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'S OPPOSITION TO APPELLEES' MOTION TO DISMISS APPEAL AND, IN THE ALTERNATIVE, COUNTERMOTION TO DISMISS APPELLEES' NATIONWIDE CLASS ACTION JUDGMENT

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APPELLANT'S OPPOSITION TO APPELLEES' MOTION TO DISMISS APPEAL AND, IN THE ALTERNATIVE, COUNTERMOTION TO DISMISS APPELLEES' NATIONWIDE CLASS ACTION JUDGMENT

Appellees filed 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). Nevada contends that Appellees did so without adversity from the federal government. *See* Opening Br. at 32-34, 45-48.

Now, Appellees mistakenly presume that the Supreme Court's recent ruling allowing the Trump Administration's rulemaking on the same Affordable Care Act contraception provisions at issue in this case will eliminate any possible argument that could support Nevada's standing to appeal the district court's nationwide injunction and final judgment.[1] Mot. at 1. This presumption is mistaken for two reasons, warranting denial of Appellees' motion, or in the alternative, dismissal of Appellees' nationwide class action judgment.

First, the Supreme Court did not resolve the merits of the Trump Administration's rulemaking. *Little Sisters of the Poor Saints Peter & Paul Home*

[1] Appellees incorporate their prior motion to dismiss, which was denied by this court, by reference. Nevada incorporates their prior opposition by reference and only addresses the actual argument made by Appellees in this motion.

v. Pennsylvania, 140 S. Ct. 2367, 2386 (2020). Instead, the cases were remanded to the lower courts. As noted by Justice Alito in his concurrence, it is "all but certain [that Pennsylvania and New Jersey will] pursue their argument that the current rule is flawed on yet another ground, namely, that it is arbitrary and capricious and thus violates the APA. ROA.2387. "This will prolong the legal battle" against the rulemaking. ROA.2387. Should the challenging states succeed in demonstrating that the rulemaking was arbitrary and capricious, Nevada would again be harmed by the district court's nationwide injunction and class judgment. Further, changes in presidential administrations have resulted in significant changes in rulemaking on these provisions. There is no dispute that the federal government has the authority to conduct rulemaking on the contraception coverage issues. The Supreme Court held "that the ACA gives HRSA broad discretion to define preventive care and screenings and to create the religious and moral exemptions." *Little Sisters of the Poor Saints Peter & Paul Home*, 140 S. Ct. at 2381. Should there be further change on contraception coverage rulemaking, Nevada suffers harm should its citizens be subject to the district court's nationwide injunction and permanent judgment.

Second, Appellees' assertions, taken to their logical conclusion, makes the district court's nationwide class action judgment moot, which would also moot this appeal. Stated differently, Appellees did not have a case or controversy if the

federal rulemaking was effective and needed no nationwide class injunction or judgment. Nevada has already argued that the lack of adversity before the district court warranted vacating the nationwide class action judgment. Opening Br. at 45-48. 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).

Because these circumstances are not due to the actions of any current party to this case, this Court should vacate the district court's nationwide class action judgment as moot. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950) (vacatur appropriate where review of the judgment was prevented through happenstance).

Accordingly, Nevada believes the motion should be denied and that the appeal should proceed on its merits. Alternatively, the underlying class action judgment should be vacated as moot.

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CONCLUSION

The State of Nevada opposes Appellees' motion. In the alternative, Appellees' nationwide class action judgment should be vacated as moot.

Dated: August 3, 2020

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 August 3, 2020, 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: August 3, 2020.

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 610 words.

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Dated: August 3, 2020.

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