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 APPELLEES' RENEWED MOTION TO DISMISS NEVADA'S APPEAL IN PART FOR LACK OF JURISDICTION, AND RESPONSE TO NEVADA'S COUNTERMOTION TO DISMISS NATIONWIDE CLASS-ACTION JUDGMENT

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I. The Court Has No Jurisdiction To Consider Nevada's Appeal Of The District Court's Final Judgment, The Class-Certification Orders, And The Order Granting The Plaintiffs' Motion For Summary Judgment And Permanent Injunction

Nevada is correct to observe that the lower courts *might* issue another nationwide injunction against the Trump Administration's final rule. *See Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2397–2400 (2020) (Kagan, J., concurring). And it is possible that a future Administration *might* attempt to rescind the agency rule that protects religious objectors.[1] But none of that can salvage Nevada's standing to appeal, because its alleged injuries must be "real and immediate," not "conjectural or hypothetical." *Rohm & Hass Texas, Inc. v. Ortiz Brothers Insulation, Inc.*, 32 F.3d 205, 208 (5th Cir. 1994) (citations and internal quotation marks omitted); *id.* at 209 ("Article III pretermits consideration of such a conjectural and hypothetical injury on appeal"); *Scottsdale Insurance Co. v. Knox Park Construction, Inc.*, 488 F.3d 680, 684 (5th Cir. 2007) ("'[T]he injury or threat of injury must be both real and immediate[,] not conjectural or hypothetical.'" (citation omitted)). The Supreme Court's ruling in *Little Sisters* has eliminated any injury that might have resulted from the district court's judgment and classwide injunction—and those district-court rulings are incapable of harming Nevada while the Trump Administration's agency rule

1. *See* Tyler Olson, *Biden Says He Would Restore Pre-Hobby Lobby Contraceptive Mandate In Wake Of Little Sisters Ruling*, Fox News (July 9, 2020), available at: https://fxn.ws/31r2MUy

remains in effect. The conjectural and hypothetical possibility that the Trump Administration's protections for religious objectors might someday be undone does not give Nevada standing to appeal a district-court ruling that is not currently inflicting *any* harm upon the State.

Nevada also cannot satisfy the redressability component of standing, because it has not shown an injury that is "*likely* to be redressed by a favorable judicial decision." *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013) (emphasis added)); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("[I]t must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.' " (citation omitted)). Nevada has not even alleged (let alone shown) that it is "likely" (as opposed to merely possible) that the protections for religious objectors in the Trump Administration's final rule will be nixed by a future court decision or agency rulemaking. So Nevada has not shown that a ruling from this Court is "likely" to redress an Article III injury—and it is impossible for a ruling from this Court to redress *any* type of injury while the Trump Administration's rule is in effect.

More importantly, Nevada lacked standing to appeal even before the Supreme Court's ruling in *Little Sisters*, for the reasons provided in the original motion to dismiss Nevada's appeal in part. *See* Appellees' Motion to Dismiss Nevada's Appeal in Part for Lack of Jurisdiction (September 6, 2019); Reply Brief in Support of Motion to Dismiss Nevada's Appeal in Part for Lack of Jurisdiction (October 4, 2019); *Rohm & Hass Texas, Inc. v. Ortiz Brothers Insulation, Inc.*, 32 F.3d 205, 208 (5th Cir. 1994) ("'[A]n indirect financial stake

in another party's claims is insufficient to create standing on appeal.'" (citation omitted)). A previous motions panel of this Court opted to carry that motion with the case, but there is no longer a reason to delay ruling on those jurisdictional objections when *Little Sisters* has eliminated any possible injury resulting from the district court's judgment and classwide injunction.

II. The Court Has No Authority To Vacate The District Court's Judgment Under *Munsingwear*

Nevada also contends that this Court should vacate the district court's judgment under the standards set forth in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994), and *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950)—but only if it concludes that Nevada lacks standing to appeal. *See* Nevada's Br. at 3–4. This is wrong because: (1) The case or controversy between the plaintiffs and defendants ended when the defendants voluntarily dismissed their appeal on December 10, 2019; and (2) This Court has no authority to vacate district-court rulings that have not been "lawfully brought before [this Court] for review." 28 U.S.C. § 2106.

A. Vacatur Under *Munsingwear* Is Unavailable Because The Case Or Controversy Between The Plaintiffs And Defendants Ended When The Defendants Abandoned Their Appeal On December 10, 2019

Vacatur under *Munsingwear* is unavailable unless a case or controversy has become *moot*. *See Azar v. Garza*, 138 S. Ct. 1790, 1792 (2018) ("When 'a civil case from a court in the federal system . . . *has become moot while on its way here*,' this Court's 'established practice' is 'to reverse or vacate the judg-

ment below and remand with a direction to dismiss.' *United States v. Munsingwear, Inc.,* 340 U.S. 36, 39 (1950)." (emphasis added)); *Karcher v. May*, 484 U.S. 72, 82–83 (1987) (describing "our practice of vacating lower court judgments *when a case becomes moot on appeal*." (emphasis added)).[2] The only Article III case or controversy that has ever existed in this litigation is between the plaintiffs and the defendants—and that case or controversy came to an end on December 10, 2019, when the defendants voluntarily dismissed their appeal. The defendants dismissed their appeal six months before the Supreme Court's ruling in *Little Sisters*, and before any other event that might have "mooted" the controversy. The case between the plaintiffs and the defendants is not moot; that case is *over*—and it ended when the defendants abandoned their appeal and allowed the district court's judgment to become final and conclusive between the parties.

There has never been an Article III case or controversy between the plaintiffs and the state of Nevada. The plaintiffs have not sued Nevada, and they have not asserted any claims or sought any relief against the State. And

2. *See also Fleming & Associates v. Newby & Tittle*, 529 F.3d 631, 640 (5th Cir. 2008) ("[T]he Supreme Court has relaxed the *Munsingwear* rule of 'automatic' vacatur in cases *that become moot on appeal*. Under current law, the appropriateness of equitable vacatur is determined by weighing the equities on a case-by-case basis." (emphasis added)); *Goldin v. Bartholow*, 166 F.3d 710, 718–19 (5th Cir. 1999) ("*If a case becomes moot on appeal*, the general rule is still to vacate the judgment of the lower court and remand with instructions to dismiss the case as moot. *See, e.g., United States v. Munsingwear,* 340 U.S. 36, 71 S. Ct. 104, 106–07 (1950) (leading case)." (emphasis added)).

Nevada has never been a party to the case or controversy between the plaintiffs and the defendants. Although Nevada sought to intervene in the litigation, its motion to intervene was denied by the district court, and the defendants abandoned their appeal and terminated the case before this Court could rule on Nevada's appeal from the order denying intervention. So nothing in *Little Sisters* "moots" a case or controversy between the plaintiffs and Nevada, because there never was a case or controversy between the plaintiffs and Nevada to begin with.[3]

The situation in this case is no different from *Karcher v. May*, 484 U.S. 72 (1987), which refused to consider a *Munsingwear* vacatur when the losing party declined to pursue an appeal. *Karcher* involved a constitutional challenge to a New Jersey moment-of-silence law. The Attorney General of New Jersey and the other named defendants refused to defend the constitutionality of the statute. So the presiding officers of the state legislature, Alan Karcher and Carmen Orechio, intervened to defend the law on behalf of the New Jersey legislature. *See id.* at 75. The district court declared the statute unconstitutional, and Karcher and Orechio appealed. *See id.* at 75–76. On December 24, 1985, the Third Circuit affirmed the district court's judgment. *See id.* at 76 (citing *May v. Cooperman,* 780 F.2d 240 (3rd Cir. 1985)).

3. And even if there were an Article III case or controversy between the plaintiffs and Nevada, the district court has never entered any judgment or order between the plaintiffs and Nevada that could be "vacated" under *Munsingwear*, other than the order denying Nevada's motion to intervene.

On January 14, 1986, after the Third Circuit's ruling, Karcher and Orechio lost their posts as presiding legislative officers. *See id.* at 76. Karcher and Orechio nevertheless appealed to the Supreme Court on March 19, 1986, but their successors in office withdrew the legislature's appeal. *See id.* Karcher and Orechio continued with their own appeal in their capacities as individual legislators rather than as presiding officers or representatives of the New Jersey legislature.[4] The Supreme Court held that Karcher and Orechio lacked standing to appeal in their capacities as individual legislators, and dismissed their appeal for lack of jurisdiction. *See id.* at 81.

Karcher and Orechio argued that the Supreme Court was obligated to vacate the district court's judgment under *Munsingwear* if it dismissed their appeal for lack of jurisdiction. *See id.* at 81–82. But the Supreme Court held that *Munsingwear* was inapplicable because the case had *ended* when the legislature abandoned its appeal. *See id.* at 83 ("The controversy ended when the losing party—the New Jersey Legislature—declined to pursue its appeal. Accordingly, the *Munsingwear* procedure is inapplicable to this case."). There was nothing that "mooted" the lawsuit; the case or controversy had simply ended when the legislature stopped appealing.

4. *See id.* at 78 ("Having lost their official status as presiding legislative officers, Karcher and Orechio now seek to appeal in their capacities as individual legislators and as representatives of the majority of the 200th New Jersey Legislature, the now-expired legislative body that enacted the minute of silence statute.").

The same is true in this situation. The case or controversy between the plaintiffs and defendants came to an end on December 10, 2019, when the defendants voluntarily dismissed their appeal—just as the case or controversy in *Karcher* ended when the New Jersey legislature abandoned the appeal that had been taken to the Supreme Court. There is nothing that can "moot" the plaintiffs' claims against the defendants, because the case or controversy is over—just as there was nothing that could "moot" the litigation over New Jersey's moment-of-silence law after the legislature terminated its appeal.

Nevada is attempting appeal the district court's judgment, but Nevada lacks standing to appeal, just as Karcher and Orechio lacked standing to appeal from the Third Circuit's ruling. In each of these situations, the *only* permissible response is to dismiss the appeal for lack of jurisdiction, because the underlying case or controversy has ended and the Court has no jurisdiction to consider appeals from litigants who lack standing to appeal from the lower court's ruling.

B. The Court Has No Authority To Vacate The District Court's Judgment Or Classwide Injunction Under 28 U.S.C. § 2106 Because Those Rulings Have Not Been "Lawfully Brought Before" This Court

The authority to vacate judgments and orders under *Munsingwear* comes from 28 U.S.C. § 2106, which provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court *lawfully brought before it for review*, and may remand the cause and direct the entry of such appro-

> priate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

28 U.S.C. § 2106 (emphasis added); *see also U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 21 (1994) (describing 28 U.S.C. § 2106 as "[t]he statute that supplies the power of vacatur"); *Hall v. Louisiana*, 884 F.3d 546, 550 (5th Cir. 2018) ("An appellate court's authority to vacate a district court's judgment when a pending appeal has become moot is 28 U.S.C. § 2106."). The district court's judgment and classwide injunction have not been "lawfully brought before" this Court, because Nevada lacks Article III standing to appeal those district-court rulings. That squelches any possibility of vacatur under 28 U.S.C. § 2106 or *Munsingwear*.

A litigant that lacks standing to appeal a district-court judgment has no standing to ask for vacatur of that judgment under *Munsingwear*—and any regime that allows a litigant seek vacatur of an order that he lacks standing to appeal is self-contradicting. In a normal *Munsingwear* situation, the losing party that appeals an adverse district-court judgment retains standing to seek vacatur on appeal—even after the case has become moot—because he will suffer injury from the preclusive effect of the judgment below. *See, e.g.*, *Goldin v. Bartholow*, 166 F.3d 710, 720 (5th Cir. 1999) (refusing to dismiss a losing party's appeal for lack of standing after the case had become moot, because the appellant would remain bound by the district court's judgment if the appeal were dismissed);[5] *see also Azar v. Garza*, 138 S. Ct. 1790, 1792 (2018).

5. *See also id.* ("[D]ismissing the appeal due to Goldin's lack of standing, as appellees argue we should, would lead to the problem at the heart of the

The mootness of the underlying *case* does not revoke the losing party's *standing to appeal* an adverse judgment, and it does not oust an appellate court of jurisdiction to rule on whether the district court's judgment should be vacated—even though it will remove the court's authority to rule on the merits of the underlying controversy.[6] In these situations, the disputed judgment or order is "lawfully brought before" the appellate court under 28 U.S.C. § 2106, despite the mootness of the underlying controversy, because the losing party still has standing to appeal and seek vacatur of the underlying ruling.

But Nevada *never* had standing to appeal the district court's judgment—either before or after the Supreme Court's ruling in *Little Sisters*. And Nevada has no standing to seek vacatur because it was not a party to the proceedings and cannot be bound or precluded by the district court's judgment or injunction. *See Hansberry v. Lee*, 311 U.S. 32, 40–41 (1940) ("[O]ne is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process."); *Martin v. Wilks*, 490 U.S. 755, 762 (1989); *Richards v. Jefferson County*, 517 U.S. 793, 794 (1996). There is no way that this Court can vacate the district

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Munsingwear doctrine—that an order may become unappealable due to no fault of the losing party, thus denying review of a possibly erroneous decision.").

6. *See U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 21 (1994) ("'If a judgment has become moot [while awaiting review], this Court may not consider its merits, but may make such disposition of the whole case as justice may require.'" (citation omitted)).

court's judgment and classwide injunction if it concludes that Nevada lacks standing to appeal, because there is no way to satisfy the statutory requirement that those orders be "lawfully brought before [this Court] for review." 28 U.S.C. § 2106. The situation is no different from a litigant who asks for vacatur under *Munsingwear* after filing the notice of appeal three days late. *See Bowles v. Russell*, 551 U.S. 205, 210–13 (2007).

CONCLUSION

The Court should dismiss Nevada's appeal of the district's final judgment (ECF No. 98), its class-certification orders (ECF Nos. 33 & 37), and its order granting the plaintiffs' motion for summary judgment and permanent injunction (ECF No. 76), for lack of appellate jurisdiction.

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 2,591 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 August 6, 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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