

Case 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.

ALEX M. AZAR, II, SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; STEVEN T. MNUCHIN, SECRETARY, U.S. DEPARTMENT OF TREASURY; EUGENE SCALIA, in his official capacity as Secretary of Labor; UNITED STATES OF AMERICA,

Defendants – Appellants,

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

HEIDI PARRY STERN

Solicitor General

Office of the Nevada Attorney General
555 E. Washington Avenue, Suite 3900
Las Vegas, Nevada 89101

702-486-3594

hstern@ag.nv.gov

Counsel for Movant-Appellant, State of Nevada

STATE OF NEVADA'S OPPOSITION TO PLAINTIFFS' AND FEDERAL DEFENDANTS' JOINT MOTION TO HOLD APPEAL IN ABEYANCE

Nevada opposes the joint motion of Plaintiffs-Appellees (DeOtte) and Defendants-Appellants (Federal Defendants) to hold this appeal in abeyance (Joint Motion).

First, the Joint Motion requests reconsideration of this Court's ruling from October 10, 2019 (less than a week ago)—ordering the parties to proceed with briefing and to carry DeOtte's motion to dismiss with the case. Doc 515155059. The Joint Motion seeks this relief without meeting any of the standards required for reconsideration or even identifying why this Court should reconsider its order. The October 10 order was issued well after Federal Government's October 1 motion requesting the identical relief now sought by the Joint Motion. Nothing has changed since this Court's order issued last Thursday that warrants reconsideration of this Court's decision to lift the stay and proceed with briefing.

Second, the Court's consideration of the merits of this appeal is intertwined with the Nevada's intervention because the district court addressed both within the same order. ROA at 2079-82. The Joint Motion provides no reason for this Court to delay its consideration of the important legal questions raised by Nevada. This is particularly true given this Court's prior analysis of the identical questions in *East Texas Baptist Univ. v. Burwell*, 793 F.3d 449 (5th Cir. 2015), *vacated by Zubik v. Burwell*, 136 S. Ct. 1557 (2016).

Third, the Joint Motion is an improper, coordinated effort by DeOtte and the Federal Defendants to circumvent legitimate challenges to the administrative rulemaking process on this issue. DeOtte filed this suit in response to nationwide injunctions issued against federal rulemaking associated with the Affordable Care Act’s “Contraception Mandate.” *See* ROA at 276 (First Amended Complaint). As noted in opposition to DeOtte’s motion to dismiss, DeOtte only obtained this nationwide class injunction after the Federal Defendants failed to defend the mandate. Specifically, Federal Defendants:

- failed to file a responsive pleading;
- did not conduct discovery;
- refused to oppose the request for a temporary restraining order;
- agreed to convert a motion for preliminary injunction into a motion for permanent injunction and summary judgment; and
- chose not to defend the Affordable Care Act’s contraception provisions on their merits, even though this Court previously analyzed the same issue in

East Texas Baptist Univ. v. Burwell, 793 F.3d 449 (5th Cir. 2015), vacated by *Zubik v. Burwell*, 136 S. Ct. 1557 (2016).¹

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

This lack of adversity forced Nevada to seek intervention to avoid injuries to its interests resulting from a nationwide injunction.

The Federal Defendants in particular cannot complain, as they attempt in their original motion for stay pending resolution of DeOtte’s motion to dismiss, that Nevada lacks standing. They have filed their own notice of appeal and must recognize that only one party needs standing at all stages of every action for the action to proceed, and the Federal Defendants clearly have it in this case.² *Bowsher v. Synar*, 478 U.S. 714, 721 (1986).

This Joint Motion, despite its purported efforts to seek “judicial economy,” is in fact only the latest attempt by the Federal Defendants and DeOtte to avoid merits consideration by this Court of the district court’s nationwide class judgment. The district court improperly granted this judgment, however, without the “concrete adverseness” considered by the Supreme Court when determining whether it is prudent to proceed to the merits. *See United States v. Windsor*, 570 U.S. 744, 759–62 (2013).

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 Under these circumstances, DeOtte’s motion to dismiss should be denied as moot, because standing will exist if Nevada is allowed to intervene based on the Federal Defendant’s appeal.

This case is more akin to a “friendly, non-adversary, proceeding … [in which] ‘a party beaten in the legislature [seeks to] transfer to the courts an inquiry as to the constitutionality of the legislative act.’” *Id.* at 759–60 (quoting *Ashwander v. TVA*, 297 U.S. 288, 346, 56 S. Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring)). Should Nevada be successful on its intervention appeal before this Court, it would seek active participation in the case to address the nationwide injunction and judgment resulting from the lack of adversity.

Accordingly, this Court should deny the Joint Motion.

CONCLUSION

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

Dated this 16th day of October, 2019.

SUBMITTED BY:

/s/ Heidi Parry Stern
Office of the Nevada Attorney General
555 E. Washington Ave., Suite 3900
Las Vegas, Nevada 89101
702-486-3594, hstern@ag.nv.gov
Counsel for the State of Nevada

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 782 words.
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Dated: October 16, 2019

/s/ Heidi Parry Stern
Office of the Nevada Attorney General
555 E. Washington Ave., Suite 3900
Las Vegas, Nevada 89101
702-486-3594, hstern@ag.nv.gov
Counsel for the State of Nevada

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 October 16, 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.

/s/ *Sandra Geyer*
An employee of the Office of the Nevada
Attorney General