No. 19-10754

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RICHARD W. DEOTTE, on behalf of themselves and others similarly situated; YVETTE DEOTTE, on behalf of themselves and others similarly situated; JOHN KELLEY, on behalf of themselves and others similarly situated; ALISON KELLEY, on behalf of themselves and others similarly situated; HOTZE HEALTH & WELLNESS CENTER, on behalf of themselves and others similarly situated; BRAIDWOOD MANAGEMENT, INCORPORATED,

Plaintiffs – Appellees,

v.

STATE OF NEVADA,

Appellant-Proposed Intervenor.

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

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

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

I. Introduction

Nevada seeks intervention into this case to contest Plaintiffs-Appellees' (DeOtte) nationwide class injunction of the contraception provisions of the Affordable Care Act (ACA). DeOtte obtained this nationwide class injunction after the Federal Government defendants failed to defend the case by:

- failing to file a responsive pleading;
- not conducting discovery;
- refusing to oppose the request for a temporary restraining order;
- agreeing to convert a motion for preliminary injunction into a motion for permanent injunction and summary judgment; and
- choosing not to defend the ACA's contraception provisions on their merits, even though this Court previously analyzed the same issue favorably in *East Texas Baptist Univ. v. Burwell*, 793 F.3d 449 (5th Cir. 2015), *vacated by Zubik v. Burwell*, 136 S. Ct. 1557 (2016).

The Federal Government defendants' failure to oppose DeOtte's litigation forced Nevada to seek intervention, in order to avoid injuries to its interests resulting from a nationwide injunction.

While DeOtte has filed a motion to dismiss challenging Nevada's standing, the Federal Government defendants have since filed a notice of appeal—obviating any need for Nevada to establish standing in order for an appeal to proceed. This alone requires denial of the motion to dismiss.

But even assuming such a showing was necessary, and Nevada was successful on the portion of its appeal before this Court regarding intervention, Nevada would seek active participation in the case before the district court. Nevada's ultimate goal is to remedy the lack of adversity cause by the Federal Government's inaction. Nevada's participation would enable a full and fair hearing on the merits of DeOtte's claims by providing the district court with arguments and evidence weighing against the nationwide injunction and the judgment.

Nevada has a significant, legally protectable interest as a sovereign state in protecting its citizens from a permanent, nationwide injunction obtained without adversarial process. The injunction presages the return of pre-ACA problems in healthcare: unequal preventive health care, more unplanned pregnancies, fewer healthy births, more abortions, and significant additional cost for Nevada as a health care provider. DeOtte does not dispute evidence provided by Nevada that the challenged provisions resulted in a significant reduction in abortions. Nevada's evidentiary assertions demonstrate concrete and actual injury that will result from

this nationwide injunction. Nevada thus has standing to defend this case on its merits. DeOtte's motion should be denied.

II. Procedural Background

DeOtte filed this suit in response to nationwide injunctions issued against federal rulemaking associated with the Affordable Care Act's "Contraception Mandate" concerning preventive healthcare provisions by employers asserting religious objections to such healthcare. *See* Record on Appeal (ROA) at 276 (First Amended Complaint).

The Federal Government never answered or otherwise responded to any pleading. The district court, at the invitation of the Federal Government and DeOtte, converted a potential motion for preliminary injunction into a motion for summary judgment and permanent injunction. (ROA at 1406 [ECF No. 37 at 1]). It took the parties only one week (the week of April 15th) to complete the briefing. (ROA at 1409, 1420 [ECF Nos. 38-39]). The Federal Government filed only 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 at 1411 [ECF No. 38 at 3]). It took this position even though this Court has already concluded 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).[1]

In short order, Nevada sought intervention into this case to present arguments defending ACA's existing preventive health care provisions, specifically what DeOtte refers to as the "Contraception Mandate." Nevada's arguments are premised on this Court's prior analysis, and were made before the district court entertained argument on the pending motion for summary judgment. Nevada asserted its interest in the provision of contraception care in order to preserve resulting public health gains and conserve financial resources that were previously expended attempting to address unplanned pregnancies, even where existing Defendants had not even filed a responsive pleading.

Instead of considering the merits of Nevada's motion, the district court ordered summary judgment in favor of DeOtte. (*See* ROA at 1845). Only afterwards did the court consider and reject Nevada's intervention.[2] The district

[1] Nevada recognizes that the United States Supreme Court vacated this Circuit's decision in *Zubik v. Burwell*, 136 S. Ct. 1557 (2016), to allow the parties to those cases to explore whether further modifications to the existing accommodation procedure could resolve the asserted objections while still ensuring affected women receive full and equal health coverage, including contraceptive coverage. Nevada submits (and would argue, upon intervention) that the prior analysis undertaken by this Circuit should govern this Court's analysis of that legal question.

[2] DeOtte misleadingly argues that Nevada had "repeated failures" of its estimated number of impacted women, based on citations associated with the

court's final judgment makes no effort to provide notice to potential class members or to anyone else potentially affected by the nationwide permanent injunction. (*See* ROA at 2083).

It is in this unique procedural context that DeOtte challenges Nevada's standing to represent its interests in court against a nationwide injunction obtained without adversity. Because Nevada meets the requirements for Article III standing in these circumstances, the Motion must be denied.

III. The Federal Government's Notice of Appeal Moots DeOtte's Motion.

Standing is a threshold issue that must be satisfied, but only one party needs standing at all stages of every action for the action to proceed. *Bowsher v. Synar*, 478 U.S. 714, 721 (1986). Here, there is no genuine dispute that the originally named Federal Government defendants have had standing at all times, as they are subject to DeOtte's injunction under pain of contempt.

Subsequent to the filing of this Motion, the Federal Government has appealed the District Court judgment and all underlying orders to this Court. A true and correct copy of Friday's Notice of Appeal is attached hereto as **Exhibit A**. Because there is no genuine dispute that the Federal Government has standing to appeal, DeOtte's challenge to Nevada's standing to proceed with the instant appeal is now moot. This alone warrants denial of the Motion.

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district court's *sua sponte* standing analysis. This is Nevada's first opportunity to respond to standing questions in this case.

IV. Nevada Has Standing to Appeal the Final Judgment, the Class Certification Orders, and the Order Granting Plaintiffs' Motion for Summary Judgment and Permanent Injunction.

To have standing, "the plaintiff[s] must have suffered an injury in fact"—"an invasion of a legally protected interest"—that is "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Stallworth v. Bryant*, __ F.3d ___ (5th Cir. Aug. 21, 2019) (internal citations omitted). This Court requires each standing element to be supported "with the manner and degree of evidence required at the successive stages of litigation." *Id.*

At the pleading stage, "general factual allegations of injury resulting from the defendant's conduct may suffice" to establish standing. *Id.* "Thus, we 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)).

Here, the original parties proceeded to summary judgment without a responsive pleading and without the Federal Government conducting discovery. Nevada, in its initial filings with the District Court, provided evidentiary support for its asserted injuries as a sovereign State. Under these circumstances, Nevada has provided the "manner and degree of evidence required" at this stage of litigation, as required by this Court.

A. Nevada Has Properly Asserted Injury in Fact.

Nevada, a sovereign state, has asserted its interest in the provision of preventive contraception care to preserve resulting public health gains and to conserve financial resources that were previously expended attempting to address unplanned pregnancies. The loss of these financial resources is an injury in fact. Nevada has provided declarant testimony supporting the injury imposed by the district court's nationwide injunction.

Specifically, 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 among women aged 20 to 24 between 2012 to 2017.[3] (ROA at 1596 [ECF No. 62.2 at 4]) (emphasis added). By use of basic math associated with Nevada's population to the country's and the Federal Government's calculations in its related proposed Final Rules, between 600 to 1,200 Nevadan women are at risk of being

[3] DeOtte does not dispute this specific number, which alone demonstrates Nevada's injury in this case. It resulted from implementation of these provisions per the declarant, which DeOtte now seeks to reverse. Reducing abortion is a legally protectable interest of Nevada.

Rather than acknowledge this, DeOtte brainstorms attenuated causation scenarios with regard to additional state spending (*see* Motion at 6-7), whether Nevadan women will become pregnant (*see* Motion at 7-8), and whether Nevadan women will obtain contraception through other sources (*see* Motion at 8-9). DeOtte does so all in an effort to demonstrate Nevada's interest is not "direct" or "substantial." DeOtte does so without citation to authority defining what "direct" or "substantial" means in this context, however. At this early stage of Nevada's involvement, DeOtte is not allowed to substitute an opinion as to what Nevada's injuries are.

harmed from implementation of Plaintiffs' proposed class relief.[4] (ROA at 1596 [ECF No. 62.2 at 2]). The CDC notes that women with unintended pregnancies are more likely to delay prenatal care, which is imperative to positive birth outcomes. (ECF No. 62.2 at 3). Nevada also implements the ACA in numerous ways, including the provision of the state marketplace for obtaining individual health insurance. *See, e.g.*, Nev. Rev. Stat. § 695I. Nevada has a public interest in the health of its citizens, as advanced by the existing provisions. Nevada also has an interest in ensuring its citizens are treated equally for preventive health care, regardless of their sex. NEV. CONST. art. IV, § 21.

Nevada has demonstrated extensive harm to itself and its residents that would flow from Plaintiffs' unopposed prosecution of this lawsuit. In addition, Nevada has a financial interest in reducing unintended pregnancies. As set forth in the motion, 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 at 1596 [ECF No. 62.2 at 3]). All else being equal, DeOtte's proposed class action would increase Nevada

[4] DeOtte takes issue with Nevada's calculations pertaining to this 600 to 1,200 number. As set forth above, it is simple math. However, even if this was a mere factual allegation (rather than from a declaration issued by Nevada under penalty of perjury), this Court would still be obligated to take this factual allegation as true for purposes of considering intervention. *Texas v. United States*, 805 F.3d 653, 657 (5th Cir. 2015).

expenditures while harming the public health of Nevadan women. (ROA at 1596 [ECF No. 62.2 at 4]).

B. Nevada Is Entitled to Special Solicitude for Protecting its Quasi-Sovereign Interests.

In addition to Nevada's proprietary injuries, the Supreme Court recognizes that states have a quasi-sovereign interest in the physical and economic well-being of their 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). "States are not normal litigants for the purposes of invoking federal jurisdiction." *Massachusetts*, 549 U.S. at 518. Nevada has asserted and provided evidence of the significant harm to itself and its residents that flow directly from DeOtte's unopposed nationwide injunction.

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). Among other factors considered in that DAPA case, this Court noted that states surrendered certain sovereign prerogatives when entering the Union. *Id.* at 151-53. In addition, this Court held that actions affect "the states' "quasi-sovereign" interests by imposing substantial pressure on them to change their laws."[5] *Id.* at 153. The ability to avoid injury by changing applicable law was rejected by this

[5] The Court limited its recognition of "quasi-sovereign" interests to the facts asserted in the DAPA case. *Id.* at 154-55.

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 statute highlights Nevada's support for this existing 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.

Under these circumstances, Nevada has demonstrated sufficient injury to warrant denial of the Motion.

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

Nevada can fairly trace its alleged injury to the challenged action of DeOtte. First, Nevada can "fairly trace" its alleged injury to the nationwide class action injunction obtained in this case. As set forth above, with equal preventive care in place, Nevada reduced abortion rates, reduced hospital expenses, and improved the health of Nevadan women. The nationwide injunction, obtained without any

adversity by the existing Federal Defendants, reverses the policies that achieved these documented gains for certain Nevadan women.

Second, traceability does not require absolute certainty. Article III requires no more than *de facto* causality. Most recently, the Supreme Court considered traceability in *Department of Commerce v. New York*, 139 S.Ct. 2551, 2565-66 (2019). There, 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 (citing *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014)). The Court rejected causation arguments that asserted speculation about the decisions of independent actors. *Id.* Instead, based on trial evidence, the Court held that traceability was satisfied "on the predictable effect of 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. 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 of the case, there is a "substantial risk" that at least some Nevada residents will lose contraceptive coverage because of the nationwide injunction.

Third, this Court similarly rejected traceability in *Texas v. United States*, 809 F.3d 134, 150–62 (5th Cir. 2015). There, this Court 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. 524–25 (emphasis added). Under these circumstances, Nevada is also entitled to "special solicitude" because even an allegedly minor injury does not negate standing.

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

Contrary to DeOtte's assertion, Nevada's injuries from the injunction would not be self-inflicted. DeOtte's argument is misplaced for multiple reasons.

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.

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 applicable here, 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.

Further, Nevada did nothing artificial to manufacture standing, as was the case in the FISA dispute addressed by *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013). *Id.* at 159. In *Clapper*, the Supreme Court addressed standing in the context of the Foreign Surveillance Act, where individuals asserted standing on costs already incurred to avoid the possibility of FISA surveillance. *Id.* at 407. There, the Court rejected standing because these costs were used to manufacture injury in fact by voluntarily expending resources in anticipation of being subject to that policy. *Id.* at 418.

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 (2010). In *Monsanto*, the Court held that conventional alfalfa farmers had standing to challenge a federal agency decision to deregulate genetically engineered alfalfa. It was uncertain whether conventional alfalfa farms would be infected by nearby genetically engineered alfalfa farms, but undertook costly precautions against such infection. *Id.* at 154-55.

Taken to its extreme, the "self-inflicted" standard would prohibit standing for numerous landmark decisions. For an instance relevant to this case, Jane Roe

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.

This Court should reject DeOtte's efforts to subvert review of this case and controversy on its merits.

V. The Court Should Allow the Parties to Brief this Appeal on the Merits.

DeOtte concedes that Nevada has the right to appeal the District Court's Order Denying Intervention. When Nevada wins on the intervention issue, the relief it seeks would be participation in challenging the nationwide injunction issued by the district court. To avoid needless delay, this Court should consider the underlying judgment on appeal, similar to the district court asserting that it considered the proposed intervention brief on the merits when denying intervention. (ROA at 2079-2082 [ECF No. 97 at 19-22]).

CONCLUSION

The State of Nevada requests that the Court deny DeOtte's Motion and allow the parties to proceed with merits briefing.

SUBMITTED BY:

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CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of FED. R. APP. P. *32(a)(7)(B)* because, excluding the parts of the document exempted by FED. R. APP. P. 32(f), this document contains 3,472 words.

2. This document complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type-style requirements of FED. R. APP. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman, 14 point font.

Dated: September 30, 2019.

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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 September 30, 2019. 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: September 30, 2019.

/s/ Renee Carreau
An employee of the Office of the Nevada Attorney General

EXHIBIT A

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

RICHARD W. DEOTTE *et al.*,	)	
	)	
Plaintiffs,	)	**Case No. 4:18-CV-00825-Y**
	)	
v.	)	
	)	
ALEX M. AZAR II, in his official capacity as Secretary of Health and Human Services *et al.*,	)	
	)	
Defendants.	)	

NOTICE OF APPEAL

PLEASE TAKE NOTICE that Defendants 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;[1] and the United States of America hereby appeal to the United States Court of Appeals for the Fifth Circuit from the Court's Final Judgment entered on July 29, 2019 [ECF No. 98], as well as all prior orders and decisions that merge into that Judgment, including the Orders entered on March 30, 2019 and June 5, 2019 [ECF Nos. 33, 76].

Dated: September 27, 2019

Respectfully submitted,

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MICHELLE R. BENNETT
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/s/ Daniel Riess
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[1] Pursuant to Federal Rule of Civil Procedure 25(d)(1), Eugene Scalia is automatically substituted for his predecessor, Patrick Pizzella, Acting Secretary of Labor.

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CERTIFICATE OF SERVICE

On September 27, 2019, I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all parties electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2) or the local rules.

/s/ Daniel Riess