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

APPELLEES' PETITION FOR PANEL REHEARING

JONATHAN F. MITCHELL
Mitchell Law PLLC
111 Congress Avenue, Suite 400
Austin, Texas 78701
(512) 686-3940
jonathan@mitchell.law

Counsel for Plaintiffs-Appellees

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
• Richard W. DeOtte • Yvette DeOtte • John Kelley • Alison Kelley • Hotze Health & Wellness Center • Braidwood Management Inc.	Jonathan F. Mitchell MITCHELL LAW PLLC Charles W. Fillmore H. Dustin Fillmore THE FILLMORE LAW FIRM, LLP

Defendants	Defendants' Counsel
• 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 • Eugene Scalia, in his official capacity as Secretary of Labor • United States of America	Daniel M. Reiss James M. Burnham UNITED STATES DEPARTMENT OF JUSTICE

Proposed Intervenor	Proposed Intervenor's Counsel
• State of Nevada	Heidi Stern Craig Newby OFFICE OF THE NEVADA ATTORNEY GENERAL

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

The appellees respectfully ask the Court to grant panel rehearing on the following questions:

1. Can an appellate court pronounce a case "moot" when the litigation between the plaintiffs and defendants came to a complete end more than two years ago?

2. Can the court allow Nevada to intervene into a case that it has already declared to be moot, and when Nevada's "interests" in the outcome of that lawsuit were eliminated when the Trump Administration's rules protecting religious objectors took effect?

3. Did Nevada forfeit any argument for standing to appeal based on the supposedly preclusive effects of the district court's ruling by failing to present this argument at any stage of the appeal, and did the panel err by holding that Nevada suffered injury from the preclusive effects of the district court's ruling when Nevada was never a party to the district-court proceeding and cannot be subject to any preclusive effects of the district court's ruling?

4. Should the panel amend its statement that the plaintiffs "conceded Nevada was entitled to vacatur at oral argument"?

ARGUMENT

I. The Panel Should Rehear Its Decision To Declare The Underlying Dispute Moot

The panel began by declaring that the underlying dispute between the plaintiffs and the defendants became "moot" when the Supreme Court issued its ruling in *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsyl-*

vania, 140 S. Ct. 2367 (2020). *See* Panel Op. at 7–9. The panel should rehear this decision.

The litigation between the plaintiffs and the defendants had come to a complete end when the defendants dismissed their appeal on December 10, 2019—seven months before the Supreme Court announced its ruling in *Little Sisters*. Litigation that has already concluded cannot be "mooted" by subsequent events. The case between the plaintiffs and the defendants is over, and no such case has existed since the moment the defendants dismissed their appeal on December 10, 2019. A case that has ceased to exist cannot be declared "moot" by any court, even if an event occurs that would moot the case if it were still ongoing. If a litigant dies after his case has concluded, a court cannot re-open the case and declare it moot, even though the litigant's death would moot any case he was litigating at the time of his death. *See United States v. Pauline*, 625 F.2d 684, 684–85 (5th Cir. 1980). The panel opinion does not explain how this Court can declare the underlying dispute "moot" when the litigation between the plaintiffs and defendants ended more than two years ago.

II. The Panel Should Rehear Its Decision To Allow Nevada To Intervene

After declaring the underlying dispute "moot," the panel went on to hold that Nevada could intervene into this moot case. *See* Panel Op. at 11–14. The panel should rehear this decision because a litigant cannot intervene when no Article III case or controversy exists. The panel also overlooked the fact that

Nevada lost any "direct, substantial, legally protectable interest" that it might have had in the outcome of this litigation once Little Sisters allowed the Trump Administration's rule to take effect.

A. A Litigant Cannot Intervene Into A Moot Case

This Court has repeatedly and emphatically held that intervention cannot be granted unless there is an existing suit over which the federal judiciary may assert jurisdiction. *See Non Commissioned Officers Ass'n of U.S. v. Army Times Publishing Co.*, 637 F.2d 372, 373 (5th Cir. 1981) ("A prerequisite of an intervention (which is an ancillary proceeding in an already instituted suit) is an existing suit within the Court's jurisdiction"); *Truvillion v. King's Daughters Hospital*, 614 F.2d 520, 526 (5th Cir. 1980) ("[A]n existing suit within the court's jurisdiction is a prerequisite of an intervention, which is an ancillary proceeding in an already instituted suit." (citation and internal quotation marks omitted)); *Kendrick v. Kendrick*, 16 F.2d 744, 745 (5th Cir. 1926) ("An existing suit within the court's jurisdiction is a prerequisite of an intervention"). The panel did not acknowledge these authorities, and it did not attempt to explain how the law of this Court can allow intervention into a "case" that has been declared moot.[1] Mootness means that there is no Arti-

1. The panel opinion cites *In re Brewer*, 863 F.3d 861 (D.C. Cir. 2017),[1] but *Brewer* is not binding precedent and cannot be used to disregard the clear and unmistakable holdings of *Kendrick*, *Truvillion*, and *Non Commissioned Officers*.

cle III case or controversy, and without an Article III case or controversy there is nothing into which Nevada can intervene.

B. The Supreme Court's Holding in *Little Sisters* Eliminates Any "Direct, Substantial, Legally Protectable Interest" That Nevada Had Previously Asserted In The Outcome Of This Litigation

The panel opinion held that Nevada had a "direct, substantial, legally protectable interest" in the outcome of this litigation, because Nevada had alleged that the district court's injunction would adversely affect its fisc and the health of its residents. *See* Panel Op. at 15–19.

But Nevada cannot plausibly assert these "interests" now that the Trump Administration's final rule has taken effect, which tracks the protections for religious objectors that appear in the district court's injunction. *See Little Sisters*, 140 S. Ct. 2367. The outcome of this litigation does not affect Nevada in the slightest, because the Trump Administration's rules confer the exact same protections for religious objectors that the plaintiffs had sought from the district court. The panel opinion does not acknowledge that the ruling in *Little Sisters* eliminates any "interest" that Nevada might have in the outcome of this litigation—in the same way that it eliminates any "interest" that the plaintiffs would have in suing the defendants. *See* Panel Op. at 7–9. The panel cannot simultaneously hold that *Little Sisters* "moots" the plaintiffs' interests in the outcome of this case, while allowing Nevada to intervene based on "interests" that ceased to exist when the Trump Administration's rule took effect.

III. The Panel Should Rehear Its Decision That Nevada Had Standing To Appeal

The panel opinion held that Nevada had standing to appeal the final judgment because it "suffers the preclusive effect" of that ruling. *See* Panel Op. at 20. The panel should rehear this decision because: (1) Nevada forfeited this argument for standing to appeal; and (2) The district court's judgment has no preclusive effect on Nevada because it was not a party to the district-court proceedings.

A. Nevada Forfeited Any Argument For Standing To Appeal Based On Preclusive Effect Of The District Court's Judgment

The burden is on Nevada to demonstrate an injury from the district court's judgment that confers standing to appeal. *See Wittman v. Personhuballah*, 136 S. Ct. 1732, 1737 (2016) ("We have made clear that the 'party invoking federal jurisdiction bears the burden of establishing' that he has suffered an injury by submitting 'affidavit[s] or other evidence.'" (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)); *Rohm & Hass Texas, Inc. v. Ortiz Brothers Insulation, Inc.*, 32 F.3d 205, 208 n.12 (5th Cir. 1994) ("In order to establish standing on appeal, [a putative appellant] *must show* that it has suffered some actual or threatened injury." (emphasis added) (citation and internal quotation marks omitted)); *Sierra Club v. Babbitt*, 995 F.2d 571, 575 (5th Cir. 1993) ("Where standing to appeal is at issue, appellants *must demonstrate* some injury from the judgment below." (emphasis added, some emphasis removed)). Yet Nevada did not even argue that it was suffering in-

jury from any preclusive effects from the district court's judgment—nor did it argue that those preclusive effects (to the extent they exist) confer standing to appeal. Nevada has therefore forfeited any such argument for standing to appeal the district court's judgment. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2210 n.6 (2021) (arguments for standing that litigants fail to raise are forfeited); *California v. Texas*, 141 S. Ct. 2104, 2116 (2021) (same); *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1621–22 (2020) (same). The plaintiffs were given no opportunity to address this argument, and it cannot be used to confer standing on a litigant that never even asserted the argument or allowed opposing counsel an opportunity to contest it.

B. The District Court's Judgment Has No Preclusive Effect On Nevada Because Nevada Was Not A Party

The more serious problem with the panel's standing analysis is that the district court's judgment has no preclusive effect on Nevada, because Nevada was never a party in the district-court proceedings. *See Hansberry v. Lee*, 311 U.S. 32, 40 (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) ("A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings.").

The panel cited *Texas v. United States*, 945 F.3d 355 (5th Cir. 2019), but the appellants in that case had been granted intervention *before* the district

court rendered its judgment—and they were therefore "parties" who were subject to the preclusive effects of the district court's ruling. *See id.* at 377 ("[A] *party* may be aggrieved by a district court decision that adversely affects its legal rights or position vis-à-vis other parties in the case or other potential litigants." (emphasis added) (citation and internal quotation marks omitted)). Nevada, by contrast, was never a party to the district-court proceeding, so it cannot suffer "injury" from any "preclusive effect" of the district court's judgment. Although the panel ruled that the district court should have allowed Nevada to intervene,[2] that does not affect the standing analysis, as standing to appeal is measured by the world that existed at the moment the notice of appeal is filed. *See* Panel Op. at 20 ("Appellate standing is measured at the time of filing the notice of appeal"). When Nevada appealed on August 27, 2019, it was not a party and suffered no injury from the preclusive effects of the district court's judgment.

IV. The Panel Should Amend Its Statement That The Plaintiffs "Conceded Nevada Was Entitled To Vacatur At Oral Argument"

The panel opinion claims that the plaintiffs "conceded Nevada was entitled to vacatur at oral argument." Panel Op. at 21. Plaintiffs' counsel made no such concession at oral argument, and we respectfully ask the Court to amend this sentence in its opinion.

2. *See* Panel Op. at 19 ("Nevada should have been granted intervention as of right.").

Plaintiffs' counsel insisted throughout oral argument that Nevada could not obtain vacatur under *Munsingwear* because Nevada lacked standing to appeal the district court's judgment. Plaintiffs' counsel also insisted that the Court should dismiss Nevada's appeal for lack of appellate jurisdiction rather than vacating the district court's ruling under *Munsingwear*. Counsel did acknowledge that vacatur under *Munsingwear* would have been appropriate if the *defendants* had preserved their appeal from the district court's ruling, but counsel simultaneously insisted that Nevada could not obtain vacatur because it lacked standing to appeal:

> If the federal government had appealed the district court's ruling, we would not be able to stave off a *Munsingwear* argument because the case would be moot on account of *Little Sisters*. The problem for Nevada is they don't have standing to appeal, and that means this Court has no appellate jurisdiction to reach the *Munsingwear* question.

Oral Arg. at 32:59. Neither this statement—nor anything else that counsel said at oral argument—comes anywhere close to a concession that Nevada is entitled to vacatur, and any such concession would have been legal malpractice. The plaintiffs respectfully ask the panel to amend this sentence in its opinion to accurately reflect counsel's statements at oral argument.

CONCLUSION

The Court should grant the petition for panel rehearing.

Respectfully submitted.

/s/ Jonathan F. Mitchell
JONATHAN F. MITCHELL
Mitchell Law PLLC
111 Congress Avenue, Suite 400
Austin, Texas 78701
(512) 686-3940
jonathan@mitchell.law

Dated: December 31, 2021

Counsel for Plaintiffs-Appellees

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 1,974 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.

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

Dated: December 31, 2021

CERTIFICATE OF ELECTRONIC COMPLIANCE

Counsel also certifies that on December 31, 2021, 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.

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

CERTIFICATE OF SERVICE

I certify that on December 31, 2021, 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:

HEIDI PARRY STERN
Solicitor General
CRAIG A. NEWBY
Deputy Solicitor General
Office of the Nevada Attorney General
555 East Washington Avenue
Las Vegas, Nevada 89101
(702) 486-3594
hstern@ag.nv.gov
cnewby@ag.nv.gov

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