* even after judgment had been entered. *Id.* at 395 n.16 (emphasis added). Notably, the panel opinion cited *McDonald* as authority for having appellate jurisdiction here, where Nevada timely sought intervention earlier than after judgment.

Plaintiffs' reliance is further misplaced considering this Court's denial of en banc consideration in *Odle v. Flores*, 899 F.3d 344, 346-47 (5th Cir. 2017). There, this court rejected en ban rehearing of an unreported panel decision holding that a district court had jurisdiction to consider a motion for intervention by absent class members into a dismissed case challenging denial of class certification. *Id.* The *Odle* concurrence rejected Plaintiffs' overbroad reading of *Kendrick* and *Non Commissioned Officers*, noting those cases "only stand for the proposition that a person may not intervene if the original, underlying case was jurisdictionally defective." *Id.* at 348 (citations omitted). Finally, the *Odle* concurrence stated that *In re Brewer*, 863 F.3d 861 (D.C. Cir. 2017),[5] specifically allowing intervention into a dismissed case, was consistent with this court's precedents. *Id.* at 349-50.

[5] Neither the text of Plaintiffs' citations nor its contention that there are "clear and unmistakable holdings" support Plaintiffs' effort to discredit the D.C. Circuit *In re Brewer* opinion. *See*, *e.g.*, Pet. at 12 n.7.

Because the panel opinion is consistent with this Court's precedent and the precedent of sister circuits, the petitions should be denied.

B. Nevada Had a Legally Protectable Interest Warranting Intervention When It Moved to Intervene.

Evaluation of Nevada's protectable interest is proper at the time intervention is sought, not at the subsequent resolution of the underlying case. Plaintiffs thus incorrectly contend that Nevada should not have been allowed to intervene in May 2019 because the subsequent July 2020 *Little Sisters* opinion eliminated Nevada's protectable interest. Pet. at 12-13. To agree with Plaintiffs would allow parties to cooperate to obtain non-adverse judgments at the first sign of an intervenor, like a defendant settling with class members, as addressed in *In re Brewer*.

Here, the panel correctly held that Nevada had its "financial interest in federally mandated contraceptive provisions to its state fisc does not have to fill the void if exceptions are carved out of the mandate." Panel Op. at 19. The panel determined that this "holding accords with the holdings of our sister circuits in *Azar*,[6] *Pennsylvania*,[7] and *Massachusetts*,[8] which found standing on similar facts." *Id.* This court relied on those holdings to determine Texas had standing to challenge the

[6] *Massachusetts v. U.S. Dep't of HHS*, 923 F.3d 209, 212, 227–28 (1st Cir. 2019.

[7] *Pennsylvania v. President United States*, 930 F.3d 543, 561–65 (3d Cir. 2019).

[8] *California v. Azar*, 911 F.3d 558, 570 (9th Cir. 2018).

Affordable Care Act's constitutionality. *Texas v. United States*, 945 F.3d 355, 386 n.30 (5th Cir. 2019). The panel did not have to resolve further arguments as to Nevada quasi-sovereign interests.[9] *Id.*

The panel's decision avoided conflicts with its 2019 *Texas* decision and with the holdings of three sister circuits. The petitions should be denied.

IV. The Panel Properly Found Nevada Had Standing to Appeal.

The panel opinion vacated a nationwide class judgment. Absent vacatur, the nationwide class judgment has preclusive effect on Nevada as an intervening party and as a nationwide class judgment. Avoiding the effects that such a judgment would have on Nevada's fisc and sovereignty is why Nevada sought intervention.

Nevada, but for the erroneous denial of intervention, would have appealed the district court's nationwide class judgment. Indeed, Nevada filed a protective appeal of the district court's award of summary judgment pending resolution of the intervention motion. ROA.1937. Nevada appealed final judgment, class certification, granting summary judgment and permanent injunction, and the denial of intervention to this court. Pet. Op. at 6. Nevada certainly had standing to appeal

[9] Any proposed rehearing on intervention would necessarily have to resolve Nevada's asserted quasi-sovereign interests to determine Nevada could not intervene, particularly where this case was specifically designed to circumvent ongoing administrative rulemaking litigation, with non-adversity from the Federal Government. No state should have to monitor district court cases for potential class action judgments under such circumstances.

on these issues, absent the error of the district court in denying intervention. Like any other party to an appeal, Nevada did not lose standing on appeal to seek vacatur because the Supreme Court issued an opinion mooting the original substantive issue.

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 ever answered the complaint, and no discovery has been initiated. At the stage when Nevada intervened, "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).

Plaintiffs' citations do not conflict with *Stallworth* or other cases of this Court. Both considered a party's evidentiary support for standing following significant discovery and trial. In *Hollingsworth v. Perry*, 570 U.S. 693, 702 (2013), the parties conducted a twelve-day bench trial following completed discovery and motion practice. *Id.* at 702. In *Wittman v. Personhuballah*, 136 S.Ct. 1732, 1735-37 (2016), 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. Neither case requires Nevada to prove the same level of record evidence to establish standing.

Nevada has alleged how the district court's nationwide class judgment harms it. Nevada has consistently argued that its protectable interests are harmed because it was not allowed to intervene in this case to defend it on its legal merits, instead being subject to a nationwide class judgment reached without adversity from the Federal Defendants. Nevada has argued that the nationwide class judgment should be vacated.

"Nevada suffers the preclusive effect of the district-court order with equal force as a party to the lawsuit because of the nationwide scope of the injunction and the resulting inability to relitigate the issue of whether the 2017 Rules violate RFRA." Panel Op. at 20. Nevada, through no fault of its own, cannot seek a merits determination of its substantive legal arguments against the nationwide judgment. Under such circumstances *Munsingware* and *U.S. Bancorp* provide for vacatur. Indeed, as noted by the panel opinion, redress of the preclusive effect injury "is sufficient for standing to vacate or there would never be *Munsingware* vacatur." *Id.*

Plaintiffs fail to establish a conflict with a decision of the United States Supreme Court, this court, or a sister circuit court. The petitions should be denied.

CONCLUSION

Plaintiffs disagree with the panel decision, but that alone does not warrant rehearing or en banc rehearing. Plaintiffs have not identified conflicts with binding or persuasive authorities necessitating consideration by the full court.

The petition for rehearing and the petition for rehearing en banc should be denied.

Dated: January 24, 2022

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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 January 24, 2022. 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: January 24, 2022.

s/Craig A. Newby
An employee of the Office of the Nevada Attorney General

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Dated: January 24, 2022.

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