

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,

Appellants.

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

**APPELLEES' MOTION TO SUSPEND BRIEFING AND STAY
THE APPEAL PENDING THE SUPREME COURT'S RULINGS
IN LITTLE SISTERS OF THE POOR V. PENNSYLVANIA, NO.
19-431, AND TRUMP V. PENNSYLVANIA, NO. 19-454**

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CERTIFICATE OF INTERESTED PERSONS

Counsel of record certifies that the following 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.

Plaintiffs	Plaintiffs' Counsel
<ul style="list-style-type: none"> • Richard W. DeOtte • Yvette DeOtte • John Kelley • Alison Kelley • Hotze Health & Wellness Center • Braidwood Management Inc. 	<p>Jonathan F. Mitchell MITCHELL LAW PLLC</p> <p>Charles W. Fillmore H. Dustin Fillmore THE FILLMORE LAW FIRM, LLP</p>

Defendants	Defendants' Counsel
<ul style="list-style-type: none"> • Alex M. Azar II, in his official capacity as Secretary of Health and Human Services • Steven T. Mnuchin, in his official capacity as Secretary of the Treasury • Patrick Pizzella, in his official capacity as Acting Secretary of Labor • United States of America 	<p>Daniel M. Reiss James M. Burnham</p> <p>UNITED STATES DEPARTMENT OF JUSTICE</p>

Proposed Intervenor	Proposed Intervenor's Counsel
<ul style="list-style-type: none"> • State of Nevada 	<p>Heidi Stern Craig Newby</p> <p>OFFICE OF THE NEVADA ATTORNEY GENERAL</p>

/s/ Jonathan F. Mitchell
JONATHAN F. MITCHELL
Counsel for Plaintiffs-Appellees

Earlier today, the Supreme Court granted certiorari in *Little Sisters of the Poor v. Pennsylvania*, No. 19-431, and *Trump v. Pennsylvania*, No. 19-454. Each of those cases will be calendared and decided this term, and the Supreme Court's resolution of these cases is likely to determine some or all of the issues in Nevada's appeal. It would therefore serve judicial economy for this Court to stay the appeal until the Supreme Court issues its expected rulings in those cases.

The appellees' answering brief is currently due next Tuesday, January 21, 2020, and Monday is a federal holiday. So the appellees are immediately filing this motion to suspend briefing and stay the appeal until the Supreme Court decides *Little Sisters* and *Trump v. Pennsylvania*, along with a motion to extend the deadline for filing the appellees' answering brief by 30 days while the Court considers this motion. Although Nevada is unopposed to the motion to extend the deadline for filing the appellees' answering brief, counsel for Nevada needs more time to determine its position on the motion to suspend briefing and stay the appeal.

The Supreme Court granted certiorari in *Little Sisters* and *Trump v. Pennsylvania* to determine whether the Trump Administration acted lawfully when it adopted agency rules that exempt religious objectors from the Contraceptive Mandate.¹ The protections for religious objectors in the Trump

1. See Petition for Certiorari, *Little Sisters of the Poor v. Pennsylvania*, No. 19-431, available at <https://bit.ly/2G3fcId> (last visited on January 17, 2020); Petition for Certiorari, *Trump v. Pennsylvania*, No. 19-454, available at <https://bit.ly/2FYUtVJ> (last visited on January 17, 2020).

Administration’s rules are identical to the protections that appear in the district court’s final judgment. *Compare* ROA.2083-2086 *with* Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,536, 57,586–57,590 (November 15, 2018). The enforcement of the Trump Administration’s rules is currently enjoined by a nationwide injunction—which is why the plaintiffs sued to obtain those protections from the district court. *See Pennsylvania v. Trump*, 351 F. Supp. 791 (E.D. Pa. 2019), *aff’d* *Pennsylvania v. President United States*, 930 F.3d 543 (3d Cir. 2019). But *Little Sisters* and *Trump v. Pennsylvania* will decide whether the currently blocked agency rules can take effect.

If the Supreme Court allows the Trump Administration’s rules to take effect, it will eliminate any possible argument that could support Nevada’s standing to appeal the district court’s injunction and final judgment. Nevada cannot be injured by an injunction or final judgment that secures protections for religious objectors when those protections exist independently in federal agency rules. It will also preclude Nevada from asserting an “interest” that could support intervention in this lawsuit, because the district court’s rulings will not have *any* effect on Nevada or its residents beyond the protections that already appear in the Trump Administration’s rules.

Even if Nevada disagrees with this assessment, it cannot deny that a Supreme Court ruling in favor of the Trump Administration will have drastic implications for its arguments on standing and its arguments for intervention. Rather than continue to brief and argue these issues behind a veil of ig-

norance—especially when the Fifth Circuit is unlikely to decide this appeal before the end of the Supreme Court’s term in June—both the litigants and this Court would be better served by awaiting the Supreme Court’s rulings in *Little Sisters* and *Pennsylvania v. Trump* and resuming the briefing schedule at that time. There is little sense in barreling ahead when the Supreme Court is about to weigh in on the issues that Nevada seeks to appeal, and when the Court’s resolution could effectively resolve the issues on which the parties disagree.

CONCLUSION

The Court should suspend briefing and stay the appeal pending the Supreme Court’s decisions in *Little Sisters of the Poor v. Pennsylvania*, No. 19-431, and *Trump v. Pennsylvania*, No. 19-454.

Respectfully submitted.

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Dated: January 17, 2020

Counsel for Plaintiffs-Appellees

CERTIFICATE OF CONFERENCE

I certify that I conferred with Craig A. Newby, counsel for Nevada, and he informed me that Nevada needs more time to determine its position on this motion.

Dated: January 17, 2020

/s/ Jonathan F. Mitchell
JONATHAN F. MITCHELL
Counsel for Plaintiffs-Appellees

CERTIFICATE OF SERVICE

I certify that on January 17, 2020, this document was electronically filed with the clerk of the court for the U.S. Court of Appeals for the Fifth Circuit and served through CM/ECF upon:

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CERTIFICATE OF COMPLIANCE
with type-volume limitation, typeface requirements,
and type-style requirements

1. This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because it contains 645 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).
2. This motion complies with the typeface and type-style requirements of Fed. R. App. P. 27(d)(1)(E), 32(a)(5), and Fed. R. App. P. 32(a)(6) because it uses Equity Text B 14-point type face throughout, and Equity Text B is a proportionally spaced typeface that includes serifs.

Dated: January 17, 2020

/s/ Jonathan F. Mitchell
JONATHAN F. MITCHELL
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CERTIFICATE OF ELECTRONIC COMPLIANCE

Counsel also certifies that on January 17, 2020, 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/>.

Counsel further certifies that: (1) required privacy redactions have been made, 5th Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5th Cir. R. 25.2.1; and (3) the document has been scanned with the most recent version of VirusTotal and is free of viruses.

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