No. 16-11534

In the United States Court of Appeals for the Fifth Circuit

STATE OF TEXAS, ET AL.,
Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA, ET AL.,
Defendants-Appellants.

On Appeal from the Northern District of Texas, Wichita Falls Division

PLAINTIFFS-APPELLEES' MOTION TO DISMISS APPEAL OF DR. RACHEL TUDOR

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

SCOTT A. KELLER
Solicitor General
scott.keller@oag.texas.gov

JOSEPH D. HUGHES
Assistant Solicitor General
jody.hughes@oag.texas.gov

Counsel for Plaintiffs-Appellees

CERTIFICATE OF INTERESTED PERSONS

Pursuant to 5th Circuit Rules 27.4 and 28.1, I hereby certify as follows:

(1) This case is State of Texas, et al. v. United States of America, et al., No. 16-11534 (5th Cir.).

(2) The following persons and entities, including those described in the fourth sentence of Rule 28.2.1, have an interest in the outcome of this case:

Defendants-Appellants:

United States of America
U.S. Department of Education
John B. King, in his official capacity as U.S. Secretary of Education
U.S. Department of Justice
Loretta Lynch, in her official capacity as Attorney General
Vanita Gupta, in her official capacity as Principal Deputy Attorney General
U.S. Equal Employment Opportunity Commission
Jenny R. Yang, in her official capacity as Chair of the U.S. Equal Employment Opportunity Commission
U.S. Department of Labor
Thomas E. Perez, in his official capacity as U.S. Secretary of Labor
David Michaels, in his official capacity as U.S. Assistant Secretary of Labor for Occupational Safety and Health Administration

Plaintiffs-Appellees:

State of Texas
Harrold Independent School District (TX)
State of Alabama
State of Wisconsin
State of Tennessee
Arizona Department of Education
Heber-Overgaard Unified School District (AZ)

Paul LePage, Governor of the State of Maine
State of Oklahoma
State of Louisiana
State of Utah
State of Georgia
State of West Virginia
State of Mississippi, by and through Governor Phil Bryant

Movant-Appellant:

Dr. Rachel Jona Tudor

Amici Curiae:

American Civil Liberties Union Foundation
American Civil Liberties Union of Texas
C.L. "Butch" Otter, Governor of the State of Idaho
Eagle Forum Education & Legal Defense Fund
GLBTQ Legal Advocates & Defenders
Lambda Legal Defense & Education Fund, Inc.
Letitia James, Public Advocate for the City of New York
National Center for Lesbian Rights
States in Opposition to Plaintiff's Application for Preliminary Injunction
(Washington, New York, California, Connecticut, Delaware, Illinois, Maryland, Massachusetts, New Hampshire, New Mexico, Oregon, Vermont, the District of Columbia)
Transgender Law Center

Counsel:

For Defendants-Appellants:
Spencer Amdur, U.S. Department of Justice
Benjamin L. Berwick, U.S. Department of Justice
James Bickford, U.S. Department of Justice
Beth C. Brinkmann, U.S. Department of Justice
Megan A. Crowley, U.S. Department of Justice

Marleigh D. Dover, U.S. Department of Justice
August C. Flentje, U.S. Department of Justice
Sheila M. Lieber, U.S. Department of Justice
Benjamin C. Mizer, U.S. Department of Justice
Jennifer D. Ricketts, U.S. Department of Justice
Jeffrey E. Sandberg, U.S. Department of Justice
Mark B. Stern, U.S. Department of Justice
Thais-Lyn Trayer, U.S. Department of Justice

For Plaintiffs-Appellees:

Mark Brnovich, Attorney General of Arizona
Joseph David Hughes, Assistant Solicitor General of Texas
Scott A. Keller, Solicitor General of Texas
Jeff Landry, Attorney General of Louisiana
Andrew D. Leonie, Office of the Attorney General of Texas
Jeffrey C. Mateer, First Assistant Attorney General of Texas
Patrick Morrisey, Attorney General of West Virginia
David Austin R. Nimocks, Office of the Attorney General of Texas
Sam Olens, Attorney General of Georgia
Ken Paxton, Attorney General of Texas
Scott Pruitt, Attorney General of Oklahoma
Sean Reyes, Attorney General of Utah
Brad D. Schimel, Attorney General of Wisconsin
Prerak Shah, Office of the Attorney General of Texas
Herbert Slatery III, Attorney General of Tennessee
Brantley D. Starr, Office of the Attorney General of Texas
Joel Stonedale, Office of the Attorney General of Texas
Luther Strange, Attorney General of Alabama
Michael C. Toth, Office of the Attorney General of Texas

For Movant-Appellant:

Marie Eisela Galindo, Law Office of Marie Galindo
Ezra Ishmael Young, Transgender Legal Defense and Education Fund, Inc.

For Amicus Curiae American Civil Liberties Union Foundation, American Civil Liberties Union of Texas, GLBTQ Legal Advocates & Defenders, Lambda Legal Defense & Education Fund, Inc., National Center for Lesbian Rights, and Transgender Law Center:

Paul David Castillo, Lambda Legal Defense & Education Fund
Kenneth D. Upton Jr., Lambda Legal Defense & Education Fund

For Amicus Curiae C.L. "Butch" Otter, Governor of the State of Idaho

Cally Younger, Office of Governor C.L. "Butch" Otter

For Amicus Curiae Eagle Forum Education & Legal Defense Fund:

Karen Bryant Tripp

For Amicus Curiae Letitia James, Public Advocate for the City of New York: Molly Thomas-Jensen, Office of the Public Advocate

For Amicus Curiae States in Opposition to Plaintiff's Application for Preliminary Injunction (Washington, New York, California, Connecticut, Delaware, Illinois, Maryland, Massachusetts, New Hampshire, New Mexico, Oregon, Vermont, the District of Columbia):

Alan D. Copsey, Deputy Solicitor General of Washington
Anisha S. Dasgupta, Deputy Solicitor General of New York
Robert W. Ferguson, Attorney General of Washington
Colleen M. Melody, Assistant Attorney General of Washington
Clause S. Platton, Office of the Solicitor General of New York
Noah G. Purcell, Solicitor General of Washington
Eric T. Schneiderman, Attorney General of New York
Barbara D. Underwood, Solicitor General of New York

/s/ Scott A. Keller
Scott A. Keller
Counsel for Plaintiffs-Appellees

Under Federal Rule of Appellate Procedure 27 and Fifth Circuit Rule 27.4, Plaintiffs-Appellees the State of Texas et al. ("Plaintiffs") hereby move to dismiss the appeal of Dr. Rachel Tudor. Defendants-Appellants the United States of America et al. ("Defendants") do not oppose this motion. Dr. Tudor opposes it.

Plaintiffs ask that the Court consider this motion in conjunction with Plaintiffs' pending motion for an extension of time to file their Appellees' brief, which is currently due February 6. Defendants are unopposed to that motion; only Dr. Tudor opposes Plaintiffs' request for an extension. But Dr. Tudor is not a proper party to this appeal. Accordingly, the Court should discount Dr. Tudor's opposition to Plaintiffs' extension motion and dismiss her appeal of the preliminary injunction. In any event, Plaintiffs ask the Court to determine whether Dr. Tudor is a proper party so that Plaintiffs will know whether they need to devote time and words to briefing issues that Dr. Tudor has raised but Defendants have not. *See, e.g.*, Tudor Br. 31-45. Plaintiffs further ask that the motions panel considering Plaintiffs' extension motion consider the issues raised in this motion, because the potential necessity of responding to issues raised only by a non-party further supports Plaintiffs' request for an extension of time.

BACKGROUND

In a separate lawsuit, in March 2015, the U.S. Department of Justice sued Southeastern Oklahoma State University and its governing board, alleging discrimination and retaliation against Dr. Rachel Tudor, a transgender professor, under Title VII. Tudor Br. 1; ROA.1167-68. In May 2015, Dr. Tudor intervened in

that suit and claimed, *inter alia*, that she had been subjected to a hostile work environment. Tudor Br. 1; ROA.1193. Shortly thereafter, the Oklahoma defendants moved to dismiss Dr. Tudor's hostile-work-environment claims on the ground that she was not a member of a protected class for Title VII purposes. ROA.1183. In July 2015, the district court denied the Oklahoma defendants' motion to dismiss, holding that Tenth Circuit precedent allowed Dr. Tudor to claim that the Oklahoma defendants discriminated against her because "the actions Dr. Tudor alleges Defendants took against her were based upon their dislike of her presented gender." ROA.1183 (quoting *United States v. Se. Okla. State Univ.*, No. Civ-15-324-C, 2015 WL 4606079 at *2 (W.D. Okla. July 10, 2015)). That separate lawsuit has since been stayed in light of the preliminary injunction in the instant case, ROA.1066, and the clarifying order issued October 18. Order, ECF No. 86 at 6 n.2 (Oct. 18, 2016); ROA.1367.

The district court granted the preliminary injunction at issue in this appeal on August 21, 2016. ROA.1030. Dr. Tudor moved for permissive intervention under Rule 24(b) three weeks later, on September 12, 2016. ROA.1167. Dr. Tudor sought to intervene "for the limited purpose of seeking a declaratory judgment recognizing that" the order denying Oklahoma's motion to dismiss in Dr. Tudor's lawsuit "finally decided the question of whether Dr. Tudor is a member of a protected class under Title VII." ROA.1168 (citing *Se. Okla. State Univ.*, 2015 WL 4606079 at *2).

Plaintiffs and Defendants opposed Dr. Tudor's motion to intervene on several grounds. ROA.1312; ROA.1322. First, it was untimely, having been filed more than

three months after this suit was initiated and more than 15 months after Dr. Tudor intervened in the Oklahoma litigation. ROA.1323-1328. Second, it did not identify a "claim or defense that shares with the main action a common question of law or fact," as required by Fed. R. Civ. P. 24(b). ROA.1315-1316. Fatally, Dr. Tudor's stated reason for intervening—to assert that the denial of Oklahoma's motion to dismiss in Dr. Tudor's case collaterally estops Oklahoma from litigating the protected-class question here—is invalid as a matter of law because collateral estoppel requires a final judgment, which has not yet been rendered in either case. ROA.1316-1319.

On October 27, Dr. Tudor asked the district court to rule on her motion to intervene. ROA.1428. One week later, on November 3, 2016, Dr. Tudor filed a protective notice of appeal of the preliminary injunction and the October 18 clarifying order. ROA.1455. Dr. Tudor filed an appellant's brief in this Court on January 3, 2017.

ARGUMENT

A. Dr. Tudor Cannot Appeal the Preliminary Injunction Because She Is Not a Party to This Suit.

The district court has not ruled on Dr. Tudor's intervention motion, so she remains a non-party. *U.S. ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 933 (2009) ("[I]ntervention is the requisite method for a nonparty to become a party to a lawsuit."). "[A] prospective intervenor does not become a party to the suit unless and until he is allowed to intervene." *Robert Ito Farm, Inc. v. County of Maui*, 842

F.3d 681, 687 (9th Cir. 2016). As a would-be intervenor, Dr. Tudor cannot appeal the district court's preliminary injunction.

"The rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled." *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (per curiam); *see* Fed. R. App. P. 3(c)(1)(A) (requiring notice of appeal to "specify the *party or parties* taking the appeal" (emphasis added)). Specifically, this Court has recognized that "would-be intervenors" who "never obtained the status of party litigants" cannot appeal orders unrelated to their intervention efforts. *Edwards v. City of Houston*, 78 F.3d 983, 993 (5th Cir. 1996) (en banc); *see Toronto-Dominion Bank v. Cent. Nat'l Bank & Trust Co.*, 753 F.2d 66, 68 (8th Cir. 1985) ("Because the motion to intervene has not yet been granted or denied, BNB's status remains uncertain and it has no standing to take an appeal or appear as a party.").[1]

Dr. Tudor could have petitioned for a writ of mandamus directing the district court to rule on her intervention motion before Defendants perfected appeal. *See, e.g.*, *Pfizer, Inc. v. Kelly (In re Sch. Asbestos Litig.)*, 977 F.2d 764, 792 (3d Cir. 1992) (mandamus is available to remedy a court's refusal to rule on a pending motion). In

[1] An order denying a motion for permissive intervention is appealable only if the district court abused its discretion in denying permission to intervene. *See, e.g.*, *Woolen v. Surtran Taxicabs, Inc.*, 684 F.2d 324, 330-31 (5th Cir. 1982). Plaintiffs and Defendants both explained below why it would not have been an abuse of discretion to deny her intervention. ROA.1312-1328; *see also* Defs.' Br. 17 n.3. However, because the district court has not yet ruled, and Dr. Tudor has not challenged the failure to rule as an implicit denial of intervention, this Court need not reach the question of whether the district court would have abused its discretion in denying permissive intervention.

the alternative, Dr. Tudor could have argued that the district court implicitly denied her intervention motion and abused its discretion in denying permissive intervention. *See Toronto–Dominion Bank*, 753 F.2d at 68 (recognizing that a court's "failure to rule on a motion to intervene can be interpreted as an implicit denial" of the motion); *Heaton v. Monogram Credit Card Bank of Ga.*, 297 F.3d 416, 420 (5th Cir. 2002) (reviewing the "effective denial of the FDIC's motion to intervene" under the collateral-order doctrine). But Dr. Tudor did not pursue either of those options, and this Court should not put her in the same position as a successful intervenor by allowing her to appeal an order in a case to which she is not a party.

B. Dr. Tudor Cannot Appeal the Preliminary Injunction as a Non-Party.

Nor can Dr. Tudor invoke the rare exception allowing appeals by non-parties who participate without objection in the district court and are functionally treated as parties. *See Doe v. Pub. Citizen*, 749 F.3d 246, 256-265 (4th Cir. 2014). In *Public Citizen*, the Fourth Circuit allowed a non-party's appeal of peripheral issues under unique circumstances. That case is distinguishable in several respects.

First, in *Public Citizen*, the movant's intervention motion was unopposed, and the district court ultimately granted it in post-judgment proceedings.[2] *Id.* at 256. Second, the movant had "participated in the case" before judgment with the acquiescence of the parties and the district court. *Id.* at 260. Specifically, the movant

[2] The district court later attempted to revoke the movant's intervention in *Public Citizen*, but it lacked jurisdiction to do so because appeal had already been perfected. 749 F.3d at 259.

had objected to motions filed by the plaintiffs (which objections the district court considered and overruled), and also filed its own motion (apart from its intervention motion). *Id.* Third, the movant affirmatively challenged the district court's delay in ruling as a "'constructive denial' of the motion to intervene." *Id.* at 253. Finally, the movant did not challenge the merits judgment awarding the plaintiff injunctive relief; instead, it appealed only the court's peripheral orders sealing the record and allowing the plaintiff to proceed under a pseudonym. *Id.*

Here, by contrast, Plaintiffs and Defendants both objected to Dr. Tudor's belated motion to intervene. Dr. Tudor did not participate in the proceedings that led to the preliminary injunction; she did not even move to intervene until three weeks after the preliminary injunction issued. Unlike the putative intervenor in *Public Citizen*, Dr. Tudor has not challenged on appeal the district court's failure to rule on her motion to intervene or treated it as a constructive denial of her motion. And far from challenging peripheral matters, Dr. Tudor seeks to challenge the preliminary injunction itself. This case is thus very different from both *Public Citizen* and other rare cases in which non-parties who timely participated in the district-court proceedings were allowed to appeal. *Id.* at 260 (discussing *Kaplan v. Rand*, 192 F.3d 60 , 66-67 (2d Cir. 1999); *Commodity Futures Trading Comm'n v. Topworth Int'l, Ltd.*, 205 F.3d 1107, 1113-14 (9th Cir. 1999); *Binker v. Pennsylvania*, 977 F.2d 738, 745 (3d Cir. 1992)).

II. Dr. Tudor's Attempt to Appeal Is Untimely.

Dr. Tudor filed her notice of appeal on November 3, 2016. ROA.1455. She seeks to appeal both the August 21 preliminary injunction, ROA.1030, and the October 18 order clarifying the injunction, ROA.1362. Dr. Tudor had 60 days (until October 20, 2016) to appeal the preliminary injunction. Fed. R. App. P. 4(a)(1)(B). Her appeal, filed 74 days after August 21, is untimely.

Dr. Tudor invokes Federal Rule of Appellate Procedure 4(a)(3), which provides that "[i]f one party timely files a notice of appeal, any other *party* may file a notice of appeal within 14 days after the date when the first notice was filed." Fed. R. App. P. 4(a)(3) (emphasis added); Tudor Br. 5. But "a prospective intervenor does not become a party to the suit unless and until he is allowed to intervene." *Robert Ito Farm,* 842 F.3d at 687 (holding that putative intervenors are not "parties" for purposes of the Federal Magistrate Act's consent requirement). To date, Dr. Tudor has not been allowed to intervene. Accordingly, her reliance on Rule 4(a)(3) is misplaced because she is not an "other party" under that Rule. *See Eisenstein*, 556 U.S. at 933.

In *Eisenstein*, the Supreme Court held that the Federal Government is not a "party" to a *qui tam* suit for purposes of Federal Rule of Appellate Procedure 4(a)(1), which extends the appeal deadline to 60 days when the United States is "one of the parties," unless the Government "intervenes in accordance with the procedures established by federal law." 556 U.S. at 933. Similarly, Dr. Tudor will not "become a 'party' to [this] lawsuit" unless and until she is allowed to "intervene

in the action." *Id.* (defining a "'party' to litigation [a]s '[o]ne by or against whom a lawsuit is brought'" (quoting Black's Law Dictionary 1154 (8th ed. 2004))). And Dr. Tudor has not explained why a potential intervenor would be deemed a "party" for purposes of Rule 4(a)(3) when she is not one for purposes of Rule 4(a)(1).

Nor is there jurisdiction over Dr. Tudor's attempted appeal of the October 18 clarifying order. Interlocutory orders clarifying injunctions are unappealable. *See, e.g.*, *Thomas v. Blue Cross & Blue Shield Ass'n*, 594 F.3d 823, 832 (11th Cir. 2010); *Mikel v. Gourley*, 951 F.2d 166, 169 (8th Cir. 1991). Dr. Tudor argues that the Court has pendent jurisdiction over her appeal of the clarifying order because that order is "inextricably intertwined with" the preliminary injunction. Tudor Br. 5. But that argument assumes Dr. Tudor properly and timely appealed the injunction itself.

In any event, the exercise of pendent appellate jurisdiction is wholly discretionary. *See, e.g.*, *Wallace v. County of Comal*, 400 F.3d 284, 291-92 (5th Cir. 2005). And "[n]one of the few cases in which this court has exercised pendent appellate jurisdiction is substantially similar or fairly analogous to th[is] case." *Byrum v. Landreth*, 566 F.3d 442, 450 & n.9 (5th Cir. 2009) (citing cases).

* * * *

In sum, Dr. Tudor is not a party to this lawsuit and cannot properly appeal the preliminary injunction or the order clarifying it. Accordingly, the Court should discount her opposition to Plaintiffs' pending motion for extension of time and dismiss her appeal. However, if the Court deemed it appropriate to treat Dr. Tudor's appellant's brief as an amicus curiae brief, Plaintiffs would have no objection. In any

event, Plaintiffs ask the Court to determine whether Dr. Tudor is a proper party so that Plaintiffs will know whether they need to devote time and words to briefing issues that Dr. Tudor has raised but Defendants have not. *See, e.g.*, Tudor Br. 31-45.

CONCLUSION

The Court should dismiss Dr. Tudor's appeal.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

/s/ Scott A. Keller
SCOTT A. KELLER
Solicitor General

JOSEPH D. HUGHES
Assistant Solicitor General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

Counsel for Plaintiffs-Appellees

January 30, 2017

Certificate of Conference

On January 30, 2017, Plaintiffs' counsel conferred via email with Jeffrey Sandberg, counsel for Defendants-Appellants; and with Ezra Young, counsel for Movant-Appellant Dr. Rachel Tudor. Mr. Sandberg stated that Defendants-Appellants do not oppose the dismissal of Dr. Tudor's appeal and will not file an opposition. Mr. Young stated that Dr. Tudor opposes dismissal of her appeal and will file an opposition.

/s/ Scott A. Keller
Scott A. Keller

January 30, 2017

Certificate of Service

I certify that on January 30, 2017, this motion was (1) served via the Court's CM/ECF Document Filing System, https://ecf.ca5.uscourts.gov, upon all registered CM/ECF users; and (2) 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. I further certify that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Scott A. Keller
Scott A. Keller

January 30, 2017

Certificate of Compliance

This motion complies with the word limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts exempted by Fed. R. App. P. 32(f), it contains 2,240 words. This motion complies with the requirements of Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface (Equity Text A and Equity Caps A) using Microsoft Word 2010.

/s/ Scott A. Keller
Scott A. Keller

January 30, 2017