IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RICHARD W. DEOTTE et al., Plaintiffs-Appellees, v. ALEX M. AZAR II et al., Defendants-Appellants, STATE OF NEVADA, Movant-Appellant.	No. 19-10754

FEDERAL DEFENDANTS' REPLY IN SUPPORT OF MOTION TO HOLD APPEAL IN ABEYANCE

As explained in the motion to hold the appeals in abeyance, it would serve the interests of judicial economy and justice for this Court to hold in abeyance the federal defendants' and Nevada's appeals of the district court's orders granting class certification and a permanent injunction, pending the Court's disposition of Nevada's appeal from the denial of its intervention motion. Although Nevada opposes that relief, none of the grounds that it asserts provides a basis for denial of the motion.

1. As an initial matter, Nevada is mistaken in contending that this motion is a request for reconsideration of the Court's October 10,

2019 order removing the case from abeyance. The federal defendants previously filed a motion on October 1, 2019, asking the court to hold their appeal in abeyance pending disposition of the motion for partial dismissal of Nevada's appeal. That motion also included a further—and contingent—request for relief: namely, that if the Court denied the motion for partial dismissal or referred it to the merits panel, the federal defendants' appeal and Nevada's appeal of the order granting class certification and a permanent injunction be held in abeyance pending consideration of Nevada's appeal of the denial of its intervention motion.

In ruling on that motion on October 2, 2019, the Court directed only that "further proceedings in this Court [be stayed] pending a ruling on Appellees' motion for partial dismissal." The Court did not address in any way—and certainly did not deny—the further request for relief contingent on the motion for partial dismissal being denied or referred to the merits panel.

Accordingly, because the Court has now directed that the motion for partial dismissal be "carried with the case," Order (Oct. 10, 2019), the federal defendants, joined by plaintiffs, are now asking that the

federal defendants' appeal and Nevada's appeal of the district court's orders granting class certification and a permanent injunction be held in abeyance, pending disposition of Nevada's appeal of the denial of its intervention motion.

2. Nevada also erroneously asserts that the federal defendants' filing of a protective notice of appeal renders irrelevant the question whether Nevada has standing to intervene and appeal the district court's orders granting class certification and a permanent injunction. As clearly explained in the motion, the federal defendants will dismiss their appeal if this Court affirms the denial of Nevada's motion to intervene. In other words, to the extent Nevada itself lacks standing to intervene and proceed with its appeal of the district court's orders granting class certification and a permanent injunction, Nevada cannot rely on the federal defendants' standing, as the federal defendants will dismiss their appeal.

3. Nevada is also incorrect that the district court's judgment is jurisdictionally defective on the ground that plaintiffs and the federal defendants have purportedly colluded and "concrete adverseness" is therefore lacking. While the federal defendants agree with plaintiffs

and the district court that the contraceptive-coverage mandate violates the Religious Freedom Restoration Act (RFRA) with respect to those employers and individuals that, like the named plaintiffs, have sincere religious objections to providing or purchasing contraceptive coverage, the Supreme Court has repeatedly held that the fact that a defendant may agree with a plaintiff's legal position on the merits does not eliminate a justiciable controversy. *See, e.g.*, *INS v. Chadha*, 462 U.S. 919, 929-31 (1983). And that is especially so here, where the federal defendants in district court opposed class certification, *see* R.1133-52, as well as summary judgment "to the extent it seeks additional relief beyond the named plaintiffs *at this time*," R.1412; *see also* R.1412-18. In all events, the federal defendants' agreement with plaintiffs and the district court as to RFRA's application to the contraceptive-coverage mandate does not somehow give Nevada Article III standing to intervene and appeal that it would otherwise lack. Accordingly, it remains the case that judicial economy militates in favor of first resolving Nevada's appeal of the denial of intervention, because that could potentially render it unnecessary for the parties to brief and for

this Court to resolve any questions about the validity of the district court's judgment.

CONCLUSION

For the foregoing reasons, the Court should hold in abeyance both the federal defendants' appeal and Nevada's appeal of the district court's class-certification order and its order granting summary judgment and permanent injunctive relief, pending disposition of Nevada's appeal of the denial of its intervention motion.

Respectfully submitted,

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OCTOBER 2019

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I hereby certify that this motion complies with the requirements of Rule 27(d)(1)(E) because it has been prepared in 14-point Century Schoolbook, a proportionally spaced font, and that it complies with the type-volume limitation of Rule 27(d)(2)(A), because it contains 743 words, according to the count of Microsoft Word.

/s/ Karen Schoen
Karen Schoen
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CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2019, I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Karen Schoen
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