IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

STATE OF TEXAS, ET AL.,	§	
	§	
Plaintiffs,	§	
	§	
V.	§	CIVIL ACTION NO. 7:16-CV-00054-O
	§	
UNITED STATES OF AMERICA, ET AL.,	§	
	§	
Defendants.	§	

PLAINTIFFS' RESPONSE TO DR. RACHEL TUDOR'S MOTION FOR INTERVENTION

Dr. Rachel Tudor moves *only* for permissive intervention under Federal Rule of Civil Procedure 24(b)(1). ECF No. 67. Rule 24(b)(1) creates a procedural avenue for "permissive" interventions, as distinguished from "interventions of right," which are governed by Federal Rule of Civil Procedure Rule 24(a). The Fifth Circuit Court of Appeals has maintained on numerous occasions that Rule 24(b) motions are "left to the sound discretion of the district court," *Hopwood v. Texas*, 21 F.3d 603, 606 (5th Cir. 1994) (*per curiam*), subject to exceedingly limited appellate review. *Id*. (citing cases). Indeed, not once has the Fifth Circuit "reversed a lower court's decision on Rule 24(b) intervention." *Ingebretsen on Behalf of Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 281 (5th Cir. 1996).[1] For the reasons herein stated, the district court should exercise its broad discretionary authority to deny Dr. Tudor's motion.[2]

[1] Plaintiffs searched extensively and located no Fifth Circuit cases after *Ingebretsen* reversing a district court's denial of a Rule 24(b) motion. However, Plaintiffs located several Fifth Circuit cases affirming the denial of intervention under Rule 24(b). *See*, *e.g.*, *Staley v. Harris Cnty., Tex.*, 160 F. App'x 410, 414 (5th Cir. 2005) (*per curiam*); *Pruett v. Harris Cnty. Bail Bond Bd.*, 104 F. App'x 995, 997 (5th Cir. 2004) (*per curiam*); *Lucas v. McKeithen*, 102 F.3d 171, 173 (5th Cir. 1996).

[2] Defendants also oppose Dr. Tudor's motion to intervene. ECF No. 81. "[T]he opposition of all of the original parties to the main action to intervention is an element for the Court's consideration." *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, F. Supp. 252, 257 (N.D. Ill. 1962), *aff'd*, 315 F.2d 564 (7th Cir. 1963).

A. Legal Standard

Federal Rule of Civil Procedure 24 authorizes two types of intervention: "intervention of right" and permissive intervention. Fed. R. Civ. P. 24(a) and (b). The portion of the rule concerning permissive intervention provides, in relevant part: "On timely motion, the court may permit anyone to intervene who: (A) is given a conditional right to intervene by a federal statute; or (B) has a claim or defense that shares with the main action on a common question of law or fact." Fed. R. Civ. P. 24(b). Even if the conditions set forth in Rule 24(b) are satisfied, however, it remains within the discretion of the district court to determine whether to allow the intervention. *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.,* 732 F.2d 452, 471 (5th Cir. 1984) (holding that permissive intervention is discretionary even where "there is a common question or law or fact, or the requirements are Rule 24(b) are otherwise satisfied"). Stated differently, permissive intervention is "wholly discretionary." *Id.* District court decisions on Rule 24(b) motions receive an "exceedingly deferential" standard of review. *Ingebretsen,* 88 F.3d at 281. Absent a "clear abuse of discretion," the district court's ruling will stand. *Cajun Elec. Power Coop., Inc. v. Gulf States Utils., Inc.,* 940 F.2d 117, 121 (5th Cir. 1991).

B. Argument

Timeliness is in "indispensable factor" in establishing the grounds for a permissive intervention. *Staley v. Harris Cnty., Tex.*, 223 F.R.D. 458, 461 (S.D. Tex. 2004), *aff'd*, 160 F. App'x 410 (5th Cir. 2005) (upholding an "exceptionally good" and "thorough" district court opinion). An untimely intervention motion—under Rule 24 (a) or (b)—may be denied without taking into account the Rule's other requirements. *Id.* (citing *Edwards,* 78 F.3d at 999); 7C WRIGHT, MILLER, & KANE, FEDERAL PRACTICE AND PROCEDURE § 1913 (3d ed. 2007) (explaining that "timeliness *requires* a discretionary balancing of interests and in this sense *all* intervention is discretionary") (emphasis added) (internal footnotes omitted). "In exercising its

discretion," a court must consider whether permissive intervention "will unduly delay or prejudice the adjudication of the *original* parties' rights." Fed. R. Civ. P. 24(b) (emphasis added).

> Four factors serve as guideposts for determining the timeliness requirement:
>
> (1) the length of time during which the would-be intervenor actually knew or reasonably should have known of its interest in the action before petitioning for leave to intervene, (2) the extent of the prejudice that the existing parties to the litigation may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as it actually knew or reasonably should have known of its interest in the action, (3) the extent of the prejudice that the would-be intervenor may suffer if its petition for leave to intervene is denied, [and] (4) the existence of unusual circumstances militating either for or against a determination that the application is timely.

Staley, 160 F. App'x at 412 (citing *Stallworth v. Monsanto Co.*, 558 F.2d 263, 264–66 (5th Cir. 1977)). As perhaps suggested by the multifactor test, the timeliness inquiry is "contextual." *Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994). It is based on "all the circumstances" rather than "chronical considerations," *Stallworth*, F.2d at 263, or "absolute measures of timelines," *Epsy*, 18 F.3d at 1205.

Here, each of the timeliness factors weighs against intervention. First, Dr. Tudor reasonably should have known about this case around May 25, 2016, the date Plaintiffs filed suit. The suit was filed in the aftermath of a series of related, highly-publicized events. Presumably, as a national advocacy organization, Dr. Tudor's attorneys were well aware of these events. Earlier in May 2016, DOJ and North Carolina filed suit against each other in connection with a North Carolina law designating intimate areas in public facilities to members of one sex. Then, on May 13, DOE/DOJ jointly issued a "Dear Colleague" Letter, informing the nation's public schools that they must provide members of both sexes access to the same intimate areas or risk legal and financial consequences. ECF No. 6-10. Twelve days later, Plaintiffs filed suit challenging the lawfulness of a new federal rule evidenced by the

"Dear Colleague" Letter and other documents. As with the preceding events, the case attracted national media coverage. *See*, *e.g.*, *States Sue Obama Administration Over Transgender Bathroom Policy*, N.Y. TIMES, May 25, 2016, at A12.

At the time Plaintiffs filed suit, moreover, Dr. Tudor was already a party in a federal suit in Oklahoma involving allegations that a public university improperly denied Dr. Tudor access to restrooms designated for the opposite sex. *United States v. Se. Okla. State Univ.*, No. 5:15-cv-324 (W.D. Okla.) (filed Mar. 30, 2015) (ECF No. 24 at ¶¶ 43–63). And since intervening in the Oklahoma case in May 2015, Dr. Tudor has been represented by counsel who are experts "on the subject matter [of] employment discrimination against a transgender person," and are now affiliated with a national advocacy organization dedicated to that purpose. *Id*. (ECF Nos. 9 ¶ 7, 10 ¶ 7, 118, 119). Given the high-profile nature of the issue at hand, and Dr. Tudor's ability through counsel to obtain information on the proceedings, there is no reason why Dr. Tudor did not act sooner to intervene or to participate as *amicus curiae* under LR 7.2 (b), as several States and interested entities on both sides of the pertinent legal issues did. ECF Nos. 19, 28, 34, 36-1, 38.1, 48, and 55. "Neither Federal Rules of Civil Procedure nor the law of equity rewards those who slumber on their rights," especially when it comes to intervening under in high-profile cases under Rule 24(b). *Staley*, 223 F.R.D. at 463, *aff'd*, 160 F. App'x 410.

Second, Dr. Tudor's intervention at this stage in the proceedings will prejudice the existing parties. From the onset, Plaintiffs and Defendants have proceeded diligently and collaboratively to bring the litigation to a rapid disposition. Plaintiffs brought suit eleven days after the DOE/DOJ Dear Colleague Letter (ECF No. 6-10). After adding two more Plaintiff States and filing a timely amended complaint, Plaintiffs moved for a preliminary injunction on July 6, 2016. ECF No. 11. Prior to that filing, the parties agreed to expedite the remaining briefing with the goal of providing "clarity to education authorities *before* the 2016–2017 school year

commences." *Id.* at 37 (emphasis in original). Pursuant to this agreement, which is reflected in the Court's scheduling order (ECF No. 12), Defendants responded to the preliminary injunction motion on July 27, 2016 and Plaintiffs replied on August 3, 2016. ECF Nos. 40, 52. During this time, 23 different amici appeared, through seven different briefs to share their perspectives with the Court. ECF Nos. 19, 28, 34, 36.1, 38.1, 48, and 55. Furthermore, at the August 12, 2016 hearing for the preliminary injunction, Plaintiffs again mentioned the virtue in resolving the contested legal issues before August 22, the first day of school in many of the Plaintiff States. On August 21, 2016, the Court ruled on Plaintiffs' motion and entered a nationwide preliminary injunction. ECF No. 58.

Further, it bears noting the parties have continued to brief many federal questions on an expedited basis to bring the case to a prompt conclusion for the sake of public education educational institutions across the country. After the preliminary injunction order, but still before Dr. Tudor's intervention motion, Defendants and Plaintiffs each filed detailed notices in accordance with the Court's instructions. ECF Nos. 61, 64. And on the day that Dr. Tudor moved to intervene, Defendants moved to clarify the preliminary injunction order. ECF No. 65. Once again, Plaintiffs responded on a mutually agreed upon expedited timeline, and the Court promptly heard oral argument from the parties on the motion. ECF Nos. 70, 73, and 76.

Throughout the proceedings, Plaintiffs and Defendants have demonstrated a mutual interest in resolving the case with appropriate haste. As such, "[g]ranting intervention in this case and at this time would clearly interfere with its rapid disposition, and it is not warranted by the circumstances." *Dillard v. Cty. of Foley*, 926 F. Supp. 1053, 1062 (M.D. Ala. 1995). Permissive intervention is inappropriate where, as here, the would-be intervenor moves after the district court entered a preliminary injunction, and knew or reasonably should have known of the case. *Preston v. Thompson*, 589 F.2d 300, 304 (7th Cir. 1978) (affirming denial of permissive

intervention filed three weeks after preliminary relief where movants knew that the relief sought by plaintiffs could impinge on their interests).

This matter has progressed swiftly from the pleadings to the entry of injunctive relief, and perhaps to a final judgement or appeal in the near future. ECF No. 75 at 2. As the Fifth Circuit has noted, however: "Additional parties always take additional time. Even if they have no witnesses of their own, they are the source of additional questions, briefs, arguments, motions and the like which tend to make the proceeding a Donnybrook Fair." *Bush v. Viterna*, 740 F.2d 350, 359 (5th Cir. 1984) (quoting *Crosby Steam Gage & Valve Co. v. Manning, Maxwell & Moore, Inc.* 51 F. Supp. 972, 973 (D. Mass. 1941) (J. Wyzanski)). Thus, permitting Dr. Tudor to intervene will prejudice the existing parties and their collective effort to adjudicate their issues promptly. *See Otto v. Pa. State Educ. Ass'n-NEA*, 107 F. Supp. 2d 615, 628 (M.D. Pa. 2000) (denying Rule 24(b) motion that would unduly delay the adjudication of the rights of the original plaintiffs), *aff'd in part, rev'd in part on other grounds*, 330 F.3d 125 (3d Cir. 2003).

Third, Dr. Tudor will suffer no prejudice if leave is denied. Dr. Tudor is an intervenor-plaintiff in a separate federal suit, now for nearly 18 months. The Court's injunction in the case *sub judice* does not prevent Professor Tudor's case and claims from moving forward. While the injunction restrains the Defendants, it will generally not apply to private parties. *See* ECF No. 64 at 3–6. The Oklahoma case "will permit a full adjudication of their rights. There is no need further to complicate or delay this action by the interjection of new parties and an entirely new set of claims." *Meridian Homes Corp. v. Nicholas W. Prassas & Co.*, 89 F.R.D. 552, 555 (N.D. Ill. 1981) (denying permissive intervention because movants were parties in a state court case), *aff'd*, 683 F.2d 201 (7th Cir. 1982).

Finally, additional circumstances militate against intervention. This case involves issues that are "primarily legal, not factual." ECF No. 75 at 2. Thus, the

parties have represented that "they do not foresee, at this time, significant (if any) factual disputes" or the related need for discovery. *Id*. Dr. Tudor's proposed intervenor-complaint purports to introduce an array of allegations and facts that are specific to the events and circumstances of the movant's employment at a public university in Oklahoma, and do not relate to the central issue in this matter, to wit: whether state and local authorities, or the federal government, control access to intimate areas. To include Dr. Tudor's fact-specific allegations "in proceedings which [are] already complex . . . . would unduly delay the remaining proceedings." *Penick v. Columbus Ed. Ass'n*, 574 F.2d 889, 890–91 (6th Cir. 1978).

C. Conclusion

For the reasons stated herein, this Court should deny Dr. Tudor's motion to intervene in this case.

Respectfully submitted this the 3rd day of October, 2016,

LUTHER STRANGE
Attorney General of Alabama

BRAD D. SCHIMEL
Attorney General of Wisconsin

PATRICK MORRISEY
Attorney General of West Virginia

HERBERT SLATERY, III
Attorney General of Tennessee

MARK BRNOVICH
Attorney General of Arizona

SCOTT PRUITT
Attorney General of Oklahoma

JEFF LANDRY
Attorney General of Louisiana

SEAN REYES
Attorney General of Utah

SAM OLENS
Attorney General of Georgia

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

BRANTLEY STARR
Deputy First Assistant Attorney General

PRERAK SHAH
Senior Counsel to the Attorney General

ANDREW D. LEONIE
Associate Deputy Attorney General for Special Litigation

/s/ Austin R. Nimocks
AUSTIN R. NIMOCKS
Associate Deputy Attorney General for Special Litigation
Texas Bar No. 24002695
Austin.Nimocks@texasattorneygeneral.gov

MICHAEL TOTH
Senior Counsel for Special Litigation

Office of Special Litigation
OFFICE OF THE ATTORNEY GENERAL OF TEXAS
P.O. Box 12548, Mail Code 009
Austin, Texas 78711-2548

Tel: 512-936-1414

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I, Austin R. Nimocks, hereby certify that on this the 3rd day of October, 2016, a true and correct copy of the foregoing document was transmitted via using the CM/ECF system, which automatically sends notice and a copy of the filing to all counsel of record.

/s/ Austin R. Nimocks
Austin R. Nimocks