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.	No. 19-10754

FEDERAL DEFENDANTS' MOTION TO HOLD APPEAL IN ABEYANCE

The federal defendants respectfully move to hold their appeal in abeyance pending disposition of the motion for partial dismissal of Nevada's appeal. In that appeal from the same underlying case, the State of Nevada challenges both the district court's denial of its motion to intervene and the district court's grant of class certification to the plaintiffs and its entry of a permanent injunction. If this Court affirms the district court's denial of Nevada's intervention motion, it will be unnecessary for the Court to consider Nevada's appeal of the other orders, and it will also be unnecessary to consider the federal defendants' appeal, because the federal defendants will voluntarily dismiss their appeal, as they do not intend to pursue it if Nevada's merits appeal is dismissed. And for the same reason, if this Court

denies the motion for partial dismissal of Nevada's appeal or refers the motion to a merits panel for consideration and disposition, the federal defendants respectfully request that both 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 consideration of Nevada's appeal from the denial of its intervention motion. Simply put, because Nevada's intervention is a prerequisite to there being any appeal at all of the merits of the district court's orders, this Court should defer any briefing of the merits until it decides whether Nevada can intervene and appeal in the first place.

1. This class-action lawsuit involves a challenge to the contraceptive-coverage mandate adopted pursuant to regulations and guidelines promulgated under the Patient Protection and Affordable Care Act by the Departments of Health and Human Services, Labor, and the Treasury. Plaintiffs-appellees brought this suit in October 2018 on behalf of themselves and two putative classes: a class of employers with religious objections to providing contraceptive coverage and a class of individuals who have religious objections to contraceptive coverage and who would be willing to purchase insurance excluding

contraceptive coverage if such coverage were available. Plaintiffs alleged that the contraceptive-coverage mandate violates their rights under the Religious Freedom Restoration Act (RFRA).

2. On March 30, 2019, the district court issued an order granting plaintiffs' motion to certify the two classes.

3. On May 24, 2019, the State of Nevada filed a motion to intervene.

4. On June 5, 2019, the district court granted plaintiffs' motion for summary judgment and issued a permanent injunction prohibiting the federal defendants from enforcing the contraceptive-coverage mandate against members of the employer class. The injunction also prohibits the federal defendants from enforcing the mandate against members of the individual class or in a manner that prevents members of that class from purchasing health insurance without contraceptive coverage from a willing health-insurance issuer or plan sponsor.

5. On July 3, 2019, although the district court had not yet ruled on Nevada's motion to intervene, Nevada filed a protective notice of appeal challenging the district court's orders. This Court docketed the appeal as No. 19-10754.

6. On July 29, 2019, the district court denied Nevada's motion to intervene and entered final judgment.

7. On August 27, 2019, Nevada filed an amended notice of appeal, adding the denial of its motion to intervene to the orders it seeks to appeal. Its appeal of the denial of its intervention motion was docketed under the same appeal number as its appeal of the district court's prior orders (No. 19-10754).

8. On September 6, 2019, plaintiffs filed a motion to dismiss for lack of jurisdiction the portion of Nevada's appeal challenging the district court's class-certification order and its order granting summary judgment and permanent injunctive relief to plaintiffs and the two classes. Plaintiffs contend that Nevada lacks a judicially cognizable interest to challenge the district court's orders enjoining the federal defendants from enforcing the contraceptive-coverage mandate against the two certified classes. Nevada filed its response on September 30, 2019.

9. The federal defendants agree with the district court that the contraceptive-coverage mandate violates RFRA with respect to those individuals and employers that, like the named plaintiffs, have sincere

religious objections to purchasing or providing contraceptive coverage. The federal defendants did not intend to appeal the district court's class-certification order and its order granting summary judgment and permanent injunctive relief to plaintiffs and the two classes. But if Nevada is permitted to intervene and appeal those orders, the federal defendants wish to preserve their rights to participate in full in proceedings in this Court. Accordingly, in an abundance of caution, the federal defendants filed a protective notice of appeal on September 27, 2019. This Court docketed the appeal under the same appeal number as Nevada's appeal.

10. The federal defendants do not intend to take a position on plaintiffs' motion to dismiss in part Nevada's appeal for lack of jurisdiction. But, as noted, the federal defendants do not intend to proceed with their appeal if Nevada is not permitted to intervene and proceed with its merits appeal. There would thus be no reason for the parties to brief, or this Court to consider, the merits of the district court's class-certification order or its order granting summary judgment and permanent injunctive relief, unless Nevada is permitted to intervene and to proceed with its appeal of those orders.

11. Accordingly, to promote judicial economy, the federal defendants respectfully request that their appeal be held in abeyance pending disposition of the motion to dismiss in part Nevada's appeal. Should the Court deny the motion for partial dismissal of Nevada's appeal or refer the motion to the merits panel, the federal defendants further request that 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 be held in abeyance pending disposition of Nevada's appeal of the denial of its intervention motion.

12. We have consulted with counsel for plaintiffs, and they do not oppose this motion. We have also consulted with counsel for Nevada, who stated that Nevada opposes this motion. The government's proposal, however, would promote judicial economy, and given the speculative nature of the State's alleged financial harm, there would be no real harm to Nevada from any delay, let alone sufficient harm to justify potentially unnecessary briefing on substantial legal questions.

CONCLUSION

For the foregoing reasons, the Court should hold the federal defendants' appeal in abeyance pending disposition of the motion to dismiss in part Nevada's appeal. If the Court denies the motion for partial dismissal of Nevada's appeal or refers the motion to the merits panel, 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 should be held in abeyance pending disposition of Nevada's appeal of the denial of its intervention motion.

Respectfully submitted,

SHARON SWINGLE

/s/ Karen Schoen

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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 1,137 words, according to the count of Microsoft Word.

/s/ Karen Schoen
Karen Schoen
Counsel for the Federal Government

CERTIFICATE OF SERVICE

I hereby certify that on October 1, 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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