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.

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

REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS NEVADA'S APPEAL IN PART FOR LACK OF JURISDICTION

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Nevada must point to evidence in the record that establishes: (1) an injury in fact; (2) that is "fairly traceable" to the district court's injunction; and (3) that is not self-inflicted. *See Wittman v. Personhuballah*, 136 S. Ct. 1732, 1737 (2016); *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013). Nevada's response does not come close to meeting these requirements.

I. Nevada Has Failed To Establish Injury In Fact

It is not enough for Nevada to allege or "assert" injury at this stage of the litigation.[1] To have standing to appeal, Nevada must identify "record evidence *establishing* [its] alleged harm" and must "*establish* [its] injury by submitting affidavit[s] or other evidence." *Wittman*, 136 S. Ct. at 1737 (emphasis added).

It is also not enough for Nevada to invoke its "interests" in the litigation, as if the court were ruling on a motion to intervene. *See* Fed. R. Civ. P. 24(a)(2).[2] Standing to appeal requires injury in fact—not an "interest"—and litigants with "interests" sufficient to support intervention often lack the "injury in fact" needed to appeal. *See Wittman*, 136 S. Ct. at 1737; *Hollingsworth*, 570 U.S. at 704; Caleb Nelson, *Intervention*, 106 Va. L. Rev. ___ (forthcoming April 2020) (distinguishing "interest" from "injury in fact"), available at https://ssrn.com/abstract=3380589, pages 8-15.

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1. Nevada's Br. at 7 ("Nevada Has Properly Asserted Injury in Fact.").
2. Nevada's Br. at 8 ("Nevada has a public interest in the health of its citizens").

Nevada's brief offers three candidates for "injury in fact": (1) Alleged injuries to the state's fisc; (2) An alleged increase in abortions; and (3) Alleged injuries to Nevada residents. *See* Nevada's Br. at 7-9. None of these alleged injuries give Nevada standing to appeal.

A. Nevada Failed To Offer Evidence That The Injunction Will Harm The State's Fisc

Nevada repeats its claim that the district-court injunction will injure the state by increasing its spending on social-welfare programs. *See* Nevada's Br. at 7-9. But Nevada cannot rely on bald assertions or speculative conjecture; it must identify *evidence in the record* showing that the injunction will harm the state's fisc. *See Wittman*, 136 S. Ct. at 1737; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("[E]ach element [of Article III standing] must be supported . . . with the manner and degree of evidence required at the successive stages of the litigation."). Nevada's brief—like the district-court record—provides nothing in the way of evidence showing that the district court's rulings will increase state expenditures.

Nevada says that it provided "declarant testimony" of this supposed fiscal injury. Nevada's Br. at 7. But Nevada does not provide citations or descriptions of that testimony. Nevada submitted only two declarations—one from Beth Handler, a state employee, ROA.19-10754.1595-1598, and one from Kathryn Kost, a demographer with the Guttmacher Institute, ROA.19-10754.1599-1625. Neither declaration contains evidence of fiscal injury to the State.

Handler's declaration begins by observing that "more than 379,000 women of child bearing age . . . receive private insurance" in Nevada. ROA.19-10754.1596. But none of these women can be affected by the injunction unless their employer: (1) objects to the Contraceptive Mandate on religious grounds; (2) is unwilling to execute ESBA Form 700, which causes its employees to receive full contraceptive coverage despite the employer's objections;[3] (3) is not required to provide contraceptive coverage under Nevada's state-law contraceptive mandate;[4] *and* (4) is not protected by an injunction, settlement, or consent decree from the many previous lawsuits brought against the Contraceptive Mandate. Handler's declaration does not claim that any such employer exists in Nevada, and makes no attempt to estimate the number of women who work for such employers.

Later, Handler asserts that "between 600 to 1,200 Nevada women would be harmed" by the injunction, ROA.19-10754.1596, but neither Handler nor Nevada has explained how they came up with these numbers—nor have they explained what they mean by the word "harmed." Nevada's brief calls this "basic math," without deigning to explain *how* the "math" was performed. Nevada's Br. at 7. Handler's statement is flatly inadmissible and cannot be

3. Some religious employers object to providing contraceptive coverage directly but are willing to execute ESBA Form 700.

4. Nevada's state-law contraceptive mandate is unaffected by the district-court injunction, and it compels Nevada-licensed insurance plans to cover contraception without cost sharing. ROA.19-10754.1582 (citing statutes). Nevada, however, exempts insurers "affiliated with a religious organization." *Id.*; ROA.19-10754.1898.

treated as "evidence" of standing. There is no evidence that Handler has personal knowledge of the number of affected women in Nevada,[5] and Handler's estimate would not be admissible as an expert opinion because it is unreasoned and is not based on facts or data.[6] A litigant cannot establish standing by blurting out a number and providing no explanation for how it was derived.

To make matters worse, Nevada's brief walks back Handler's assertion by claiming that "between 600 to 1,200 Nevadan women are *at risk of* being harmed" by the injunction—a far cry from Handler's pronouncement that "between 600 to 1,200 Nevada women *would* be harmed." *Compare* Nevada's Br. at 7-8 *with* ROA.19-10754.1596. And neither Handler's declaration nor Nevada describes the category of women they are referring to. Are these

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5. *See* Fed. R. Evid. 602 ("A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.").

6. *See* Fed. R. Evid. 703; *Lang v. Kohl's Food Stores, Inc.*, 217 F.3d 919, 924 (7th Cir. 2000) ("[E]xperts' work is admissible only to the extent it is reasoned, uses the methods of the discipline, and is founded on data. Talking off the cuff—deploying neither data nor analysis—is not an acceptable methodology.").

   In a footnote, Nevada claims that this Court must accept Handler's bald assertion as true "for purposes of considering intervention." Nevada's Br. at 8 n.4 (citing *Texas v. United States*, 805 F.3d 653, 657 (5th Cir. 2015)). But the plaintiffs' motion is not challenging Nevada's attempted *intervention*, and it is not seeking to dismiss Nevada's appeal of the intervention issue. It is challenging Nevada's *standing to appeal* the final judgment and related orders, and a litigant cannot establish standing to appeal with mere allegations. *See Wittman*, 136 S. Ct. at 1737.

the women who work for religious employers in Nevada? Or is it a more precise subset? And what exactly does Nevada mean when it says that these women are merely "*at risk* of being harmed"? It that a concession that Nevada has no idea whether any woman in Nevada will actually lose contraceptive coverage on account of the district court's injunction? *See Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 44 (1976) ("[U]nadorned speculation will not suffice to invoke the federal judicial power.").

But what is utterly fatal to Nevada's appeal is that there no evidence that women who lose their contraceptive coverage will make demands on Nevada's treasury. Nevada has nothing to say in response the plaintiffs' debunking of its claim that the State will wind up paying for hospitalization costs or contraception access. *See* Mot. to Dismiss at 6-10. And Nevada fails to identify any state-funded program other than Medicaid that could end up paying for these services. It is absurd to believe that a woman who holds a job with employer-sponsored health insurance would qualify for Nevada's Medicaid program, *id.* at 9-10, and there is no evidence in the record even suggesting that this might happen.

B. Nevada Failed To Offer Evidence That The Injunction Will Increase Abortions, And If It Had This Would Not Inflict Article III Injury On Nevada

Nevada also tries to establish standing by suggesting that the injunction will increase abortions. *See* Nevada's Br. at 7 & n.3. But there is no evidence

in the record that this will happen, and even if there were it would not inflict Article III injury on Nevada.

Handler's declaration observes that Nevada's abortion rate dropped after the Contraceptive Mandate took effect. *See* ROA.19-10754.1598. But correlation is not evidence of causation. *See Huss v. Gayden*, 571 F.3d 442, 459 (5th Cir. 2009). The abortion rate had been dropping for *decades* before the Contraceptive Mandate,[7] and its continued decline after the Mandate is attributable to many factors that neither Handler nor Nevada attempts to account for. More importantly, the district-court injunction leaves the Contraceptive Mandate in place; it exempts only a small subset of employers who object to contraceptive coverage on religious grounds. Nevada must produce evidence that a *religious exemption* will increase abortion; the mere observation that abortion rates continued their decades-long decline after the Mandate took effect does nothing to establish this. Nevada has not provided evidence that *any* woman in Nevada will lose contraceptive coverage on account of the district court's injunction—and its claim that one or more of these hypothetical women will fail to obtain contraception through other sources; engage in unprotected sex after failing to obtain contraception; become pregnant on account of those choices; and then choose to abort her fetus is nothing but rank speculation.

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7. *See* https://www.guttmacher.org/sites/default/files/factsheet/fb_induced_abortion_3.pdf ("In 2011, the U.S. abortion rate reached its lowest level since 1973").

In all events, Nevada would not suffer Article III injury if a woman who becomes pregnant on account of the injunction chooses to abort her pregnancy. Abortion is legal in Nevada, so Nevada would not suffer a violation of its laws, and Nevada's dismay over a woman's decision to abort does not confer standing to appeal. *See Diamond v. Charles*, 476 U.S. 54, 66 (1986) (denying litigant standing to appeal as a "protector of the unborn.").

C. Nevada Cannot Establish Standing By Alleging Injury To Its Residents

Nevada does not go so far as to assert *parens patriae* standing, but its brief repeatedly alleges harm to "its residents." Nevada's Br. at 8. None of these alleged harms give the State standing to appeal.

To begin, Nevada has failed to produce evidence showing that any of its residents will lose contraceptive coverage on account of the injunction. *See supra*, at 3-6. But even if it had, a State cannot assert standing to protect its residents from the operation of federal statutes such as RFRA. *See Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923) ("It cannot be conceded that a state, as *parens patriae*, may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof."); *Massachusetts v. EPA*, 549 U.S. 497, 520 n.17 (2007) ("*Mellon* prohibits" a State from suing "to protect her citizens from the operation of federal statutes").

D. The "Special Solicitude" Doctrine Does Not Absolve Nevada Of Its Duty To Establish Injury In Fact

Nevada claims it should receive "special solicitude" in the standing analysis, but neither *Massachusetts* nor *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), liberates the States from their obligation to show injury in fact. Massachusetts had established indisputable Article III injury from the erosion of land that it owned. *See Massachusetts*, 549 U.S. at 522 ("These rising seas have already begun to swallow Massachusetts' coastal land."). And Texas had established injury by "demonstrating that it would incur significant costs in issuing driver's licenses to DAPA beneficiaries." *Texas*, 809 F.3d at 155. Nevada has not produced evidence of any Article III injury, and nothing in the "special solicitude" doctrine allows courts to confer standing on states that fail to demonstrate injury in fact.

II. The Alleged Causal Connection Is Too Speculative And Too Dependent On Choices Made By Others

Even if Nevada had established injury, the alleged causal link between the injury and the district-court injunction is too speculative and too reliant on the independent decisions of others to support Article III standing. *See* Mot. to Dismiss at 11-13.

Nevada does not deny that its alleged causal chain rests on speculation about decisions made by others, and it does not address or distinguish the many cases that reject standing in those situations. *See, e.g.*, *Clapper v. Amnesty International*, 568 U.S. 398, 414 (2013) (invoking "our usual reluctance

to endorse standing theories that rest on speculation about the decisions of independent actors."); *Hotze v. Burwell*, 784 F.3d 984, 995 (5th Cir. 2015) (denying standing because "[s]peculation about a decision made by a third party . . . constitutes an essential link in this chain of causation."). Instead, Nevada tries to analogize this case to *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019). But *Department of Commerce* held that the plaintiffs' theory did "*not* rest on mere speculation about the decisions of third parties" because the district court had found as a matter of fact that citizenship questions depress noncitizens' census-response rates, and there was sufficient evidence at trial to support this factual finding. *Id.* at 2566. Here, there is no district court factfinding for Nevada to rely upon, and the alleged injuries can occur only in response to a *series* of decisions made by independent actors.

III. Any Injury To Nevada's Fisc Is Self-Inflicted

Nevada is under no compulsion to fund a welfare state, and Nevada chooses the amount of money it will spend on its social-welfare programs. Any choice that Nevada makes to increase spending on these matters is a self-inflicted injury. *See Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) ("No [party] can be heard to complain about damage inflicted by its own hand."). This case is nothing like *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), because Texas would have faced immediate lawsuits from the Obama Administration and immigrant-rights groups if it had withheld driver's licenses from DAPA beneficiaries. *See Arizona Dream Act Coalition v.*

Brewer, 757 F.3d 1053 (9th Cir. 2014) (enjoining Arizona from denying drivier's licenses to DACA recipients).

Nevada's claim that the alleged injuries in *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010), and *Roe v. Wade*, 410 U.S. 113 (1973), were "self-inflicted" is wrong. The farmers in *Monsanto* were forced to choose between undertaking costly precautions or risking infection of their crops—either choice would result in injury imposed by the federal agency. Jane Roe could have traveled to another state or avoided pregnancy by refraining from sexual intercourse, but those choices would *also* impose injury in fact caused by the state's abortion ban. Nevada would suffer no Article III injury by holding the line on welfare spending in response to the injunction, so any "injury" it asserts from increased spending is entirely self-inflicted.

IV. The Federal Government's Appeal Does Not Obviate Nevada's Need To Establish Standing Because The Litigants Are Not Seeking Identical Relief

When two or more litigants seek identical relief, the courts may absolve a litigant of its responsibility to demonstrate Article III standing if another litigant's standing has been established. *See Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1648 (2017). This doctrine is no help to Nevada because the federal appellants are not pursuing the relief that Nevada wants. Far from it: The government has declared that it *agrees* with the district court's analysis and filed a "protective" appeal merely to preserve its right to participate if Nevada's intervention is granted. *See* Mot. to Hold Appeal in Abey-

ance ¶ 9. It has also announced that it will dismiss its appeal unless Nevada is allowed to intervene and appeal the district-court injunction. *See id.* ¶ 10. Nevada cannot glom on to the federal government's standing in this scenario. *See Chester*, 137 S. Ct. at 1648 ("[A litigant] must meet the requirements of Article III if [it] wishes to pursue relief not requested by [another litigant].").

CONCLUSION

The motion to dismiss the appeal in part should be granted.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

with type-volume limitation, typeface requirements,
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1. This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because it contains 2,600 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF ELECTRONIC COMPLIANCE

Counsel also certifies that on October 4, 2019, this brief was transmitted to Mr. Lyle W. Cayce, Clerk of the United States Court of Appeals for the Fifth Circuit, via the court's CM/ECF document filing system, https://ecf.ca5.uscourts.gov/.

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