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; LORETTA E. LYNCH, in her 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

DR. RACHEL JONA TUDOR,

Movant – Appellant

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

DR. RACHEL TUDOR'S RESPONSE TO PLAINTIFFS-APPPELLEES' MOTION TO DISMISS HER APPEAL

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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
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

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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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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 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
Clause S. Platton, Office of the Solicitor General of New York
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Barbara D. Underwood, Solicitor General of New York

/s/ Ezra Young
Transgender Legal Defense and Education Fund, Inc.

Counsel for Dr. Rachel Jona Tudor

BACKGROUND

Plaintiffs-Appellees, 15 states and state subdivisions, and Defendants-Appellants, the United States and several of its agencies, are entangled in a contentious battle over the metes and bounds of federal sex discrimination laws as applied to transgender Americans.

Movant-Appellant Dr. Rachel Tudor is a transgender woman and the aggrieved employee at the heart of a U.S. Department of Justice enforcement action filed in the Western District of Oklahoma in March 2015. Tudor Appellant Brief at 11–15 (summarizing those proceedings). Dr. Tudor was dragged into the instant case when Plaintiffs-Appellees moved the District Court to enjoin proceedings in Dr. Tudor's Oklahoma case. ROA.1087 to ROA.1090.

Once Dr. Tudor's Oklahoma case was directly attacked by Plaintiffs-Appellees, Tudor promptly moved below to intervene and defend her interests. ROA.1167 to ROA.1177; Tudor Appellant Brief at 20–22 (discussing Dr. Tudor's swift intervention efforts below). On October 18, 2016, more than a month after Dr. Tudor moved to intervene below, the District Court issued an order expressly enjoining Tudor's Oklahoma case. Within 16 days of the District Court's October 18 order,

Dr. Tudor filed a protective notice of appeal. ROA.1455 to ROA.1457. The Clerk of Court noticed Dr. Tudor's counsel and counsel for Plaintiffs-Appellees and Defendants-Appellants of the briefing schedule for the instant appeal on November 22, 2016. Dr. Tudor filed her timely appellant's brief with this Court on January 3, 2017.

INTRODUCTION

Plaintiffs-Appellees' motion to dismiss purports that Dr. Tudor is barred from participation in this appeal for two reasons. First, they argue that a non-party in the district court cannot participate as a party on appeal. This argument is without merit. It is well-settled that a non-party who is aggrieved by an injunction may challenge it as a party on appeal. Alternatively, because Dr. Tudor's appellant's brief clearly identifies her interest in the instant appeal, her arguments on the merits, and the relief she seeks from this Court, this Court can deem the brief both an opening brief and a motion to intervene on appeal.

Second, they argue that Dr. Tudor filed her notice of appeal out of time because she cannot invoke the extra time provision of Fed. R. App. P. 4(a)(3) as a "nonparty" to the case below. This argument is also without merit—Plaintiffs-Appellees' construction of 4(a)(3) is without textual

support, nonsensical, and unwise. Even if this Court adopted Plaintiffs-Appellees' construction of Fed. R. App. P. 4, Dr. Tudor nevertheless met the deadline for filing her protective notice of appeal of the October 18 order and is thus properly before this Court. Alternatively, this Court may exercise pendant appellate jurisdiction over Dr. Tudor's appeal.

Plaintiffs-Appellees' failure to cite any tenable basis for dismissing Dr. Tudor's appeal is sufficient reason to deny the motion. However, another basis for denying this motion exists—Plaintiffs-Appellees' motion to dismiss is untimely under the circumstances.

ARGUMENT

I. Dr. Tudor May Participate as a Party in this Appeal

Plaintiffs-Appellees contend that since Dr. Tudor has yet to be joined as a party below, she cannot appeal the same orders appealed by the Defendants-Appellants which purport to enjoin Tudor's Oklahoma case. Plaintiffs-Appellees' Mot. at 4. Not so. Though Dr. Tudor maintains that her intervention effort below (which has yet to be adjudicated by the District Court) is merited, her non-party status below is irrelevant to whether she is a proper party to this appeal.

A. Dr. Tudor is entitled to appeal the preliminary injunction because it directly impinges her interests.

Dr. Tudor's unique entanglement in the preliminary injunction entitles her to participate in the instant appeal. Dr. Tudor is directly aggrieved by the August 21 preliminary injunction as materially altered by the October 18 order because they enjoin proceedings in the Oklahoma court. Plaintiffs-Appellees' Mot. at 2 (admitting Tudor's Oklahoma case is enjoined by the orders challenged in the instant appeal).

It is well-settled that a non-party at the district court level may participate as a party on appeal. The Supreme Court has repeatedly recognized that the right to appeal is not limited to "named parties to the litigation." *Devlin v. Scardeletti*, 536 U.S. 1, 7 (2002) (collecting cases where non-named parties were afforded right to appeal); *In re Beef Industry Antitrust Litigation*, 589 F.2d 786, 788–89 (5th Cir. 1979) (compiling precedents where this Court "has been lenient in hearing the appeals of nonparties"). Where a non-party is injured or directly aggrieved by an appealable order issued by the district court, the non-party may appeal it without formally moving to intervene. *See, e.g.*, *In re Taxable Mun. Bond Securities Litigation*, 979 F.2d 1535, 1535 (5th Cir. 1993) (*citing United States v. Chagra*, 701 F.2d 354, 359 ("If an injunction extends to non-parties, they may appeal from it.")); *Class Plaintiffs v.*

City of Seattle, 955 F.2d 1268, 1277 (9th Cir. 1992) (nonparty who is injured or directly aggrieved by judgment can appeal without intervention).

B. If a motion to intervene on appeal is necessary, this Court should treat Dr. Tudor's appellant's brief as both intervention motion and appellant's brief.

Plaintiffs-Appellees imply that Dr. Tudor could properly participate in this appeal if she filed a formal motion to intervene with this Court. Plaintiffs-Appellees' Mot. at 3–4. *See also* Defendants-Appellants' Brief at 17 n.3 (arguing that Dr. Tudor may not participate in this appeal because she was a non-party below[1]). If this Court determines such a motion is necessary (but see Argument I-A), the Court should deem Dr. Tudor's timely filed appellant's brief as both an intervention motion and opening appellant brief.

[1] Neither *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (*per curiam*) nor *Edwards v. City of Houston*, 78 F.3d 983, 993 (5th Cir. 1996) (*en banc*) require that a nonparty below move to intervene on appeal before party status is granted. *See, e.g.*, *Devlin v. Scardelletti*, 536 U.S. 1, 14 (2002) (explaining that 28 U.S.C. § 1291 vests any person with the right to appeal an action that finally disposes of one's rights; motion to intervene on appeal and thus not necessary where non-party's rights are impinged by challenged order); *Searcy v. Phillips Elecs. N. Am. Corp.*, 117 F.3d 154, 156–57 (5th Cir. 1997) (recognizing that neither *Marino* nor *Edwards* impose a rigid bar on "non-party appeals").

This Court's long-standing policy favoring liberal intervention weighs in favor of treating Tudor's timely appellant brief as an intervention motion. Intervention on appeal is governed by Fed. R. Civ. P. 24. *Bates v. Jones*, 127 F.3d 870, 873–74 (9th Cir. 1997). This Court construes Fed. R. Civ. P. 24 to allow liberal intervention. *See Wright & Miller*, § 1914 (*citing Farina v. Mission Inv. Trust*, 615 F.2d 1068, 1075 (5th Cir. 1980)). Taken together, this Court should allow liberal intervention on appeal. In the specific circumstances of this case, this Court should permit Dr. Tudor's appellant's brief to be a stand in for a motion to intervene on appeal.

Dr. Tudor's appellant's brief is an adequate stand in for a separate motion to intervene on appeal. Dr. Tudor's appellant's brief plainly sets forth all necessary elements of an intervention motion. Dr. Tudor's brief also clearly lays out both her interests in participating on this appeal and presents legal arguments supporting the relief she seeks. The purpose of a motion to intervene on appeal is to timely apprise the parties and court of the nonparty's interest in the appeal. Dr. Tudor's brief plainly satisfies these purposes.

Moreover, treating Tudor's appellant's brief as both motion to intervene and appellant's brief would not do injustice to the original parties or unduly burden this Court. No delay—other than adjudication of Plaintiffs-Appellees' motion to dismiss—is sown. And neither Plaintiffs-Appellees nor Defendants-Appellants are prejudiced since both have had ample time to familiarize themselves with Tudor's claims and legal arguments at this juncture.

II. Dr. Tudor's Protective Appeal is Timely

A. Dr. Tudor Should Be Considered a Party Under Fed. R. App. P. 4(a)(3).

Federal Rule of Appellate Procedure 4(a)(3) does not address whether parties and nonparties should be treated differently when computing time to file a notice of appeal. As an issue of first impression,[2] this Court should treat parties and nonparties eligible to be parties on appeal the same for the purposes of computing time under Fed. R. App. 4(a)(3).

[2] Plaintiffs-Appellees' reliance on *Eisenstein v. City of New York*, 556 U.S. 928 (2009) is misplaced. The *Eisenstein* Court did not purport to settle the question of whether all nonparties should be considered parties for the purposes of Fed. R. App. P. 4(a)(3)'s extra time provision. Rather, *Eisenstein* settled the narrow question of whether in "the specific context of the [Federal Claims Act], intervention is necessary for the United States to obtain status as a 'party' for the purposes of Rule 4(a)(1)(B)." 556 at 934 n.3.

Plaintiffs-Appellees and Dr. Tudor agree that where the United States is a party to a case, Fed. R. App. P. 4(a)(1)(B) provides that any party may file a notice of appeal within 60 days after the entry of the order being appealed. They further agree that once a notice of appeal is filed, 4(a)(3) provides that "any other party" may file a notice of appeal within 14 days after the time provided by 4(a). Plaintiffs-Appellees propose that a non-party below cannot take advantage of 4(a)(3)'s extra time provision, curiously deeming a person in Tudor's unique situation as a "party" for the purposes of 4(a)(1)(B), but not a party for 4(a)(3). *See* Plaintiffs-Appellees Mot. at 7 (arguing Tudor had 60 days to appeal pursuant to 4(a)(1)(B)). Dr. Tudor proffers that the term "party" should be given the same meaning throughout the rule.

This Court should reject Plaintiffs-Appellees' nonsensical construction of Fed. R. App. P. 4. Both 4(a)(1)(B) and 4(a)(3) use the term "party." If Tudor is a "party" for 4(a)(1)(B), there is no good reason to deem Tudor unable to reap the benefits of the extra time afforded to a "party" by 4(a)(3). It is most sensible for this Court to hold parties and nonparties to the same rule for filing of a notice of appeal. *Cf. Legal Voice v. Stormans Inc.*, 738 F.3d 1178 (9th Cir. 2013) ("Plaintiffs' proposed rule

would therefore allow parties either to appeal immediately upon entry of the order or to await the entry of a final judgment, but would require non-parties to appeal within thirty days of the entry of the order or lose the right to appeal. We reject a rule with this effect; all potential appellants should be in the same position with regard to the timing of an appeal from the same order.").

The fact that Dr. Tudor's protective notice of appeal challenges the same orders appealed by the United States' also weighs in favor of treating Tudor as a party under 4(a)(3). While Dr. Tudor's brief raises some arguments not brought by Defendants-Appellants, both briefs attack the August 21 and the October 18 orders. Given this essential commonality, Plaintiffs-Appellees will suffer no prejudice if Dr. Tudor is permitted to appeal now. Moreover, "[t]he record contains no indication that Plaintiffs have in any way relied on their belief that [Tudor's] time for appeal had expired, nor do Plaintiffs[-Appellees] identify any substantive right that would be prejudiced by permitting this appeal to proceed." *Legal Voice*, 738 F.3d at 1183.

B. Dr. Tudor's Protective Appeal of the October 18, 2016 Order is Timely.

If this Court adopts Plaintiffs-Appellees' construction of Fed. R. App. P. 4 and deems Dr. Tudor's appeal of the August 21 order to be untimely, Dr. Tudor's appeal should still go forward because she timely appealed the October 18, 2016 order. Alternatively, this Court should exercise pendant appellate jurisdiction over Dr. Tudor's appeal.

Dr. Tudor filed her protective notice of appeal within 18 days of the October 18 order's issuance, which plainly falls within the time prescribed by Fed. R. App. P. 4(a)(1)(B). Timely appeal of the October 18 order is sufficient to preserve Dr. Tudor's right to appeal because the October 18 order materially alters the August 21 order, and thus restarts the time for appeal under Fed. R. App. P. 4. *Hodgson v. United Mine Workers of Am.*, 473 F.2d 118, 125–27 (D.C. Cir. 1972).

Though the District Court's August 21, 2016 preliminary injunction order first established the nationwide injunction now challenged, the October 18, 2016 materially altered the August 21 order and is thus itself appealable. *Thomas v. Blue Cross and Blue Shield Ass'n*, 594 F.3d 823, 832 (11th Cir. 2010).

The October 18 order changes several critical aspects of the August 21 order, thereby making the October 18 order itself appealable. *Sierra*

Club v. Marsh, 907 F.2d 210, 213 (1st Cir. 1990). Among other things, the October 18 order changes the scope of the August 21 order, because it (1) enjoins Dr. Tudor's Oklahoma case which was substantially developed prior to the filing of the instant case and (2) enjoins a Title VII enforcement action. *Compare* August 21 Order, ROA.1066 (expressly enjoining Title IX enforcement activities; also explaining the injunction "should not unnecessarily interfere with litigation currently pending before other federal courts on this subject" and inviting Plaintiffs and Appellees to notify the court of pending cases so the injunction's scope can be narrowed) *with* October 18 Order, ROA.1367 n.2 (ordering Dr. Tudor's earlier filed Oklahoma Title VII case to be enjoined). It is of no moment that the District Court deemed the October 18 order to be a mere clarification of the August 21 order. *Gautreaux v. Chicago Hous. Auth.*, 178 F.3d 951, 956–57 (7th Cir. 1999) ("This court has repeatedly held that it will look beyond labels such as 'clarification' or 'modification' to consider the actual effect of the order.").

Alternatively, it is within this Court's discretion to exercise pendent appellate jurisdiction over Dr. Tudor's appeal. "In the interest of judicial economy, this court may exercise its discretion to consider under pendant

appellate jurisdiction claims that are closely related to the issue before [the court]." *Morin v. Carre*, 77 F.3d 116, 121 (5th Cir. 1996). Given the unique formulation of the two challenged orders, and the close connection between Dr. Tudor's appeal and Defendants-Appellants' appeal, this Court should deem Dr. Tudor's timely protective notice appealing the October 18, 2016 order to give this Court jurisdiction over Tudor's instant appeal. Plainly, the August 21 order is "inextricably intertwined" with the October 18 order, and review of both "necessary to ensure meaningful review." *Thornton v. Gen. Motors Corp.*, 136 F.3d 450, 453 (5th Cir. 1998). That hearing Dr. Tudor's appeal will not inconvenience any of the parties and prevent piecemeal review also weighs in favor of exercise of pendant appellate jurisdiction. *See Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950) (recognizing "the inconvenience and costs of piecemeal review" as one of the most important considerations when determining whether an order can be appealed).

III. Plaintiffs-Appellees' Motion to Dismiss is Untimely

Plaintiffs-Appellees' motion to dismiss should also be denied because it is untimely under the circumstances.

Neither the Fed. R. App. P. nor this Court's rules prescribe a deadline for filing a motion to dismiss an appeal. But this Court is empowered to disregard a motion to dismiss and decide a case on the merits where it is in the interests of justice and doing so will avoid prolonging litigation for no good reason. *See, e.g.*, *Milton v. U.S.*, 120 F.2d 794, 796 (5th Cir. 1941).

Given Plaintiffs-Appellees' inexcusable delay in moving to dismiss Dr. Tudor's appeal, this Court should deny the motion. Plaintiffs-Appellees' motion was filed on January 30, 2017—88 days after Dr. Tudor filed her protective notice of appeal (ROA.1455), 69 days after this Court noticed counsel of the briefing schedule, and 27 days after Dr. Tudor filed her appellant's brief. If Plaintiffs-Appellees believed themselves entitled to dismiss Tudor's appeal, they should not have sat on their rights until mere days before they risked missing a long-noticed deadline for filing their own opening brief in this appeal. *See* Plaintiffs-Appellees' Mot. at 1 (claiming an urgency in this Court deciding motion to dismiss given impending briefing deadline [since obviated by an intervening order form this Court]).

CONCLUSION

Dr. Tudor's only hope of proceeding in her Oklahoma enforcement action lies in defeating the preliminary injunction at the heart of the instant appeal. Plaintiffs-Appellees' motion to dismiss is without legal merit and should not stand in the way of Dr. Tudor's appeal. For all the foregoing reasons Dr. Tudor respectfully requests that Plaintiffs-Appellees' motion be denied.

Dated: February 6, 2017

Respectfully submitted,

TRANSGENDER LEGAL DEFENSE AND EDUCATION FUND, INC.

By: /s/ Ezra Young

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing Response using the Court's CM/ECF systems, which constitutes service under the Court's rules.

Dated: February 6, 2017

/s/ Ezra Young
Ezra Young

CERTIFICATE OF COMPLIANCE

This response 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 2743 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 Microsoft Word using 14-point, proportionally spaced font.

Dated: February 6, 2017

/s/ Ezra Young
Ezra Young