No. 16-11534

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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); GOVERNOR OF MAINE PAUL LEPAGE; STATE OF OKLAHOMA; STATE OF LOUISIANA; STATE OF UTAH; STATE OF GEORGIA; STATE OF WEST VIRGINIA; STATE OF MISSISSIPPI; STATE OF KENTUCKY,

Plaintiffs – Appellees

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF EDUCATION; JOHN B. KING, in his Official Capacity as United States Secretary of Education; UNITED STATES DEPARTMENT OF JUSTICE; JEFF SESSIONS, in his Official Capacity as Attorney General of the United States; VANITA GUPTA, in her Official Capacity as Principal Deputy Assistant Attorney General; UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; JENNY R. YANG, in her Official Capacity as the Chair of the United States Equal Employment Opportunity Commission; UNITED STATES DEPARTMENT OF LABOR; THOMAS E. PEREZ, in his Official Capacity as United States Secretary of Labor; DAVID MICHAELS, in his Official Capacity as the Assistant Secretary of Labor for Occupational Safety and Health Administration,

Defendants – Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

PETITION FOR PANEL REHEARING OF DISMISSAL OF APPEAL BY MOVANT-APPELLANT DR. RACHEL TUDOR

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to 5th Cir. 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 undersigned counsel of record hereby certifies that 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
Jeff Sessions, in his 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
Oklahomans for Equality, Inc.

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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
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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:

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For Amicus Curiae Letitia James, Public Advocate for the City of New York:

Molly Thomas-Jensen, Office of the Public Advocate for the City of New York

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):

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Anisha S. Dasgupta, Deputy Solicitor General of New York
Robert W. Ferguson, Attorney General of Washington
Colleen M. Melody, Assistant Attorney General of Washington
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/s/ Ezra Young
Transgender Legal Defense and Education Fund, Inc.

Counsel for Dr. Rachel Jona Tudor

REQUEST FOR ORAL ARGUMENT

Movant-Appellant Dr. Rachel Tudor respectfully requests oral argument for this petition.

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ARGUMENT

In accordance with Fifth Circuit Rule 40.2, Movant-Appellant Dr. Rachel Tudor respectfully brings to the attention of the panel claimed errors of fact and law in its February 9, 2017 opinion dismissing her appeal as well as a substantial change in circumstance that warrant rehearing.

Mistaken Critical Facts

The Opinion is premised on critical errors of fact concerning the timing of Tudor's intervention below and the date the District Court modified the preliminary injunction to enjoin Tudor's Oklahoma case. The Opinion also misapprehends Tudor's participation in the proceedings below, facts giving rise to the due process violation sown by the District Court's issuance of the preliminary injunction without hearing from Tudor, as well as the relief Tudor seeks through her direct appeal of the injunction. These facts are critical because they inform the propriety of nonparty appeal (see *infra* Argument at 7–14).

Tudor moved to intervene on September 12, 2016,[1] more than a month before the October 18 order's issue[2] and before the Oklahoma court ordered Tudor's case remain stayed[3]. *Contra* Opinion, p. 3 (Tudor moved to intervene below *after* the October 18 order was issued and after the Oklahoma court deemed Tudor's case enjoined).

Tudor also participated below to the extent permitted by the District Court. Within days of learning that her interests might be impinged Tudor swiftly moved to intervene.[4] Tudor completed responsive briefing on her intervention on October 17, 2016.[5] Tudor also moved for her intervention to be decided, explicitly pointing out failure to rule could

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[1] ROA.1167.
[2] ROA.1367 n.2.
[3] Tudor Br. at 15 n.7 (*citing* ROA.1078 (Defendant-Appellant's notice advising that in "excess of caution" they would seek stay from Oklahoma court as means to comply with August 21 order); U.S. and *Tudor v. Se. Okla. State Univ. et al.*, 5:15-cv-324, Doc. 123 (W.D.Okla. Sept. 6, 2016) (staying Oklahoma proceedings pending clarification of the injunction's scope); *Tudor*, 5:15-cv-324, Doc. 130 (Nov. 16, 2016) (denying DOJ's request to lift stay because District Court deemed Oklahoma court proceedings enjoined)).
[4] Tudor Br. at 20 (Tudor notified the parties of her intent to intervene on September 7, 2016) (*citing* ROA.1353 to ROA.1354); *id.* at 21 (Tudor moved to intervene on September 12, 2016) (*citing* ROA.1167 to ROA.1177 [motion to intervene]; ROA.1179 to ROA.1191 [putative complaint-in-intervention]).
[5] ROA.1334 (reply to Defendants' opposition to Tudor's intervention below); ROA.1342 (reply to Plaintiffs' opposition to Tudor's intervention below).

impede her efforts at appealing the injunction[6]. *Contra* Opinion, p. 5 (supposing Tudor did not participate in proceedings below).

By repeatedly refusing to hear from Tudor but proceeding to enjoin her Oklahoma case, the District Court deprived Tudor of due process.[7] The District Court invited the parties to brief whether Tudor's Oklahoma case should be enjoined[8] (and weighed evidence from the Oklahoma case Plaintiffs supplied[9]), but it declined to hear from Tudor at the September 30, 2016 hearing[10] and refused Tudor's evidence[11]. Ultimately, the

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[6] ROA.1428 (filed Oct. 27, 2016).

[7] *See, e.g.*, *Adams v. Baldwin Cty. Bd. of Ed. of Baldwin Cty., Ga.*, 628 F.2d 895, 897 (5th Cir. 1980) (important constitutional rights at stake in intervention below demand "a scrupulous regard for due process considerations" requiring "evidentiary hearing").

[8] Tudor Br. at 20 (*citing* ROA.1084).

[9] Tudor Br. at 20–21 ("On September 9, 2016, Plaintiffs Appellees advised the District Court that they believed Dr. Tudor's case was covered by the injunction (ROA.1087 to ROA.1090). In support of their position, Plaintiffs-Appellees produced excerpts from five depositions taken by DOJ *and* Tudor in the course of discovery in the Oklahoma case and invited the District Court to weigh these in clarifying whether the injunction applied to Tudor's case (ROA.1088 to ROA.1089).").

[10] Tudor Br. at 21 (Tudor and her counsel attended the September 30, 2016 hearing on the scope of the injunction and notified the Court of their presence but "were not invited to participate") (*citing* ROA.1428).

[11] Tudor Br. 21 to 22 (Tudor pointed to two other "deposition excerpts [that] evidence that in the Oklahoma case, Oklahoma's own witnesses attest there are no university rules or state laws prohibiting transgender people from using restrooms matching their sex. ROA.1358 ('She could use any restroom'.); ROA.1361 ('We don't' have a policy—RUSO does not have a policy that specifies one way or the other, and so—I mean, so the person can use whatever restroom they're comfortable with'.).."). *See also* ROA.1173 to ROA.1174 (arguing that Plaintiffs misrepresented events in the Oklahoma case to the district court).

District Court deemed Tudor's own pleadings in the Oklahoma case to trigger grounds for enjoining Tudor's case[12]. In effect, the District Court tried components of Tudor's Oklahoma case and, with Tudor *in abstentia*, enjoined the Oklahoma case.[13] *Contra* Opinion, p. 6 ("we are not convinced that it would be in the interests of justice to allow a nonparty to pursue an appeal")[14].

Tudor's central aim in intervening below[15] (and in her appeal[16]) is to get a ruling that the District Court does not have jurisdiction over her Oklahoma case and thus was not empowered to enjoin those proceedings. *Contra* Opinion, p. 4 (implying Tudor has an "effective means of obtaining review" of issues grieved by seeking mandamus).

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[12] ROA.1367 n.2 (enjoining Oklahoma case because Tudor's own hostile work environment claim "involve[s] access to intimate facilities" and holding and array of substantive actions which Tudor and DOJ must necessarily undertake collaboratively in the Oklahoma case to be enjoined).

[13] *See Chase Nat'l Bank v. City of Norwalk, Ohio*, 291 U.S. 431, 437 (1934) (subjecting nonparties to an injunction "violates established principles of equity jurisdiction and procedure").

[14] *But see U.S. v. Urbana*, 412 F.2d 1081, 1082 (5th Cir. 1969) (where remand will not resolve all issues "efficiency in the administration of justice demands that we consider the other assignments of error raised on this appeal").

[15] *See, e.g.*, ROA.1169 (arguing her intervention should be denied as moot if the district court does not have jurisdiction over the Oklahoma case); ROA.1429 to ROA.1430 (similar).

[16] *See, e.g.*, Tudor Br. at 26–31.

Misapplication of Law

The Opinion cites one precedential case, *In re Scott*, 163 F.3d 282, 283–84 (5th Cir. 1998), claiming that where a district court does not rule on a motion to intervene mandamus should be sought rather than direct appeal of an order that impinges the putative intervenor's interests.[17] But *In re Scott* does not involve a putative intervenor or a nonparty appeal. The better precedent is *Maiz v. Virani*, 311 F.3d 334, 338–39 (5th Cir. 2002), where this Court recognizes that a direct appeal of a order is preferable to mandamus where the nonparty's interests are impinged by an appealable order.

In re Scott is also distinguishable on the facts because Tudor seeks relief only obtainable through a direct appeal of the injunction. Because Tudor can properly come before this Court on nonparty appeal (see *infra* Argument at 7–14) or mandamus, the Court should hear her appeal now.[18] Tudor's appeal should also be heard now because she will be unable to appeal the injunction later—if Tudor successfully intervenes

[17] Opinion, p. 3.
[18] *See Hines v. D'Atrois*, 531 F.2d 726, 732 (1976).

below, she will be out of time under Fed. R. App. P. 4(1) to notice a new appeal of the injunction.

In re Scott is also distinguishable because mandamus can neither cure the injuries posed by the injunction nor be used to challenge a district court's jurisdiction. Mandamus can only redress a court's failure to take an action.[19] That the district court has to date failed to rule on Tudor's motion to intervene is problematic, but this issue is distinct from the due process violation sown by entering the preliminary injunction. Curing the due process violation requires vacation of acts of discretion not redressable by mandamus.[20] Additionally, mandamus is unavailable where a petitioner challenges the jurisdiction of the district court. *Belcher v. Grooms*, 406 F.2d 14, 17 (5th Cir. 1968) (challenge to jurisdiction can only be effectuated by "pending appeal under normal and

[19] *See Randall D. v. Sebelius*, 635 F.3d 757, 766 (5th Cir. 2011) ("An injunction 'is a remedy to restrain the doing of injurious acts' or to require 'the undoing of injurious acts and the restoration of the status quo', whereas 'mandamus commands the performance of a particular duty that rests on the defendant or respondent, by operation of law or because of official status'.") (*quoting* 42 Am.Jur. 2d *Injunctions* § 7).

[20] *See, e.g.*, *Ex Parte Schwab*, 98 U.S. 240, 241 (1878) ("Mandamus cannot be used to perform the office of an appeal or a writ of error."); *A-Cos Leasing Corp. v. Ingraham*, 408 F.2d 492 (5th Cir. 1972) (similar).

ordinary appellate procedures, upon detailed consideration of the record, and application of established standard of judicial review").

The Opinion also cites *Edwards v. City of Houston*, 78 F.3d 983, 993 (5th Cir. 1996), claiming that a nonparty in the district court cannot appeal a judgment.[21] However, there is no categorical bar to nonparty appeals, only a presumption against them. *SEC v. Forex Asset Management LLC*, 242 F.3d 325, 329 (5th Cir. 2001). In unique circumstances nonparties may appeal. *See, e.g.*, *Devlin v. Scardelleti*, 536 U.S. 1, 6 (2002); *Castillo v. Cameron Cnty., Tex.*, 238 F.3d 339, 349 (5th Cir. 2001) ("[i]f the decree affects [a third party's] interests, he is often allowed to appeal").

The Opinion then claims that Dr. Tudor's reliance on *In re Taxable Mun. Bond Sec. Liti.*, 979 F.2d 1535, 1535 (5th Cir. 1992) (unpublished) is misplaced because it is an unpublished and therein the Court dismissed the nonparty's appeal.[22] First, *In re Taxable* is binding precedent under Fifth Circuit Rule 47.5.4 because it was issued before January 1, 1996. Second, therein the Court dismissed the appeal because

[21] Opinion, p. 4.
[22] *Id.*

the nonparty had a pending motion to intervene below and, if intervention were denied that decision could be meaningfully grieved to this Court.[23] But, as explained above, Tudor does not have an effective means of appealing the preliminary injunction if her instant appeal is not heard.

The Opinion then cites this Court's "vague balancing test" pointed to in *Searcy v. Philips Elecs. N. Am. Corp.*, 117 F.3d 154, 157 (5th Cir. 1997), claiming that because Tudor did not point to this test in her response to the motion to dismiss application is waived citing *Miller v. Metrocare Servs.*, 809 F.3d 827, 832 n.5 (5th Cir. 2016).[24]

As a threshold matter, the Opinion errs deeming the test in *Searcy* applicable.[25] In *Castillo*, 238 F.3d at 339 n.16, this Court explains that the purpose of the *Searcy* test is to "address[] the prudential concerns relevant to a standing analysis." Here, Tudor seeks to vindicate *her right* as a party to the earlier filed Oklahoma case, to proceed unencumbered by the injunction.[26] Tudor's appeal ultimately aims to disentangle her

[23] 979 F.2d 1535 at 1535.
[24] Opinion, p. 4–5.
[25] *Id.*
[26] Tudor Br. at 3 ("The inequities Dr. Tudor has endured as a result of the preliminary injunction shed light on one very important ground for reversal—co-equal federal courts cannot exercise jurisdiction over live litigations in other federal fora.").

Oklahoma case from the instant case—attacking the District Court's jurisdiction and, in the alternative, offering legal arguments keyed to Tudor's unique interests which support lifting the injunction as to *her* case[27]. Because Tudor seeks to advance her own interests, like the non-named class members in *Devlin*, 536 U.S. at 7, Tudor's appeal does not raise prudential standing concerns and thus application of the "vague balancing test" is obviated.

If the balancing test does apply, the Opinion errs in *sua sponte* raising it and penalizing Tudor for not briefing it. Where the Court raises application of the three-part test to rebut the "presumption of nonparty

[27] *See, e.g.*, Tudor Br. at 28–29 (district court abused discretion in exercising jurisdiction over Plaintiffs' declaratory judgment action because it "seeks to preempt substantially developed merits litigations [] including Dr. Tudor's Oklahoma case"); *id.* at 30 (an abuse of discretion to entertain declaratory judgment action that "substantially duplicates issues presented in earlier filed litigations like Dr. Tudor's Oklahoma case"); *id.* at 34 (collateral estoppel bars Oklahoma "re-litigating whether Title VII reaches sex discrimination experienced by transgender persons" and citing earlier issued order in Oklahoma case); *id.* at 51 ("sworn depositions in Tudor's Oklahoma case also evidence Oklahoma lacks a direct conflict with the Guidance") (*citing* ROA.1383 and ROA.1385); *id.* at 52 (arguing Oklahoma cannot meet hardship factor because it waited 422 days after the Oklahoma case was filed by DOJ before filing the declaratory judgment case and then waited 42 days before moving for the preliminary injunction; arguing that "lengthy delays in seeking relief militate against finding Oklahoma's interest in seeking the preliminary injunction outweighs concomitant hardships imposed on the federal government and other affected parties like Dr. Tudor").

appeal" *sua sponte*[28] it should give leave to the parties to brief application.[29] *Cf. Day v. McDonough*, 547 U.S. 198, 210 (2006) ("before acting on its own initiative, a court must accord the parties fair notice and opportunity to present their positions"); *Robinson v. Louisiana*, 606 Fed.Appx. 199, 213–14 (5th Cir. 2015) (unpublished) (Elrod, J. dissenting) (Court should "first request supplemental briefing on the issue to give the parties a chance to rebut the presumption" rather than applying three-factor test *sua sponte*).

Moreover, the Court errs in dismissing Tudor's appeal because she plainly meets the *Searcy* test as demonstrated on the face of the record and her appellant's brief.[30] As to the first factor, Tudor participated in the proceedings below (see *supra* Argument at 2–3). *Sanchez v. R.G.L.*, 761 F.3d 495, 502 (5th Cir. 2014) (nonparties submitted briefs and

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[28] The (movant) Appellees argued a different test applied. *See* Motion to Dismiss, p. 5–6 (arguing test in *Doe v. Pub. Citizen*, 749 F.3d 246, 256–65 (4th Circ. 2014) applies).

[29] The Opinion cites *Miller v. Metrocare Servs.* for the proposition that Tudor waived application of the three-factor test because she did not brief it in her response to the motion to dismiss. Opinion, p.5. But *Miller* is distinguishable. On brief, the appellant is burdened with preserving issues support her appeal, thus in *Miller* the appellant's failure to brief a key issue in its brief constituted forfeiture. However, on the motion to dismiss the movant bears the burden of persuasion, and it was incumbent on the movant to point to the basis for dismissing Tudor's appeal.

[30] *See, e.g.*, *SEC v. Forex Mgmt. LLC*, 242 F.3d 325, 328–30 (5th Cir. 2001) (noting parties failed to apply balancing test and proceeding to apply test *sua sponte*).

evidence below and argued some issues before the court); *SEC*, 242 F.3d at 329 (nonparty appellants "participated in the proceedings in the district court to the extent their interests were involved"). That the Appellants (see *infra* Argument at 14–15) likely will not represent Tudor's interests going forward also weighs in favor of hearing Tudor's appeal. *Sanchez*, 761 F.3d at 502 (failure of parties to respond to unique issues presented by putative parties).

As to the second factor, equities weigh in favor of hearing Tudor's appeal. Tudor is unable to proceed in her Oklahoma case because of the injunction. *SEC*, 242 F.3d at 329 (nonparty's interests affected by orders appealed by other favor nonparty appeal). Additionally, hearing Tudor's appeal will not frustrate any other legal purposes because this is not a class action matter. *SEC*, 242 F.3d at 329.

As to the third factor, Tudor has a personal stake in the outcome of these proceedings. This Court's decision on the Appellant's broader appeal of the injunction will resolve application of the preliminary injunction to Tudor's Oklahoma case without considering Tudor's arguments and her unique interests. *Sanchez*, 761 F.3d at 502–03.

The Opinion also claims that because the Court is unaware of authorities allowing a nonparty to appeal without successfully intervening below and having participated in those proceedings that Tudor's appeal should be dismissed.[31] As discussed above, Tudor took all steps in her power to intervene below and she did participate in the proceedings. (Relatedly, the Opinion's reliance on Justice Scalia's dissent in *Devlin*, 536 U.S. at 16–17[32] for the proposition that only a narrow subset of nonparties appeals is permissible is misplaced because it was expressly rejected by the *Devlin* majority opinion which is binding.[33])

The Opinion also errs in concluding that Tudor's appellant brief cannot be treated as a motion to intervene because it fails to point to "common question of law or fact."[34] Respectfully, Dr. Tudor's appellant brief does point to common questions of law and fact which, liberally construed,[35] support intervention on appeal. Indeed, Tudor's brief plainly

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[31] Opinion, p. 5.
[32] Opinion, p. 5 n.10.
[33] *Devlin*, 536 U.S. at 8.
[34] Opinion, p. 5.
[35] "Although the movant bears the burden of establishing its right to intervene, Rule 24 is to be liberally construed." *Texas v. U.S.*, 805 F.3d 653, 656 (5th Cir. 2015) (Elrod, J.) (quoting *Brumfield v. Dodd*, 749 F.3d 339, 341 (5th Cir. 2014)); *Newby v. Enron Corp.*, 443 F.3d 416, 422–23 (5th Cir. 2006 (showing of a common issues of fact and law should be "liberally construed") (*citing In re Estelle*, 516 F.2d 480, 485 (5th Cir. 1975); *SEC v. United States Realty & Imp. Co.*, 310 U.S. 434, 459 (1940) ("This

alleges *plausible* common issues of fact and law when read in parallel to the United States' brief.[36] Both briefs challenge the August 21 and October 18 orders which purport to enjoin federal agency guidance on Title VII and Title IX's application to transgender persons.[37] Both briefs also argue that the "Guidance" are not final agency actions,[38] Appellees lack standing,[39] and the Appellees failed to demonstrate irreparable harm[40]. Once Appellees' brief is filed (presently due March 8, 2017), it is likely that there will be additional common issues of fact and law.

The Opinion also errs in finding that dismissal of the motion to dismiss is not in the interests of justice because there is generally no value to permitting a nonparty appeal.[41] Tudor's unique circumstances weigh in favor of nonparty appeal. Tudor is not a stranger to this preliminary injunction or this litigation. Tudor's Oklahoma case was

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provision [Rule 24(b)(2)] plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation.")).

[36] *Official Comm. of Unsecured Creditors of WorldCom, Inc. v. SEC*, 467 F.3d 73, 78–79 (2d Cir. 2006) (nonparty who states a *plausible* interest affected by the judgment has standing to appeal even without intervention below).

[37] *See, e.g.*, Tudor Br. at 41–46; US Br. at 3 (to the extent the preliminary injunction extends to "Title VII . . . the injunction is a manifest abuse of discretion").

[38] Tudor Br. at 39–41; *id.* at 55 [incorporating by reference arguments of US]; US Br. at 21–29.

[39] Tudor Br. at 54 [incorporating by reference arguments of the US]; US Br. at 29.

[40] Tudor Br. at 46–51; US Br. at 37–41.

[41] Opinion, p. 6.

especially singled out by the Appellants[42] and Appellees[43] in their filings below and by the District Court's October 18 order[44]. Moreover, dismissing Tudor's appeal stands to prolong this litigation further. If this Court grants Tudor the relief she seeks[45] then she can return to the Oklahoma court, proceed to trial there, which obviates the need to bring additional writs or appeals to this Court.[46]

Substantial Change in Circumstances

In addition to the foregoing, a substantial change in circumstances since the Opinion was issued on February 9, 2017 also warrant rehearing. On February 10, 2017 the Appellants moved to cancel oral arguments on their motion to stay the preliminary injunction pending appeal and withdrew their motion. In their papers, Appellants stated "[t]he parties are currently considering how best to proceed in this appeal." (This startling pronouncement made national headlines[47] and is

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[42] *See, e.g.*, Tudor Br. at 20 (*citing* ROA.1078).
[43] *See, e.g.*, Tudor Br. at 20–21 (*citing* ROA.1087 to ROA.1090); *id.* at 21 n.13 (collecting deposition excerpts from Tudor's Oklahoma case by Plaintiffs below to support their request that the District Court enjoin the Oklahoma case).
[44] ROA.1367 n.2.
[45] Tudor Br. at 55–56.
[46] *See, e.g.*, ROA.1169 (intervention should be denied as moot if the district court lacks jurisdiction over the Oklahoma case).
[47] *See, e.g.*, Liam Stack, *Trump Drops Defense of Obama Guidelines on Transgender Students*, New York Times (Feb. 11, 2017), https://www.nytimes.com/2017/02/11/us/politics/trump-transgender-students-

reminiscent of actions taken by the U.S. Department of Justice when it changed its litigation position in a class of cases in the mid-1990s due to a change in presidential administration[48].)

Prior to February 10, 2017, Appellants consistently represented to the District Court[49] and this Court[50] that one of their core reasons for opposing Dr. Tudor's intervention is that Appellant's interests and Tudor's align and thus there is no need for her participation. If, as Tudor suspects, her and Appellants interests no longer align,[51] then this Court should reconsider the propriety of Tudor's participation in this appeal based on these changed circumstances.[52]

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injunction.html; Sandhya Somashekhar and Moriah Belingit, *Trump Administration Signals Change in Policy for Transgender Students*, Wash. Post (Feb. 11, 2017), https://www.washingtonpost.com/national/trump-administration-signals-change-in-policy-for-transgender-students/2017/02/11/c2fd138e-f051-11e6-b4ff-ac2cf509efe5_story.html?utm_term=.04ec972679c6.

[48] *See, e.g.*, *Sonntag v. McConnell*, 166 F.3d 334 (4th Cir. 1998) (unpublished).

[49] ROA.1315 n.2 ("any interest that Dr. Tudor has in this case is adequately represented by the United States").

[50] US Br. at 17 n.3 ("if Tudor had a legally cognizable interest in this litigation, defendants already adequately represent that interest").

[51] This Court may deem it necessary to hold oral arguments on this Motion to ask Appellants directly to elucidate their present litigation position. *See also Texaco, Inc. v. Duhe*, 274 F.3d 911, 923 n.17 (5th Cir. 2001) (applying judicial estoppel even though Court could not adduce whether "changing positions mid-litigation" prejudiced party to appeal); *id.* ("Litigants undermine the integrity of the judicial process when they deliberately tailor contradictory (as opposed to alternate) positions to the 'exigencies of the moment'.") (*quoting U.S. v. McCaskey*, 9 F.3d 368, 378 (5th Cir. 1993)).

[52] See *EEOC v. La. Office of Cmty. Servs.*, 47 F.3d 1438, 1443 (5th Cir. 1995) (dismissing nonparty appeal because "EEOC adequately represented [nonparty]

CONCLUSION

For all of the foregoing reasons, Dr. Tudor respectfully requests that this petition be granted.

Dated: February 20, 2017

Respectfully submitted,

TRANSGENDER LEGAL DEFENSE AND EDUCATION FUND, INC.

By: /s/ Ezra Young

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below and continues to do so on appeal"); *EEOC v. West La. Health Servs., Inc.*, 959 F.2d 1277 (5th Cir. 1992) (allowing nonparty appeal where EEOC did not pursue appeal in representative capacity). *Cf. Texas*, 805 F.3d at 663 (divergent interests between putative intervenors and government support intervention).

CERTIFICATE OF SERVICE

I certify that I emailed the foregoing Motion to Ms. Mary Yeager (mary_yeager@ca.5.uscourts.gov) with instruction to file, thereby accomplishing service to all counsel of record.

Dated: February 20, 2017

/s/ Ezra Young
Ezra Young

CERTIFICATE OF COMPLIANCE

This motion complies with Fifth Circuit Rule 40.1 because appended hereto is an unmarked copy of the order sought to be reviewed. This motion also complied with Fifth Circuit Rule 40.2 because it is intended to bring claimed errors of fact or law to the attention of the Court.

This motion also complies with the word limit of Fed. R. App. P. 40(b) because, excluding the parts exempted by Fed. R. App. P. 32(f), it contains 3761 words. This motion also complies with the requirements of Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6) because it uses 14-point, proportionally spaced font in text and 12-point, proportionally spaced font in footnotes prepared using Microsoft Word.

Dated: February 20, 2017

/s/ Ezra Young
Ezra Young

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
February 9, 2017

Lyle W. Cayce
Clerk

No. 16-11534

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); GOVERNOR OF MAINE PAUL LEPAGE; STATE OF OKLAHOMA; STATE OF LOUISIANA; STATE OF UTAH; STATE OF GEORGIA; STATE OF WEST VIRGINIA; STATE OF MISSISSIPPI; STATE OF KENTUCKY,

Plaintiffs–Appellees,

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF EDUCATION; ELISABETH PRINCE DEVOS, in her Official Capacity as United States Secretary of Education; UNITED STATES DEPARTMENT OF JUSTICE; JEFF SESSIONS, in his Official Capacity as Attorney General of the United States; VANITA GUPTA, in her Official Capacity as Principal Deputy Assistant Attorney General; UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; JENNY R. YANG, in her Official Capacity as the Chair of the United States Equal Employment Opportunity Commission; UNITED STATES DEPARTMENT OF LABOR; EDWARD C. HUGLER, Acting, in his Official Capacity as United States Secretary of Labor; DAVID MICHAELS, in his Official Capacity as the Assistant Secretary of Labor for Occupational Safety and Health Administration,

Defendants–Appellants,

DR. RACHEL JONA TUDOR,

Movant–Appellant.

No. 16-11534

Appeals from the United States District Court
for the Northern District of Texas
USDC No. 7:16-CV-54

Before OWEN, ELROD, and COSTA, Circuit Judges.

PER CURIAM:*

The Appellees, which we will collectively refer to as the States, have filed a motion with this court to dismiss Dr. Rachel Jona Tudor's appeal. The United States Appellants do not oppose the motion to dismiss. We grant the motion.

I

The United States Department of Justice (DOJ) sued Southeastern Oklahoma State University and its governing board in the Western District of Oklahoma (the *Southeastern* Litigation), asserting a Title VII claim for alleged discrimination and retaliation against Dr. Tudor, a professor who is transgender. Dr. Tudor subsequently intervened. Oklahoma moved to dismiss on the ground that Dr. Tudor was not a member of a protected class for Title VII purposes. The District Court for the Western District of Oklahoma denied the motion, reasoning that Dr. Tudor fell within a protected class because the defendants' actions "were based upon their dislike of her gender."

Over a year later, the District Court for the Northern District of Texas issued the preliminary injunction that is currently at issue in the appeal pending before this court. In its order clarifying the preliminary injunction, the District Court for the Northern District of Texas noted that because the

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Southeastern Litigation "was substantially underway before the issuance of this injunction, DOJ's legal arguments in the case fall outside the scope of this injunction." However, the clarification stated that the preliminary injunction "still 'enjoin[s] [the United States] from enforcing the Guidelines against [the States] and their respective schools, school boards, and other public, educationally-based institutions' (including Southeastern Oklahoma State University) and 'enjoin[s] [the United States] from initiating, continuing, or concluding any investigation based on [the United States'] interpretation that the definition of sex includes gender identity in Title IX's prohibition against discrimination on the basis of sex.'" Thereafter, the district court for the Western District of Oklahoma stayed the *Southeastern* Litigation.

Dr. Tudor then moved pursuant to Rule 24(b) to intervene in the Northern District of Texas case.[1] She sought a declaratory judgment in that court that the order issued by the district court in the *Southeastern* Litigation "finally decided the question of whether Dr. Tudor is a member of a protected class under Title VII." Both the States and the United States opposed Dr. Tudor's motion to intervene in the district court. Although the District Court for the Northern District of Texas has not ruled on the motion to intervene,[2] Dr. Tudor has filed a notice of appeal seeking review of the preliminary injunction. The States moved in this court to dismiss her appeal, and the United States does not oppose that motion.

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[1] FED. R. CIV. P. 24(b).

[2] When a motion to intervene is denied, the movant may appeal that ruling. *Edwards v. City of Houston*, 78 F.3d 983, 992 (5th Cir. 1996) (en banc). If a district court unreasonably delays in ruling on a motion, mandamus relief requiring a prompt ruling may be available. *See In re Scott*, 163 F.3d 282, 283-84 (5th Cir. 1998) (per curiam); *In re Sch. Asbestos Litig.*, 977 F.2d 764, 792 (3d Cir. 1992).

II

A

"It is well-settled that one who is not a party to a lawsuit, or has not properly become a party, has no right to appeal a judgment entered in that suit."[3] Dr. Tudor is not a party: she is neither "[o]ne by or against whom a lawsuit is brought" nor a successful intervenor.[4] Nevertheless, she argues that "[w]here a non-party is injured or directly aggrieved by an appealable order issued by the district court, the nonparty may appeal it without formally moving to intervene." To support this proposition, she relies on this court's unpublished decision in *In re Taxable Municipal Bond Securities Litigation*.[5] But in that case, not only did we expressly "decline to rule on the dictum of this court . . . that '[i]f an injunction extends to non-parties, they may appeal from it,'" we also *granted* the motion to dismiss the nonparty's appeal because "the appellants clearly ha[d] an effective means of obtaining review," which was to seek intervention.[6]

We have recognized an exception to this well-settled rule that allows nonparties to "rely on a vague balancing test to overcome the general presumption against non-party appeals."[7] If the court were to apply this test, it would assess "whether 'the non-parties actually participated in the proceedings below, the equities weigh in favor of hearing the appeal, and the

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[3] *Edwards v. City of Houston*, 78 F.3d 983, 993 (5th Cir. 1996).

[4] *See United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 933 (2009) (internal quotation marks omitted) (quoting BLACK'S LAW DICTIONARY 1154 (8th ed. 2004)); *see id.* (noting that the Supreme Court has "indicated that intervention is the requisite method for a nonparty to become a party to a lawsuit").

[5] 979 F.2d 1535, 1535 (5th Cir. 1992) (unpublished) (quoting *United States v. Chagra*, 701 F.2d 354, 359 (5th Cir. 1983)).

[6] *Id.*

[7] *In re Lease Oil Antitrust Litig.*, 570 F.3d 244, 249 (5th Cir. 2009).

non-parties have a personal stake in the outcome.'"[8] Dr. Tudor, however, has not referenced this test in her brief, and as a result, she has forfeited its application.[9] Even absent forfeiture, Dr. Tudor has not cited any authority, and we have found none (outside of those involving collateral orders[10]), in which this court has allowed a nonparty to appeal without intervening and without having actually participated in the proceedings below.

B

Alternatively, Dr. Tudor requests that we treat her appellate brief as a motion to intervene because it serves the "purpose" of such a motion in that it "timely apprise[s] the parties and court of the nonparty's interest in the appeal." Although timely notice of a nonparty's interest might be *a* purpose of a motion to intervene, it is not the *principal* purpose; it does not establish that a nonparty *can* intervene, that is, that the nonparty "has a claim or defense that shares with the main action a common question of law or fact."[11] Dr. Tudor's appellate brief is not the equivalent of a motion to intervene.

III

Dr. Tudor also argues that the States' motion to dismiss should be denied because it is untimely. She acknowledges that neither the Federal Rules of Appellate Procedure nor this court's rules "prescribe a deadline for filing a motion to dismiss an appeal." Instead, she asserts that we should deny the motion to dismiss because "it is in the interests of justice and doing so will avoid prolonging litigation for no good reason." Dr. Tudor has provided no case

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[8] *Searcy v. Philips Elecs. N. Am. Corp.*, 117 F.3d 154, 157 (5th Cir. 1997) (quoting *EEOC v. La. Office of Cmty. Servs.*, 47 F.3d 1438, 1442 (5th Cir. 1995)).

[9] *Miller v. Metrocare Servs.*, 809 F.3d 827, 832 n.5 (5th Cir. 2016).

[10] *See Chagra*, 701 F.2d at 358–59 (5th Cir. 1983); *see also Devlin v. Scardeletti*, 536 U.S. 1, 16–17 (2002) (SCALIA, J., dissenting) (explaining that non-parties have been "allowed to appeal from the collateral orders to which they *were* parties").

[11] FED. R. CIV. P. 24(b)(1)(B).

in which a court has dismissed a motion to dismiss an appeal as untimely, and we are not convinced that it would be in the interest of justice to allow a nonparty to pursue an appeal. It is also unclear how granting the motion to dismiss will prolong the litigation, a point which Dr. Tudor's brief does not elucidate.

* * *

For the foregoing reasons, we GRANT the States' motion to dismiss.