Case No. 19-10754

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

Plaintiffs – Appellees,

v.

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

APPELLANT STATE OF NEVADA'S OPENING BRIEF

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CERTIFICATE OF INTERESTED PERSONS

Case No. 19-10754 – *DeOtte et al. v. Azar, et al.*

The undersigned counsel of record certifies that the following listed private (non-governmental) persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Named Plaintiffs and members of their nationwide class have a financial interest in the outcome of this case, to the extent they seek to uphold the district court's order and judgment, which allows them not to provide seamless preventive care required by the Affordable Care Act to their employees. Similarly, employees of the nationwide class religious employers have a financial interest in the outcome of this case, to the extent they would lose their right to seamless preventive care insurance pursuant to the Affordable Care Act and the medical care associated with it, should the lower court's order and judgment be upheld.

s/Heidi Parry Stern
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STATEMENT REGARDING ORAL ARGUMENT

The State of Nevada believes that oral argument would be helpful in addressing Nevada's proposed intervention and the merits of this case challenging the Affordable Care Act's contraception provisions.

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JURISDICTIONAL STATEMENT

Pursuant to Fed. R. App. P. (FRAP) 28(a)(4), Nevada provides the following jurisdictional statement:

1. The district court had federal subject matter jurisdiction pursuant to 28 U.S.C. § 1331, as Plaintiffs challenged certain provisions of the Affordable Care Act (ACA) (42 U.S.C. § 300gg-13(a)(54)) as being in violation of the Religious Freedom Restoration Act (RFRA) (42 U.S.C. § 2000bb *et al.*).
2. Nevada's appeal is from the district court order denying intervention and issuing final judgment.
3. This court has appellate jurisdiction to address Nevada's proposed intervention and the judgment issued by the district court as a final order. 28 U.S.C. § 1291.
4. Nevada filed a timely appeal. On July 3, 2019, Nevada timely filed a notice of protective appeal against the district court's June 5, 2019, order granting summary judgment and a permanent injunction. On August 27, 2019, Nevada timely filed an amended notice of appeal against the district court's July 29, 2019, order denying intervention and issuing final judgment.

STATEMENT OF ISSUES

1. Nevada has standing to pursue this appeal.

2. The district court should have granted Nevada's motion to intervene on the merits as a defendant in the district court.

3. The district court erred in awarding Plaintiffs a permanent nationwide class injunction.

STATEMENT OF THE CASE

This is an appeal from an order of summary judgment in the district court in favor of Plaintiffs. The district court certified plaintiffs' nationwide class and awarded Plaintiffs' class a nationwide injunction against the ACA's requirement that certain group health insurance plans provide coverage for women's preventive care, including contraception.

BACKGROUND FACTS AND PROCEDURAL HISTORY

I. The Affordable Care Act's Contraception Provisions

The ACA provides that certain group health insurance plans cover preventive care and screenings without imposing costs on the employee and his/her covered dependents. 42 U.S.C. § 300gg-13(a). This includes women's "preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration [HRSA]." 42 U.S.C. § 300gg-13(a)(54).

The 2009 Women's Health Amendment, adopted by Congress along with the ACA, sought to redress the "fundamental inequity" that women were systematically charged more for preventive services than men. 155 Cong. Rec. S12027 (Dec. 1, 2009) (statement of Sen. Gillibrand). At the time, "more than half of women delay[ed] or avoid[ed] preventive care because of its costs." *Id.* Supporters expected that eradicating these discriminatory barriers to preventive care – including contraceptive care – would result in substantially improved health outcomes for women. *See, e.g.*, *id.* at S12052 (statement of Sen. Franken); *id.* at. S12059 (statement of Sen. Cardin); *id.* (statement of Sen. Feinstein). Congress rejected a competing amendment that would have permitted broad moral and religious exemptions to the ACA's coverage requirements – the same moral and religious exemptions that are reflected by Plaintiffs' proposed nationwide class. 58 Cong. Rec. S539 (Feb. 9, 2012); 159 Cong. Rec. S2268 (Mar. 22, 2013).

Rather than set forth a comprehensive definition of women's preventive services that must be covered, Congress opted to rely on HRSA's expertise. 42 U.S.C. § 300gg-13(a)(4). HRSA, in turn, commissioned the Institute of Medicine (IOM) to study the issue, and make evidence-based recommendations. The IOM assembled a panel of independent experts who surveyed the relevant literature and peer-reviewed medical research, and ultimately issued a final report. *See* IOM, Clinical Prevention Services for Women: Closing the Gaps (2011) (IOM Report),

available at https://www.nap.edu/read/13181/chapter/1. The IOM Report acknowledged many of Congress' concerns raised during adoption of the Women's Health Amendment and recommended covering all FDA-approved contraceptive methods. The IOM considers these services essential so that "women can better avoid unwanted pregnancies and space their pregnancies to promote optimal birth outcomes." *Id.* at https://www.nap.edu/read/13181/chapter/7#104. The IOM also recommended that "preventive care" include not only contraceptive coverage such as access to all FDA-approved contraceptive methods, but also counseling and education to ensure that women received information on the best method for their individual set of circumstances. *Id.* at https://www.nap.edu/read/13181/chapter/7#107.

HRSA adopted the IOM Report's recommendations in its guidelines, and the three federal agencies responsible for implementing the ACA promulgated regulations requiring that regulated entities cover all FDA-approved contraceptive methods without cost to women and their covered dependents.[1] 45 C.F.R. § 147.130(a)(1)(iv); 29 C.F.R. § 2590.715-2713(a)(1)(iv); 26 C.F.R. § 54.9815-2713(a)(1)(iv). In implementing this statutory scheme, the Department of Health and Human Services (HHS) made clear that these coverage requirements were not

[1] HRSA reaffirmed their guidelines based on recommendations by the American College of Obstetricians and Gynecologists in 2016 and these remain the standard. *See* https://www.hrsa.gov/womens-guidelines/index.html.

applicable to group health plans sponsored by religious employers. Further, HHS made available a religious accommodation to certain employers who seek to not provide this coverage. Through this religious accommodation, the federal government ensured that women had access to seamless contraceptive coverage as entitled under the ACA, while also providing employers with a mechanism to opt out of providing or paying for this coverage.

II. Prior Litigation Pertaining to ACA-Contraceptive Coverage

Significant litigation has been pursued within this Circuit and before the United States Supreme Court pertaining to the balance between providing equal access to preventive care and respecting sincerely held religious beliefs. These initial lawsuits culminated in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. __, 134 S. Ct. 2751 (2014), which held that, at minimum, closely held, for-profit corporations that oppose contraceptive coverage for religious reasons must be allowed to use the "accommodation" offered to religious non-profits. *See id.* at 2781-82. The Supreme Court also issued emergency relief to non-profit employers that sought to avoid delivering the prescribed certification form. *See Little Sisters of the Poor v. Sebelius*, 134 S. Ct. 1022 (2014); *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014). The federal government subsequently amended regulations implementing the ACA to allow closely held, for-profit corporations to use the accommodation offered to religious non-profits and to allow objecting employers

to choose whether to notify the HHS Secretary directly, or to notify their health insurance issuers or third-party administrators.

Further litigation followed throughout the Circuits, including this one.[2] In *East Texas Baptist University v. Burwell*, 793 F.3d 449 (5th Cir. 2015), this Circuit

[2] Seven other Circuits (out of eight) that considered this issue before *Zubik* reached same conclusion this Circuit did – that the accommodation process did not impose a substantial burden on religious exercise under RFRA. *See Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229 (D.C. Cir. 2014), *vacated*, *Zubik*, 136 S. Ct. at 1561; *Catholic Health Care Sys. v. Burwell*, 796 F.3d 207 (2d Cir. 2015), *vacated*, —— U.S. ——, 136 S. Ct. 2450; *Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs.*, 778 F.3d 422 (3d Cir. 2015), *vacated*, *Zubik*, 136 S. Ct. at 1561; *E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449 (5th Cir. 2015), *vacated*, *Zubik*, 136 S. Ct. at 1561; *Mich. Catholic Conference & Catholic Family Servs. v. Burwell*, 807 F.3d 738 (6th Cir. 2015), *vacated*, —— U.S. ——, 136 S. Ct. 2450 (2016); *Grace Schs. v. Burwell*, 801 F.3d 788 (7th Cir. 2015), *vacated*, —— U.S. ——, 136 S. Ct. 2011 (2016); *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell*, 794 F.3d 1151 (10th Cir. 2015), *vacated*, *Zubik*, 136 S. Ct. at 1561; *Eternal Word Television Network v. Sec'y of U.S. Dep't Health & Human Servs.*, 818 F.3d 1122 (11th Cir. 2016), *vacated*, 2016 WL 11503064 (11th Cir. May 31, 2016) (No. 14-12696-CC), *as modified by* 2016 WL 11504187 (11th Cir. Oct. 3, 2016).

Only the Eighth Circuit concluded otherwise. *See Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, 801 F.3d 927, 945 (8th Cir. 2015) (affirming grant of preliminary injunction to religious objectors because "they [were] likely to succeed on the merits of their RFRA challenge to the contraceptive mandate and the accommodation regulations"), *vacated sub nom. Dep't of Health & Human Servs. v. CNS Int'l Ministries*, No. 15-775, —— U.S., 2016 WL 2842448, at *1 (May 16, 2016).

After *Zubik*, the Third Circuit reiterated its prior conclusion that the accommodation process did not impose a substantial burden under RFRA. *See Real Alternatives, Inc. v. Sec'y Dep't of Health & Human Servs.*, 867 F.3d 338, 356 n.18 (3d Cir. 2017). The Ninth Circuit most recently held "that the accommodation process likely does not substantially burden the exercise of religion." *California v. U.S. Dep't of Health & Human Servs.*, 941 F.3d 410, 429-30 (9th Cir. 2019).

held that the ACA's contraception requirements did not violate RFRA because religious objectors had "not shown and [were] not likely to show that the requirement substantially burdens their religious exercise under established law." *Id.* at 452. In its analysis, this Circuit noted that plaintiffs must show that the challenged regulations "substantially burden their religious exercise" to establish a RFRA violation. *Id.* at 456. In that case, this Circuit considered the extent to which it should "defer to a religious objector's view on whether there is a substantial burden." *Id.* Based on two applicable free-exercise decisions by the Supreme Court, this Circuit concluded it was bound by precedent to decide, as a question of law, whether the challenged law pressures the objector to modify his religious exercise. *Bowen v. Roy*, 476 U.S. 693 (1986) (pertaining to the issuance of a Social Security number); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (pertaining to road and permit logging on federal land).[3]

This Circuit concluded that "the acts [religious objectors] are required to perform do not include providing or facilitating access to contraceptives. Instead, the acts that violate their faith are those of third parties." *East Texas Baptist University*, 793 F.3d at 459. First, this Circuit rejected the argument that submitting a notice seeking exemption from the ACA's contraception requirements "will authorize or trigger payments for contraceptives" because the "ACA already

[3] These two Supreme Court cases remain binding precedent.

requires contraceptive coverage." *Id.* Second, this Circuit rejected the argument that held that the accommodation uses the insurance plans as vehicles for payments for contraceptives, recognizing that this is just what the regulations prohibit. *Id.* Third, this Circuit rejected the argument that offering a group health plan pressures objectors to authorize or facilitate the use of contraceptives, recognizing that the accommodation excludes contraceptive coverage from their plans and allowing objectors to express their disapproval of it. *Id.* at 461. Stated differently, this Circuit held that "RFRA does not entitle [objectors] to block third parties from engaging in conduct with which they disagree." *East Texas Baptist University*, 793 F.3d at 461. "In short, the acts *the plaintiffs* are required to perform do not involve providing or facilitating access to contraceptives, and the plaintiffs have no right under RFRA to challenge the independent conduct of third parties." *Id.* at 463.

The United States Supreme Court did not vacate *East Texas Baptist University*, on the merits. *See Zubik v. Burwell*, 136 S. Ct. 1557 (2016). Instead, the Court, following supplemental briefing from the parties addressing "whether contraceptive coverage could be provided to petitioners' employees, through petitioners' insurance companies, without any such notice from petitioners," remanded the cases to provide "an opportunity to arrive at an approach going forward that accommodates petitioners' religious exercise while at the same time

ensuring that women covered by petitioners' health plans receive full and equal health coverage, including contraceptive coverage." *Id.* at 1560.

Following *Zubik*, the Department of Treasury and HHS (Departments) published a request for information to determine whether modification to the existing accommodation procedure could resolve the objections asserted by religious objectors while still ensuring that affected women receive full and equal health coverage, including contraception coverage. *See* ROA.912. The Departments received over 54,000 public comments. *Id.* In response, the Departments concluded that the "comments demonstrate that a process like the one described in the [*Zubik*] Court's supplemental briefing order would not be acceptable to those with religious objections to the contraceptive-coverage requirement."[4] *Id.* at 912-13, 915. Accordingly, the Departments did not modify the accommodation regulations at that time. *Id.* at 912.

Following the change in administrations and consistent with the current administration's general opposition to the ACA, the Departments instituted rulemaking proceedings to provide further exemptions for objecting employers and individuals. They eventually issued final rules that allow employers and individuals to object to the ACA's preventive care requirements on sincerely held

[4] It is unclear whether the Plaintiffs in this case would have found such a process acceptable, although they note the Departments' conclusion that "no feasible approach had been identified at this time that would resolve the concerns of religious objectors." *Id.*

religious or moral grounds. *See* Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,536 (November 15, 2018). The Departments' revised rules are subject to litigation in multiple federal courts and are currently stayed by one nationwide preliminary injunction. *See Pennsylvania v. Trump*, 351 F. Supp. 3d 791 (E.D. Pa. 2019), *aff'd*, *Pennsylvania v. Trump*, 930 F.3d 543 (3d Cir. 2019). The Final Rules are also stayed by a preliminary injunction for the 13 States (plus the District of Columbia) that were parties to the Ninth Circuit lawsuit. *See California v. U.S. Dep't of Health & Human Servs.*, 941 F.3d 410, 431 (9th Cir. 2019).

III. The Procedural Posture of this Case

Plaintiffs filed this suit in direct response to nationwide injunctions issued against federal rulemaking associated with the ACA's "Contraception Mandate" concerning preventive healthcare provisions by employers asserting religious objections to such healthcare. *See* ROA.276 (First Amended Complaint). Plaintiffs sought a nationwide class action in this case against the ACA's contraceptive provisions because of purported violations of RFRA. Plaintiffs filed on October 6, 2018. ROA.38. They subsequently submitted an amended complaint on February 5, 2019. ROA.276.

To date, the Federal Defendants have not filed an answer or other responsive pleading in this case, notwithstanding the district court's prior order to do so. *See*

ROA.266. The Federal Defendants have not opposed Plaintiffs' request for a temporary restraining order. *See* ROA.1117. The Federal Defendants "are not raising a substantive defense of the Mandate or the accommodation process with respect to Plaintiffs' RFRA challenge." ROA.1411. Instead, the Federal Defendants agreed to convert a motion for preliminary injunction into a motion for permanent injunction and summary judgment. ROA.1392. The Federal Defendants also agreed to brief the newly converted summary judgment on an expedited basis. ROA.1395.

Nevada sought to intervene to ensure its sovereign interests in the existing ACA contraception protections. Rather than consider the intervention motion, the district court entertained argument and granted summary judgment shortly thereafter, accepting Plaintiffs' arguments that this case was substantively different than *East Texas Baptist University*. ROA.1845-79. Only after awarding Plaintiffs' final relief did the district court deny Nevada's motion to intervene – without hearing. ROA.2061-82.

The court denied intervention on three primary bases:

First, the district court conducted a *sua sponte* analysis to determine Nevada lacked standing. ROA.2064-69. After Nevada's appeal, the court issued a notice reversing its standing determination. *See* Notice, Record Excerpts (RE.134-35).

Second, the district court rejected Nevada's motion to intervene solely due to its conclusion that Nevada does not have a protectable interest in this case. This erroneous conclusion resulted in the court's issuance of a nationwide class judgment that contradicts the ACA. ROA.2071-75.

Third, the district court considered and rejected Nevada's assertion that the *East Texas Baptist University* analysis should govern this RFRA case. ROA.2079-81.

Nevada timely appealed, first by filing a notice of protective appeal within thirty days of the order granting summary judgment. ROA.1937. Plaintiffs moved this Court to dismiss the appeal on standing grounds. *See* Motion (Sept. 6, 2019). Prior to Nevada's opposition being due, the Federal Defendants appealed the judgment. *See* Notice of Appeal (Sept. 27, 2019). Subsequently, the Federal Defendants sought leave to stay the appeal pending the Court's determination of standing. See Motion (Oct. 1, 2019). In a joint motion with Plaintiffs, the Federal Defendants also sought leave to stay this appeal pending the Court's determination of intervention. See Motion (Oct. 11, 2019). As set forth in the joint motion, the Federal Defendants did "not intend to proceed with their appeal if Nevada is not permitted to intervene and proceed with its merits appeal." *Id.* at 5. Following that request being denied by this Court, the Federal Defendants voluntarily dismissed their appeal. *See* Motion for Voluntary Dismissal (Dec. 6, 2019).

SUMMARY OF THE ARGUMENT

In this Affordable Care Act contraception case, the original parties have continuously sought to avoid adverse rulings before other federal courts on the same substantive policy issue presented here. Disheartened that "a federal judge in Philadelphia issued a preliminary injunction against the enforcement of [final rules issued by the Federal Defendants], Plaintiffs filed this class action case to "seek an injunction against [the] enforcement [of the Affordable Care Act's contraception provisions]." ROA.277. Similarly disheartened by this and another preliminary injunction issued against their preferred "final rules," the Federal Defendants provided little to no adversity to Plaintiffs' efforts in this case. They filed no responsive pleading. Rather than seek a stay or appeal following class certification, the Federal Defendants expedited "briefing" on the merits, making no reference to this Circuit's recent analysis of the same legal question. Given this lack of adversity, Plaintiffs effectively circumvented the administrative rulemaking litigation by obtaining a permanent injunction in this case, precluding the adverse rulings in the other litigations.

Nevada seeks intervention to protect its interests and the interests of women nationwide. In support of intervention, Nevada provides declarant support premised on the Federal Defendants' own rulemaking – demonstrating that Nevadan women will be harmed by the permanent injunction. For Nevada, this

risk of harm takes the form of financial cost, increased health care costs, increased unplanned pregnancies, and increased abortions. Ignoring these facts, the district court denied intervention, erring by asserting Nevada suffered no injury for standing purposes and had no significant, protectable interest affected by the nationwide class injunction. On appeal, the Federal Defendants have switched positions on whether or what issues they will appeal.

Nevada has standing to appeal the district court's order denying intervention and, if intervention is granted, the nationwide class injunction. As a matter of right, Nevada assert a significant, legally protectable interest necessitating intervention in this case. On the merits, the district court erred when making distinctions from this Circuit's prior analysis of the same legal issue, which is consistent with almost every other circuit that has considered the issue.

This Court should reverse the district court's judgment, and Nevada should be allowed to participate in all further proceedings as a defendant-intervenor.

ARGUMENT

I. The District Court's Judgment Creates a Substantial Risk of Harm for Women in the United States Generally and for Nevada 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 amount

women aged 20 to 24 between 2012 to 2017.[5] ROA.1598. Nevada has concluded, through straightforward math, based on extrapolating nationwide calculations in the Federal Government's proposed Final Rules, between 600 to 1,200 Nevadan women would be harmed from implementation of Plaintiffs' proposed class relief.[6] ROA 1596. Nevada derived these numbers as follows:

The Departments included a regulatory impact analysis, (*see* 82 Fed. Reg. at 47,815-28; 82 Fed. Reg. at 47,856-59), as required by law. *See* Regulatory Planning and Review, Executive Order 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993). In their regulatory impact analysis, the Departments estimated that, nationwide, between 31,700 and 120,000 women would be affected by the expanded exemptions. *See* Fed. Reg. at 47,821-23. The Departments accounted for various factors that could skew the estimates.

The Departments based their lower bound estimate of 31,700 women partially on the number of employers that had previously challenged the contraceptive coverage requirement in litigation, and partially on an estimate of the

[5] Plaintiffs do not dispute this specific number, which alone demonstrates Nevada's interest in this case. This estimate resulted from implementation of these provisions, per Nevada's declarant. Reducing abortion is a direct, substantial, legally protectable interest of Nevada. At this stage of the proceedings, this court and the district court are obligated to defer to Nevada's factual assertions.

[6] Even if this was a mere factual allegation (rather than a fact 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).

number of employers using the accommodation. *See* 82 Fed. Reg. 47815-21. The Departments based their upper bound estimate of 120,000 women from the consideration of a pre-ACA Kaiser Family Foundation survey, further reduced by estimating "that no more than approximately one third of the persons covered by relevant entities … would likely be subject to potential transfer impacts." *Id.* at 47,823.

From there, the Departments estimated an "average annual expenditure on contraceptive products and services of $584 per user," resulting in a "transfer effect[]" attributable to the Interim Final Rules of between about $18.5 and $63.8 million annually nationwide. *Id.* at 47,823-24. This amount does not include a numerical estimate for the "noteworthy potential impact[]" of "increased expenditures on pregnancy-related medical services." *Id.* at 47,828 n.113.

Subsequently, for the final rules, based on the same methodology, the Departments calculate that between 70,515 and 126,400 women will lose employer-based coverage for their chosen method of contraception. *See* 83 Fed. Reg. 57578, 57580; 83 Fed. Reg. 57627-28. The increase was largely attributable to the fact that the Departments failed to account for nearly two-thirds of the people receiving contraceptive coverage through the accommodation. *Compare* 82 Fed. Reg. 47821 (stating that 1,027,000 people "are covered in accommodated plans"), with 83 Fed. Reg. 57577 (stating that 2,907,000 people "were covered in

plans using the accommodation under the previous regulations"). Nevada simply multiplied these numbers from the final rule by its percentage of the total United States population to calculate the 600 to 1,200 Nevada women.

The Centers for Disease Control (CDC) notes that women with unintended pregnancies are more likely to delay prenatal care, which is imperative to positive birth outcomes. ROA.1597. The increase in Nevada women relying on publicly funded services would strain Nevada's existing family planning programs and providers, making it more difficult for them to meet the current need for care. For instance, in 2014, 194,000 women were in need of publicly funded family planning in Nevada, with the existing state family planning network only able to meet 10% of this need. RR 1624;[7] *see also* Frost JJ, Frohwirth L and Zolna MR, *Contraceptive Needs and Services*, 2014 Update, New York: Guttmacher Institute, 2016, https://www.guttmacher.org/sites/default/files/report_pdf/contraceptive-needs-and-services-2014_1.pdf).

Nevada also implements the ACA in numerous other ways, including the provision of the state marketplace for obtaining individual health insurance. *See, e.g.*, NEV. REV. STAT. (NRS) § 695I. Nevada has a public interest in the health of its citizens, as advanced by the existing provisions. Nevada also has an interest in

[7] Ms. Kost is the Acting Vice President for Domestic Research at the Guttmacher Institute, having served in various capacities there for nearly 30 years. ROA 1599. Her declaration describes harms associated with Plaintiffs' proposed permanent injunction, both on a nationwide and Nevada-specific basis.

ensuring equal treatment of its citizens for preventive health care, regardless of their sex. NEV. CONST. art. IV, § 21.

Nevada has standing to appeal as well as a direct, substantial, legally-protectable interest warranting intervention as a matter of right.

II. Nevada Has Standing to Pursue this Appeal in Order to Remedy the Risk of Harm to It from the District Court's Erroneous Judgment.

The test of Nevada's standing on appeal is not whether injury is certain to occur. Rather, Nevada must show only a substantial risk of injury to satisfy the imminence component of Article III. *See, e.g., Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014); *Clapper v. Amnesty Int'l, USA*, 568 U.S. 398, 414 n. 5 (2013) (stating that plaintiffs are not required "to demonstrate that it is literally certain that the harms they identify will come about"). Because Nevada faces a substantial risk of injury as a result of the district court's judgment, it has standing to appeal.[8]

The district court's nationwide injunction barring implementation of the ACA's contraceptive mandate will harm Nevada's economic and quasi-sovereign interests. This Court thus owes Nevada "special solicitude in [the] standing analysis"—not heightened skepticism. *See Massachusetts v. EPA*, 549 U.S. 497, 520 (2007).

[8] The district court determined that Nevada did not need to establish standing in that court. RE.136-137.

Nevada is not required to identify a "particular woman" who has lost or will lose coverage as a result of the district court's judgment. The effects detailed above, which demonstrate that Nevada women will be negatively impacted by the judgment and that as a result Nevada faces a substantial risk of economic injury are sufficient to establish standing. *SBA List*, 573 U.S. at 158. Requiring Nevada to identify a "particular woman" who has lost or will lose coverage because of the rules would be equivalent to insisting that Nevada show that injury is certain to occur. Because Article III does not demand such a showing to establish standing, this Court should not require it here.

Most recently, in *Texas v. United States*, Case No. 19-10011, at 32 n.30 (5th Cir. Dec. 18, 2019), this Circuit rejected arguments that standing requires proof pertaining to at least one specific person. *Id.* This Court did so, recognizing that if it did otherwise, it "would create a split with our sister circuits." *Id.* The avoided split was with the First, Third, and Ninth Circuits' standing analysis relative to the ACA's contraception coverage and arguments premised on "failing to identify a specific woman." *Id.* In short, this Circuit avoided a split with sister circuits on this issue. This Court should follow its recent opinion on this issue and reject the "specific woman" argument.

Both the Supreme Court's and this Court's precedent recognizes standing based on a substantial risk of future injury of similar or lesser magnitude than

Nevada has asserted in this case. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 153-55 & n. 3 (2010) (finding the conventional alfalfa farmers had standing even though they did not identify a particular alfalfa plant that had been pollinated by or was likely to be pollinated by bees carrying the genetically engineered gene); *see Texas v. United States*, 809 F.3d 134, 155-56, 162 (5th Cir. 2015), aff'd, 136 S. Ct. 2271 (2016) (per curiam) (finding, in a case challenging DAPA, that Texas had standing even where it did not identify particular noncitizens who had applied, or would likely apply, for driver's licenses "because driving is a practical necessity in most of the state," and there was thus a sufficient likelihood that "some DAPA beneficiaries would apply"). Based on the information provided by the administrative record for the final rules, it is highly likely that Nevada employers, such as Hobby Lobby Stores, Inc., will use the nationwide class judgment to avoid providing contraceptive coverage. *Compare with Massachusetts*, 923 F.3d at 224 (containing identical analysis pertaining to Hobby Lobby).

The risk of harm to Nevada is not speculative. There is a substantial risk that Nevada women affected by the judgment will be forced to choose a method of contraception that is not covered by their employers' plans. *See* ROA.603 (plaintiff Braidwood's representation that it is unwilling to provide insurance to cover any "contraception because it is often (though not always) used to facilitate sexual

activity outside of marriage).” Given that 90% of all women at risk of an unintended pregnancy are currently using a contraceptive method, (ROA.1601), no speculation is required to conclude that an objecting employer like Braidwood, who would provide no contraception coverage whatsoever, will inevitably employ women who choose some otherwise covered form of contraception.

Likewise, no speculation is required to conclude that some Nevada women who lose coverage will be eligible for state-funded public insurance programs. Nevada submitted declarations demonstrating that such programs paid 60% of all expenses for unintended pregnancies that ended in birth, costing Nevada $37 million in 2010, prior to the ACA. ROA 1597-98, 1625. At the pre-trial stage of this case, the declarations strongly support that Nevada faces a substantial risk of fiscal injury from the district court’s judgment. Plaintiffs provided no evidence to contest those declarations, and the evidence in them must therefore “be taken to be true.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

Nevada must be able to challenge the district court’s judgment based upon the substantial risk—not certainty—that it will suffer harm. Imposing a stricter standard to establish standing would mean that a state like Nevada would only be able to challenge the judgment after Nevada women have suffered unacceptable harm. Nevada’s request for a remedy cannot wait. This is particularly true here, where Nevada is a sovereign state that has quasi-sovereign interests, regardless of

whether it causes Nevada any financial injury. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982) (finding that Puerto Rico has a "quasi-sovereign interest in the health and well-being . . . of its residents").

In short, this Court has standing to consider all issues raised by Nevada in this appeal.

III. Nevada Has the Right to Intervene, and the District Court's Order to the Contrary was Legal Error.

A. Intervention Is Liberally Construed as a Legal Question.

Nevada is entitled to intervene as a matter of right if: (1) its motion is timely; (2) it has an interest "relating to the property or transaction which is the subject of the action;" (3) the outcome of the action may, "as a practical matter, impair or impede his ability to protect that interest;" and (4) the existing parties cannot adequately represent that interest. *Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Comm'n*, 834 F.3d 562, 565 (5th Cir. 2016).

Rule 24 is "liberally construed" in favor of intervention. *Blumfield v. Dodd*, 749 F.3d 339, 341 (5th Cir. 2014). "[D]oubts [are] resolved in favor of the proposed intervenor." *In re Lease Oil Antitrust Litig.*, 570 F.3d 244, 248 (5th Cir. 2009). In fact, this Circuit has allowed parties to intervene even where they never filed a motion to do so. *See Farina v. Mission Inv. Trust,* 615 F.2d 1068, 1074 (5th Cir. 1980). For the purposes of Nevada's motion for intervention, this Court must accept Nevada's factual allegations as true. *Texas v. United States*, 805 F.3d 653,

657 (5th Cir. 2015). Intervention as a matter of right "must be measured by a practical rather than a technical yardstick," and the inquiry is a "flexible one" focused on the "particular facts and circumstances" of each case. *Edwards v. City of Houston*, 78 F.3d 983, 999 (5th Cir. 1996) (*en banc*). "Federal courts should allow intervention where no one would be hurt and the greater justice could be obtained." *Texas v. United States*, 805 F.3d at 657; *Sierra Club v. Espy*, 18 F.3d 1202, 1206 (5th Cir. 1994).

Here, the district court held that Nevada met its burden as to the timeliness, impairment, and adequate representation prongs of the intervention test. ROA.2069-70, 2075-79. The district court nevertheless concluded that "Nevada Does Not Have a Protectable Interest." *Id.* at 2071-75. This conclusion is erroneous as a matter of law.

B. Nevada Has a Direct, Substantial, and Legally Protectable Interest.

Nevada satisfies Rule 24's requirement that intervenors must have a "direct, substantial, legally protectable interest in the proceedings." *Texas v. United States*, 805 F.3d at 657. Property or pecuniary interests are the "most elementary type[s] of right[s]" protected by Rule 24(a) and "are almost always adequate." *Id.* at 658. This is the primary nature of Nevada's interest.

Rule 24(a) safeguards less tangible interests as well, however, such as a right to vote. *See, e.g., League of United Latin American Citizens, District 19 v. City of*

Boerne, 659 F.3d 421, 434 (5th Cir. 2011). For instance, this Court has recognized that intervention as of right does not require proof of a property right in the context of a public-law case. Further, "although an asserted interest must be 'legally protectable,' it need not be legally *enforceable*." *Id.* at 658-59 (emphasis in original). "In other words, an interest is sufficient if it is of the type that the law deems worthy of protection, even if the intervener does not have an enforceable legal entitlement or would not have standing to pursue her own claim." *Id.*

Here, Nevada, a sovereign state, seeks to defend existing ACA provisions. As set forth above, Nevada has achieved concrete public health gains in reducing unintended pregnancies and abortions from these provisions. The ACA intended to provide Nevada these public health benefits, along with potential fiscal benefits. Under these circumstances, Nevada has a legally protectable interest in this case.

The district court's first holding—that Nevada was "asserting a mere economic interest not directly related [to] this litigation"—is simply incorrect. ROA 2072. Rather, Nevada has asserted its interest in the provision of contraception care to preserve resulting public health gains and to conserve financial resources that were previously expended attempting to address unplanned pregnancies. Nevada has provided declarant testimony supporting its asserted interest, which courts are obligated to treat as true for purposes of adjudicating this motion. *Texas v. United States*, 805 F.3d at 657.

As noted, *supra*, adoption of the contraception mandate resulted in a 35% decrease in Nevada's abortion rate among women aged 15 to 19 and a 10% decrease in women aged 20 to 24 between 2012 and 2017. ROA 1598 (emphasis added). Nevada has concluded, based on extrapolating nationwide calculations in the federal government's proposed final rules, that between 600 to 1,200 Nevada women would be harmed from implementation of Plaintiffs' proposed class relief. ROA.1598. This is straightforward math. The CDC notes that women with unintended pregnancies are more likely to delay prenatal care, which is imperative to positive birth outcomes. ROA.1597. In addition, the increase in Nevada women relying on publicly funded services as a result of unplanned pregnancies would strain Nevada's existing family planning programs and providers, making it more difficult for them to meet the current need for care.

Nevada's determination that its citizens face a substantial risk of harm is not speculative. The determination is based squarely on the facts detailed above. This Court should thus reject the district court's contention that Nevada's interest is not "direct" because "Nevada argues that the class-wide injunction Plaintiffs seek will have ripple effects." ROA.2072. In making this finding, the district court inappropriately substitutes a test for certainty instead of risk at the pleading stage of this case. *See Department of Commerce v. New York*, 139 S. Ct. 2551, 2565-66 (2019). The Supreme Court has explained the concept of risk, recognizing that

future injuries associated with seeking citizenship information from Census participants, for example, "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 (2014) (*SBA List*)). The Court rejected causation arguments that asserted speculation about the decisions of independent actors. *Id.* The Court held that traceability was satisfied "on the predictable effect of Government action on the decisions of third parties." *Id.* at 2566.

Nevada has pled, based on the calculations made by the federal government, that 600-1,200 Nevada women would be affected, such that they would be at risk of increased pregnancies, abortions, or expense. In addition, the district court erred when it concluded that Nevada "failed to establish a 'substantial' interest in the outcome of these proceedings because it does not estimate the amount of additional spending [Nevada] will incur." ROA.2073.

This Court has recognized that "a party within the zone of interests protected by a statute may possess a type of substantive right not to have the statute violated." *New Orleans Pub. Serv., Inc. v. United Gas Pipeline Co. (NOPSI),* 732 F2d. 452, 465 (5th Cir. 1984) *(en banc).* This Court did not further "determine the zone of interests protected or regulated by a constitutional provision or statute of

general application" in *NOPSI* because that dispute did "not involve such a public law question," instead centering on a breach of contract claim.[9] *Id.*

C. Nevada Is Entitled to Special Solicitude in Order to Protect its Quasi-Sovereign Interests.

In addition to Nevada's proprietary injuries, the Supreme Court has recognized 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). Nevada has demonstrated the extensive harm to itself and its residents that would flow from Plaintiffs' unopposed prosecution of this lawsuit. "States are not normal litigants for the purposes of invoking federal jurisdiction." *Massachusetts*, 549 U.S. at 518.

This Circuit similarly recognizes the importance of states' quasi-sovereign interests. *See Texas v. United States*, 809 F.3d at 150–62 (5th Cir. 2015). Among other factors considered in this case, this Court held that certain actions can affect "the states' 'quasi-sovereign' interests by imposing substantial pressure on them to

[9] *NOPSI* rejected intervention because it determined that there was adequate representation of the City of New Orleans' interest by NOPSI in the breach of contract dispute with a fuel supplier. *Id.* at 472-73. Here, Plaintiffs cannot and do not argue that the Federal Defendants have represented Nevada's interests in this case.

change their laws."[10] *Id.* at 153. This Court rejected the argument that states had the ability to avoid injury by changing applicable law. "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.

Here, Nevada has demonstrated the extensive harm to itself and its residents that would flow from Plaintiffs' unopposed prosecution of this lawsuit. 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* NRS 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.

This interest further warrants intervention as of right.

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

D. This Suit Will Impair Nevada's Ability to Protect Its Interests in the ACA's Contraception Provisions.

If Plaintiffs prevail, the proposed nationwide class action would "impair or impede" Nevada's ability to protect its interests detailed above. *Wal-Mart*, 834 F.3d at 565. With complete disregard for Nevada's interests, Plaintiffs seek to impose nationwide restrictions outside the ongoing federal rulemaking process—a process that requires opportunities for interested parties to participate. Significant numbers of Nevada women will lose access to necessary healthcare, reversing significant public health gains achieved following adoption of the ACA.

Nevada should not be forced to "wait on the sidelines" while a court decides issues "contrary to their interests." *Brumfield*, 749 F.3d at 344–45. Rather, the "very purposes of intervention is to allow interested parties to air their views so that a court may consider them *before* making potentially adverse decisions." *Id.* at 345 (emphasis added). Indeed, the mere "*stare decisis* effects of the district court's judgment" sufficiently impairs Nevada's interests to allow it to intervene now. *Sierra Club*, 18 F.3d at 1207.

E. Nevada's Intervention was Timely Under the Circumstances.

This Court considers four factors when evaluating the timeliness of a motion to intervene:

(1) The length of time the applicants knew or should have known of their interest in the case;

(2) Prejudice to existing parties caused by the applicant's delay;

(3) Prejudice to the applicant if the motion is denied; and

(4) Any unusual circumstances.

Stallworth v. Monsanto Co., 558 F.2d 257, 264–66 (5th Cir. 1977). Each factor here demonstrates the timeliness of Nevada's motion under the circumstances of this case.

The first inquiry is contextual, as "absolute measures of timeliness should be ignored." *Sierra Club*, 18 F.3d at 1205. The clock beings to run when the applicants knew or reasonably should have known of their interests, or from the time they became aware that their interests would no longer be protected by the existing parties to the lawsuit. *Edwards*, 78 F.3d at 1000; *Sierra Club*, 18 F.3d at 1206.

Here, the district court, at the behest of the parties, including the Federal Defendants who had not answered or otherwise responded to any pleading, converted a potential motion for preliminary injunction into a motion for summary judgment and permanent injunction. ROA.1406. It took the parties the week of April 15th to complete the briefing. ROA.1409-35. Only then did the Federal Defendants file a "Response" in which they stated they "do 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.1411.

Nevada has acted diligently and did not unduly delay its efforts to intervene in this case. Nevada could not have known the district court was considering summary judgment or a permanent injunction prior to "the briefing on the merits [having been concluded] during those next nine days." ROA.2070. It was simply impossible under the circumstances for Nevada to have known. Accordingly, Nevada only learned of the Federal Defendants' position in this case after the week of April 19th, and it then prepared the motion to intervene and proposed opposition to the pending motion for summary judgment.

Plaintiffs fail to address how named Plaintiffs would be prejudiced by prompt consideration of Nevada's proposed opposition in light of the district court's subsequent order granting summary judgment. Named Plaintiffs were protected by an unopposed temporary restraining order. ROA.1130. In contrast, Nevada is prejudiced by not being able to defend the existing preventive health care provisions premised on this Court's prior analysis. Nevada's motion satisfies Rule 24(a)(2)'s timeliness requirement. This Court should uphold the district court's determination on timeliness. ROA.2069-70.

F. The Federal Defendants Do Not Adequately Represent Nevada's Interests.

No current party represents Nevada's interests in defense of the ACA. The 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;
- chose not to defend the ACA's contraception provisions on their merits, even though this Court previously analyzed the same issue in *East Texas Baptist University*,[11] and

[11] Nevada recognizes that the United States Supreme Court vacated this Circuit's decision in *Zubik* and remanded to allow the parties in 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. Based in part on comments that the process described in *Zubik* would not resolve the concerns of religious objectors, the Departments concluded that there was no feasible approach "identified at this time." *See* U.S. Dep't of Labor, Emp. Benefits Sec. Admin., FAQs About Affordable Care Act Implementation Part 36, (Jan. 9, 2017). The Departments further noted that they "continue to believe the existing accommodation regulations are consistent with RFRA" based on the prior holdings by eight other Circuits (including this one) that the requirement does not substantially burden their exercise of religion. *Id.* 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.

- undertook varying positions on whether they appealed the judgment and, even if they did so, whether Nevada should first be required to engage in piecemeal appellate work as to 1) demonstrating standing and 2) obtaining reversal of the intervention order.

This lack of adversity forced Nevada to seek intervention to avoid injuries to its interests resulting from a nationwide injunction. These circumstances more than satisfy the "minimal" requirement that the Federal Defendants' representation of Nevada's interests "may be inadequate." *Edwards*, 78 F.3d at 1005.

The district court recognized that no presumption of adequate representation by the Federal Defendants applied to this case and that Nevada was not adequately represented by any party to this case. ROA.2076-77. Because Nevada has identified "particular ways in which its interests diverge" from the Federal Defendants, it is entitled to intervene. *Texas v. United States*, 805 F.3d at 663. This Court has repeatedly held that intervention is required under these circumstance—where the proposed intervenor seeks intervention as a defendant, has rebutted the presumption of adequate representation, and has shown adversity of interest by identifying its divergent interests and legal arguments from the existing defendants. *See Brumfield*, 749 F.3d at 346; *Texas v. United States*, 805 F.3d at 663; *Entergy Gulf States La., LLC v. E.P.A.*, 817 F.3d 198, 203 (5th Cir. 2016); *Wal-Mart*, 834

F.3d at 569. Because Nevada has met those requirements, this Court should grant it intervention as a matter of right.

G. In the Alternative, Nevada Should Be Permitted to Intervene.

Alternatively, Nevada is entitled to permissive intervention under Rule 24(b), which permits the Court to use its discretion to grant intervention where the application is timely, there is a common question of law or fact, and there will be no undue delay or prejudice to the original parties. *Kneeland v. Nat'l Collegiate Athletic Ass'n*, 806 F.2d 1285, 1289 (5th Cir. 1987); *In re Enron Corp. Sec. Derivative & "ERISA" Litig.*, 229 F.R.D. 126, 131 (S.D. Tex. 2005). Rule 24(b)(2) further allows a state such as Nevada to intervene on a timely motion where a claim is premised on "a statute or executive order administered by [Nevada]." This Court has also instructed that "[f]ederal courts should allow intervention where no one would be hurt and the greater justice could be obtained." *Texas v. United States*, 805 F.3d at 657 (citing *Sierra Club*, 18 F.2d at 1205).

First, as discussed above, Nevada's motion is timely. Second, it is clear that Nevada, without a final determination of the merits, has asserted a defense that shares a question of law with Plaintiffs pertaining to whether the ACA's contraception provisions constitute a RFRA violation. Based on prior litigation involving the same preventive health care provisions, there is no doubt that this is a valid defense. *See East Texas Baptist Univ.*, 793 F.3d 449. This is consistent with

the district court's subsequent "notice," in which it determined that it erred when determining Nevada lacked standing because Nevada seeks defense of the ACA. RE.136-137. Third, given the existing temporary restraining order protecting named Plaintiffs and the ability of any other class member to seek similar relief, Nevada's intervention would not cause undue delay or prejudice to the original parties.

IV. The District Court's Nationwide Class Judgment Must be Reversed and Vacated.

A. Standard of Review

This Court views all evidence in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Bolton v. City of Dallas*, 472 F.3d 261, 263 (5th Cir. 2006).

B. This Circuit's Precedent Applies Here, Requiring Application of the Substantial Burden and Least Restrictive Means Test.

This Court has already determined that "RFRA does not entitle [objectors] to block third parties from engaging in conduct with which they disagree." *East Texas Baptist University*, 793 F.3d at 461. It has also previously analyzed the acts required to comply with the "accommodation" provided for under the contraception mandate. *Id.* This Circuit held that "the acts [objectors] are required

to perform do not include providing or facilitating access to contraceptives." *Id.* at 459. Accordingly, because "RFRA confers no right to challenge the independent conduct of third parties," [this Circuit joined other circuits] in concluding that the plaintiffs have not shown a substantial burden on their religious exercise." *Id.* Without any opportunity for discovery, the district court erred in its efforts to distinguish this case from what this Circuit already considered in *East Texas Baptist University.*

First, the district court erred in agreeing that contraception coverage would be "provided through [Plaintiffs'] plan if it opts for the accommodation," based on a statement pertaining to ERISA formalities during briefing for *Zubik*. RA 581. This assertion ignores the plain language of the accommodation, which excludes contraceptive coverage from the group coverage, segregates all premium revenue, and provides separate notice regarding the separate contraceptive coverage. *See* 45 C.F.R. § 147.131(d)-(e). As the federal government told the Supreme Court in *Zubik*, "[i]n all cases, the regulations mandate strict separation between the contraceptive coverage provided by an insurer or [third party administrator] TPA and other coverage provided on behalf of the employer." *Zubik,* Response Brief (Resp. Br.), 2016 WL 537623, at *18. Plaintiffs point to no evidence demonstrating that their own health plans "sponsor" the entirely separate

contraceptive coverage, because none exists. That result is impermissible under the existing regulations. *See* 45 C.F.R. § 147.131(d)-(e).

The federal government's *Zubik* brief directly refutes the claims made by Plaintiffs and the district court: "Nor does the government, in fact, provide contraceptive coverage using any 'plan infrastructure' belonging to petitioners." *Zubik*, Resp. Br., 2016 WL 537623, at *38. The federal government did state that if an objecting employer has a self-insured plan subject to ERISA, "the Departments' authority to require the TPA to provide contraceptive coverage derives from ERISA." *Id.* at *38. That simply means that the separate contraceptive coverage between the TPA and the employee—for purposes of ERISA only—is part of the same ERISA plan as the coverage provided by the employer. *Id.* That does not change the fact that even for those self-insured plans, the "rules governing contraceptive coverage are established by the government, not the employer, and the employer does not fund, control, or have any other involvement in that separate coverage—instead, the TPA alone does so." *Id.* (emphasis added).

In short, the ERISA status of the separate contraceptive coverage between the TPA and the employee does not affect the terms of the group health coverage that the employer and the insurer have contractually agreed upon— coverage that excludes contraceptives. *See, e.g., Priests for Life v. Department of Health and Human Servs.*, 772 F.3d 229, 225 (D.C. Cir. 2014) (stating that the fact that the

government names the TPA as the plan administrator of the separate contraceptive coverage, for purposes of ERISA only, "does not . . . amend or alter Plaintiffs' own plan instruments . . ."). This Court's prior analysis was not based on a mistaken factual premise. The district court's conclusion to the contrary was error.

Second, this Court has already specifically acknowledged that the ACA itself "already requires contraceptive coverage" and that nothing "suggests that insurers' or third-party administrators' obligations would be waived if the plaintiffs refused to apply for the accommodation." *East Texas Baptist University*, 793 F.3d at 459. Plaintiffs previously argued that the submission of the form for accommodation is the "but-for cause" of providing contraception. RA 582-83. This Court recognized, however, that "the plaintiffs cannot authorize or trigger what others are already required by law to do." *Id.* Plaintiffs are not entitled to absolute deference on the issue of substantial burden under these circumstances. *See* Brief of the Baptist Joint Committee for Religious Liberty as Amicus Curiae in Support of Respondents, *Zubik*, 2016 WL 692850 (Feb. 17, 2016) (opposing efforts to seek absolute deference to objectors' assessment of substantial burden).

Third, Plaintiffs' objections to the proposed accommodation process, alone, without further evidence, do not make it impossible to follow this Circuit's prior, persuasive analysis. It is not, in fact, "impossible for a court to accept *East Texas Baptist University's* holding that the certification form does nothing to 'facilitate'

or 'trigger' access to contraception" as Plaintiffs have contended. RA.583. Plaintiffs' arguments pertaining to the post-*Zubik* administrative process are misleading. Their arguments on this point are based solely on their own stated opinion that "a process like the one described in the Court's supplemental briefing order [in *Zubik*] would not be acceptable to those with religious objections to the contraceptive-coverage requirement." RA.269. No evidence supports such a statement.

The record contains no evidence that an individual's purchase of health insurance necessarily subsidizes another's contraception. As noted by this Court, "insurers will not lose money by paying for contraceptives, because the savings on pregnancy care at least are expected to equal the costs of contraceptives." *East Texas Baptist University,* 793 F.3d at 460. Providing preventive health care results in reduced health care costs, constituting long-term savings for insurers that are passed along to all insureds. Without record evidence showing an actual subsidy, Plaintiffs' argument has no merit.

C. Plaintiffs Are Not Subject to a Substantial Burden for RFRA Purposes.

Plaintiffs do not face a "substantial burden" associated with the existing contraception provisions. *East Texas Baptist Univ.*, 793 F.3d 449. Simply put, the actions Plaintiffs are required to take to implement the accommodation do not burden them whatsoever.

D. The Federal Government Has a Compelling Interest in the ACA's Contraception Provisions.

The district court's order presumed "- without finding -" that there was a compelling government interest. RA.1864. This is consistent with the Supreme Court's recognition in *Hobby Lobby* that the contraceptive-coverage requirement "serves the Government's compelling interest in providing insurance coverage that is necessary to protect the health of female employees, coverage that is significantly more costly than for a male employee." *Id.* at 2785-86 (Kennedy, J., concurring); accord *id.* at 2799-2800 & n.23 (Ginsburg, J., dissenting).

Here, Nevada would only be "demonstrating" what the federal government has already determined to be a "compelling government interest" by the "least restrictive means" available. The federal government demonstrated that the existing methods were the "least restrictive means" available for implementing the existing provisions during the post-*Zubik* administrative process, while maintaining the seamlessness of providing equal preventive health care. *See, generally,* RA.1661, 1664-65. The sole dispute now is the federal government's potential change in position as to whether the existing contraception provisions further that compelling interest by "the least restrictive means" available, contingent on the validity of the rulemaking presently being challenged before other courts.

This Court should similarly assume the compelling governmental interest or, alternatively, remand to the district court for further consideration.

E. The Accommodation Constitutes the Least Restrictive Means for Achieving the Compelling Interest.

This Court must next consider whether the government has pursued that interest through the least-restrictive means "available." *Bob Jones Univ. v. United States,* 461 U.S. 574, 604 (1983). RFRA does not provide for any imaginable new governmental program to constitute a less-restrictive alternative. Under Plaintiffs' logic, an employer with religious objections to certain immunizations would be entitled to an exemption from the obligation to cover immunization because Congress could enact a new law establishing separate insurance. The Supreme Court has rejected exemption from minimum-wage laws simply because Congress could pass a law ensuring additional monies are paid to make up the difference. *See Tony & Susan Alamo Found. v. Secretary of Labor,* 471 U.S. 290, 303-06 (1985).

This Circuit has already addressed the factual infirmities in Plaintiffs' presumption that present law requires employers to provide access to free contraception. *See East Texas Baptist University*, 793 F.3d 449. Plaintiffs' position likewise has no support under Supreme Court precedent. In particular, it is impossible to reconcile with *United States v. Lee*, 455 U.S. 252, 259-61 (1982). There, the Supreme Court denied an exemption to an Amish employer with religious objections to participating in the Social Security system in part because the exemption would have resulted in the denial of benefits to employees. *Id.*

Under Plaintiffs' argument, the government itself should have stepped in to pay Social Security benefits directly to the employees, or restructured the Social Security system to rely on direct employee contributions or general tax revenues, rather than employer withholding. Each step was theoretically within Congress' power, and each would have been less burdensome on the employer than requiring participation in the Social Security system. The Supreme Court rejected that logic under the Free Exercise Clause, and this Court should recognize the district court's error in attributing to Congress an intent to take such a dramatic step in RFRA.

The ACA's accommodation provision amply satisfies this standard for the least restrictive means available. "The heart of the Affordable Care Act was a decision to approach universal health insurance by expanding" and improving the existing "employer-based system of private health insurance that had evolved in our country, rather than to substitute a new 'single payer' government program to pay for health care, like the systems in place in the United Kingdom and Canada." *University of Notre Dame v. Burwell*, 786 F.3d 606, 625 (7th Cir. 2015) (Hamilton, J., concurring); *see* 78 Fed. Reg. at 39,888. The accommodation works within that system of private, employer-based coverage to ensure that the compelling interests served by the contraceptive-coverage requirement are met, while also eliminating any role for objecting employers.

The Departments engaged in an extensive rulemaking process that included multiple rounds of public comment and consultation with "representatives of religious organizations, insurers, women's groups, insurance experts, and other interested stakeholders." 77 Fed. Reg. at 16,503. They considered a wide variety of alternative approaches, but concluded that those alternatives "were not feasible and/or would not advance the government's compelling interests as effectively" as the accommodation. 78 Fed. Reg. at 39,888. The post-*Zubik* request-for-information process confirmed that there was no such process that would resolve religious objections to the accommodation, which appear to apply to any system in which employees gain an entitlement to contraceptive coverage from third parties after petitioners opt out.

Unlike *Hobby Lobby,* this is not a case in which a proposed less-restrictive alternative is "an existing, recognized, workable, and already-implemented framework to provide coverage." *Hobby Lobby,* 134 S. Ct. at 2786 (Kennedy, J., concurring). The Supreme Court explained that accepting the RFRA challenge in *Hobby Lobby* "need not result in any detrimental effect on any third party" because the accommodation already in place for religious nonprofit organizations could be extended to closely held for-profit companies. *Id.* at 2781 n.37. The Supreme Court has thus repeatedly emphasized that the effect of its decision on female employees and beneficiaries "would be precisely zero." *Id.* at 2760; *see id.* at 2759,

2782-2783. Here, Plaintiffs seek to invalidate the very regulatory accommodation that *Hobby Lobby* identified, while conceding that it would require Congress to establish "a whole new program" of contraceptive coverage, *id.* at 2786 (Kennedy, J., concurring), or to significantly modify an existing program. Unless Congress took such action, women who rely on objecting employers for their health coverage would be denied contraceptive coverage altogether.

The accommodation serves the government's compelling interest while minimizing the burden on objecting employers. In contending that even more is required, and that RFRA grants them a right to prevent the affected women from obtaining separate coverage from third parties, Plaintiffs disregard the Supreme Court's admonition that courts applying RFRA "must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Hobby Lobby,* 134 S. Ct. at 2781 n.37 (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005)). The free exercise of religion protected by RFRA cannot "unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling." *Id.* at 2787 (Kennedy, J., concurring).

F. Ordering a Nationwide Class Judgment Was Improper, Regardless of the Merits Asserted by the Individual Plaintiffs.

The Federal Defendants opposed additional relief beyond named Plaintiffs because "unnamed class members have not yet established that they in fact have a

sincere religious objection to the Mandate." ROA.1412. The Federal Defendants submitted that they are required to have "an opportunity … to contest such a showing," (ROA.1414), and that the "proposed injunction puts [them] at risk of contempt when enforcing the Mandate." ROA.1416. Finally, the Federal Defendants argued that "Plaintiffs are improperly proposing that this Court enter final judgment," effectively putting "the cart before the horse." ROA.1417.

Nevada and the Federal Defendants have a fundamental disagreement pertaining to the validity of the ACA contraception provisions, but agree on the inappropriateness of class certification. This certification further constitutes error by the district court.

G. Alternatively, this Court Should Vacate the Nationwide Class Judgment for Lack of Adversity Among the Original Parties.

In the event this Court denies Nevada's intervention, it should recognize the lack of Article III "case or controversy" between the original parties to this case and vacate the nationwide class judgment. The district court judgment occurred without the "concrete adverseness" considered by the Supreme Court when determining it was prudent to proceed to the merits in *United States v. Windsor*, 570 U.S. 744, 759-62 (2013), where the federal government refused to defend the Defense of Marriage Act.

This case exemplifies the Supreme Court's concern with facing 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 (1936) (Brandeis, J., concurring)). "Nonparties to litigation may suffer directly from poorly considered decisions reached in actions brought by parties who may not have adequate incentives or motives to effectively present a legal challenge." *Townley v. Miller*, 722 F.3d 1128, 1135 (9th Cir. 2013) (quoting Wright et al., FED. PRACTICE AND PROCEDURE § 3531.1 (3d ed. 2008)). This allows courts to avoid deciding "abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

Here, if Nevada is not permitted to intervene, there will never be sufficient adversity on this issue in this case. As a result, "nonparties" will suffer from poorly considered decisions in this case, including the lack of factual distinctions with this Court's prior analysis of the identical legal issue. Even before this Court, the Federal Defendants have demonstrated inadequate (and perplexing) mixed motives for effectively defending the Affordable Care Act. They appealed the judgment solely to force Nevada to engage in a three-part appeal consisting of 1) demonstrating standing, 2) obtaining reversal on the denial of intervention, and then 3) addressing the merits of the underlying judgment. The Federal Defendants

forced these contortions—all while insisting that they would not actually appeal should Nevada be defeated during the first two stages of the process. *See* Joint Motion (October 11, 2019). In short, the Federal Defendants wanted the nationwide class judgment despite not being able to succeed through the administrative rulemaking process. The rulemaking process, in fact, would be more competent at addressing the underlying issue in this case, as it does provide interested parties such as Plaintiffs and Nevada to participate and to seek judicial relief.

Even if Nevada is not allowed to intervene as a matter of right, this Court has the authority to vacate the nationwide class judgment. It should recognize that the district court acted imprudently in exercising jurisdiction and awarding a nationwide judgment where there was insufficient adversity. 28 U.S.C. § 2106. This would allow any other objector to file suit for individual judgment while the courts address the overarching administrative rulemaking dispute. If individual objectors sought class relief, they could provide appropriate notice to any and all interested parties, such that the interplay between RFRA and the ACA's contraception provisions can be litigated with sufficient adversity.

CONCLUSION

Nevada requests that this Court reverse and vacate the district court's judgment and order the district court to permit Nevada to intervene in the action below.

Dated: December 19, 2019,

SUBMITTED BY:

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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 December 19, 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: December 19, 2019.

s/Heidi Parry Stern
An employee of the Office of the Nevada Attorney General

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 11,532 words.

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Dated: December 19, 2019.

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