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

OPENING BRIEF OF 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
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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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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Defenders, Lambda Legal Defense & Education Fund, Inc., National Center for Lesbian Rights, and Transgender Law Center

Paul David Castillo, Lambda Legal Defense & Education Fund
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For Amicus Curiae Eagle Forum Education & Legal Defense Fund:

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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

STATEMENT REGARDING ORAL ARGUMENT

Dr. Tudor respectfully requests oral argument. Oral argument in this case of national importance will illuminate the position of the parties and aid the Court in reaching a decision.

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INTRODUCTION

This case involves a challenge brought by Texas, Oklahoma, and thirteen additional states and state sub-divisions to federal agency guidance documents ("Guidance") as well as federal enforcement activities that protect the rights of transgender Americans. It also involves a collateral attack on an earlier filed, heavily litigated Title VII enforcement action in a federal court in Oklahoma involving Movant-Appellant Dr. Rachel Tudor.

In March 2015, the U.S. Department of Justice ("DOJ") sued Southeastern Oklahoma State University, a public college in Oklahoma, and its governing board claiming they discriminated and retaliated against a female, transgender professor Dr. Rachel Tudor. Shortly thereafter, Dr. Tudor exercised her statutory right to intervene and co-litigated her case alongside DOJ. In July 2015, the Oklahoma court rejected Oklahoma's motion to dismiss Tudor's sex discrimination claim, reasoning that the fact that Tudor is transgender does not bring her outside of Title VII's ambit of protection.

In March 2016, the State of North Carolina passed a law, colloquially known as HB2, that requires transgender people to use

restrooms inconsistent with their sex. At that time, Dr. Tudor was entering her twelfth month of litigation in the Oklahoma federal court.

In May 2016, Oklahoma and the other Plaintiffs-Appellees filed this case claiming that Defendants-Appellants' Guidance violated the Administrative Procedures Act. Forty-two days after initiating this case, Plaintiffs-Appellees claimed they had an urgent need for expansive declaratory relief to absolve them of liability for past and future discrimination against transgender people in workplaces and schools.

In August 2016, more than a year after the Oklahoma court deemed Dr. Tudor's claims viable under Title VII, the court below enjoined the Oklahoma case through an expansive nationwide preliminary injunction. In addition to deeming its own adjudication construing the metes and bounds of Title VII to take precedence, the court below has to date refused to rule on Tudor's motion to intervene, depriving her of the ability to meaningfully participate in proceedings that purport to bind the Oklahoma court.

Plaintiffs-Appellees' case seizes on the discomfort and prejudices that some Americans have about their fellow transgender citizens but has little basis in law. Few Plaintiffs-Appellees have laws on the books

or codified policies which expressly address treatment of transgender people let alone directly conflict with the federal agencies' interpretations of federal law. Many, including the State of Oklahoma, have repeatedly failed to enact laws which mandate exclusion of transgender people from sex-segregated facilities which comport with their sex. Others, like the Harrold Independent School District, hastily adopted discriminatory restroom policies on the eve of filing to manufacture a controversy.

Defendants-Appellants and a majority of federal courts and legal scholars interpret remedial civil rights laws to prohibit sex discrimination experienced by transgender people. Plaintiffs-Appellees disagree and now attempt to transform banal matters of statutory interpretation into an imminent threat worthy of extraordinarily broad preliminary relief.

There are many reasons why this Court should overturn the preliminary injunction. 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.

STATEMENT OF JURISDICTION

1. Basis of the District Court's jurisdiction.

Below, Plaintiffs-Appellees claimed that the District Court had jurisdiction over their declaratory judgment action pursuant to 28 U.S.C. § 1391 and 28 U.S.C. § 1361 (ROA.26 ¶17). However, the District Court lacked jurisdiction because Plaintiffs-Appellees' suit seeks to seriously interfere with earlier filed litigations (ROA.1085 to ROA.1099 [identifying litigations Plaintiffs-Appellees' case seeks to interfere with]), including a co-equal federal court which has jurisdiction over some of the parties to this case (ROA.1087 [identifying Plaintiff-Appellee Oklahoma and Defendant-Appellant DOJ as parties to Tudor's Oklahoma case]). *See, e.g.*, *Gregory-Portland Indep. Sch. Distr. v. Texas Ed. Agency*, 576 F.2d 81, 82–83 (5th Cir. 1978).

2. Basis of this Court's appellate jurisdiction.

Dr. Tudor comes before this Court appealing a preliminary injunction issued on August 21, 2016 (ROA.1030 to ROA.1067) and an order clarifying the scope of the preliminary injunction issued on October 18, 2016 (ROA.1362 to ROA.1368). Defendants-Appellants filed a timely Notice of Appeal on October 14, 2016 within 60 days of the entry of the

first order appealed as required by Fed. R. App. P. 4(a)(1)(B). Dr. Tudor filed her Protective Notice of Appeal on November 3, 2016 (ROA.1455 to ROA.1457), within 14 days of the Defendants-Appellants' Notice of Appeal as required by Fed. R. App. P. 4(a)(3).

This Court has interlocutory appellate jurisdiction over the preliminary injunction and the order clarifying its scope pursuant to 28 U.S.C. § 1292(a)(1). This Court has pendant jurisdiction over any otherwise non-appealable ruling that is inextricably intertwined with or necessary to ensure meaningful review of the orders properly before this Court on interlocutory appeal.

STATEMENT OF THE ISSUES

1. Whether the District Court abused its discretion in exercising jurisdiction over this declaratory judgment action.
2. Whether the District Court erred in granting the preliminary injunction where no individual movant made a *prima facie* showing entitling it to relief.
3. Whether the District Court erred in granting a preliminary injunction purporting to enjoin Dr. Tudor's Title VII case which, at the time the

injunction was issued, was still pending before a co-equal federal court in Oklahoma.

4. Whether the District Court erred in granting preliminary relief to Oklahoma where Oklahoma cannot make out a *prima facie* showing of entitlement to relief.

5. Whether the District Court erred in deciding that Title VII and Title IX's sex discrimination proscriptions do not reach sex discrimination experienced by transgender persons.

STATEMENT OF THE CASE[1]

Dr. Tudor comes before this Court seeking relief from the August 21, 2016 preliminary injunction (ROA.1030 to ROA.1067) and an October 18, 2016 order (ROA.1362 to ROA.1368) clarifying that injunction's application to her merits case in the Oklahoma federal court.

I. Remedial Federal Laws and Transgender Americans

Two remedial federal laws underlie this dispute—Title VII of the Civil Rights Act of 1964 and Title IX of the Educational Amendments Act of 1972. Both laws proscribe sex discrimination. 42 U.S.C. §2000e-2(a)(1);

[1] Movant-Appellant has included the statement of facts and rulings to be reviewed in this section of her Brief in accordance with the revised Fed. R. App. P. 28.

20 U.S.C. §1681(a). Neither law defines what constitutes sex discrimination. Defendants-Appellants believe that these remedial civil rights statutes reach sex discrimination experienced by transgender persons. Plaintiffs-Appellees disagree.

Over the course of several decades, dozens of transgender people have brought federal sex discrimination cases under Title VII and Title IX. In the earliest cases, courts held that these claims were not cognizable because, *inter alia*, the statutes did not expressly extend protection to transgender people,[2] Congress likely did not intend for transgender people to be protected,[3] Congress failed to amend the statutes to clarify transgender people are protected,[4] and transgender people are neither male nor female thus they could not experience sex discrimination.[5] *See,*

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[2] *But see U.S. v. Wells*, 516 U.S. 482, 496 (1997) ("We thus have at most legislative silence on the crucial statutory language, and we have 'frequently cautioned that it is at best treacherous to find in congressional silence alone that adoption of a controlling rule of law'.") *quoting NLRB v. Plasterers' Local Union No. 79,* 404 U.S. 116, 129–30 (1971).

[3] *But see Dellmuth v. Muth*, 481 U.S. 223, 230 (1989) ("evidence of congressional intent must be both unequivocal and textual").

[4] *But see Prostar v. Massachi*, 239 F.3d 669, 677 (5th Cir. 2001) ("Congress's failure to subsequently amend the statute . . . may only betoken unawareness, preoccupation, or paralysis. Inertia is endemic to the legislative process, rendering congressional inaction a problematic interpretive guide.") (quotations omitted).

[5] *But see* M. Dru Levasseur, *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science is Key to Transgender Rights*, 39 Vt. L. Rev. 943 (2015).

e.g., *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977), *overruling recognized in Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748 (8th Cir. 1982), *overruling recognized in Hunter v. United Parcel Serv.*, 697 F.3d 697, 702 (8th Cir. 2012); *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984).

Federal courts abruptly changed course in the wake of two seminal U.S. Supreme Court cases. The first, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) held that Title VII's sex discrimination reaches discrimination on the basis of one's status as male or female as well as discrimination animated by sex stereotypes. The second, *Oncale v. Sundowner Offshore Servs., Inc.*, further expanded the reach of Title VII's sex proscription to all forms of sex discrimination that alter the terms or conditions of employment, even permutations that are "not the principal evil Congress was concerned with when it enacted Title VII." 523 U.S. 75, 79 (1998) (Scalia, J.).

In the aftermath of *Hopkins* and *Oncale*, the majority of federal courts have construed remedial civil rights statutes to reach sex discrimination experienced by transgender people. *See, e.g.*, *Rosa v. Park*

West Bank & Trust Co., 214 F.3d 213, 214–15 (1st Cir. 2000) (Equal Credit Opportunity Act reaches transgender person's sex stereotyping claim); *Schwenk*, 204 F.3d at 1202 (9th Cir. 2000) (Gender Motivated Violence Act reaches sex discrimination experienced by transgender people); *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004) ("Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as 'transsexual', is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity."); *Etsitty v. Utah Transit Authority*, 502 F.3d 1215, 1222 (10th Cir. 2007) ("[T]ranssexuals may not claim protection under Title VII from discrimination based solely on their status as a transsexual. Rather, like all other employees, such protection extends to transsexual employees only if they are discriminated against because they are male or because they are female."); *Hunter* (8th Cir. 2012), 697 F.3d at 702 (recognizing that gender stereotyping of transgender worker can give rise to Title VII violation); *Chavez v. Credit Nation Auto Sales*, 641 Fed.Appx. 883, 883 (11th Cir. 2016) ("Sex discrimination includes discrimination

against a transgender person for gender nonconformity.") (*citing Glenn v. Brumby*, 663 F.3d 1312, 1316–17 (11th Cir. 2011)).

Eventually, federal enforcement agencies caught up with the courts. In 2007, the U.S. Equal Employment and Opportunity Commission ("EEOC") issued an informal discussion letter advising that Title VII likely reaches sex discrimination experienced by transgender people. Letter from Dianna B. Johnston, Assistant Legal Counsel, EEOC, to [redacted] (May 25, 2007), *reprinted* https://www.eeoc.gov/eeoc/foia/letters/2007/titlevii_sex_coverage_trans.html. In 2010, the U.S. Department of Education ("DOE") issued a lengthy guidance document on bullying that notes sex stereotype motivated bullying of transgender persons violates Title IX (ROA.61 to ROA.62). In 2012, the EEOC determined in a federal sector merits adjudication that Title VII's sex proscription reaches transgender persons. *Macy v. Holder*, Doc. 0120120821, 2012 WL 1435995 (EEOC Apr. 20, 2012). That same year, the U.S. Department of Health and Human Services ("HHS") issued a letter advising that Section 1557 of the Affordable Care Act (42 U.S.C. 18116) which proscribes discrimination on the same grounds as Title IX, reaches sex discrimination experienced by transgender persons. Letter

from Leon Rodriguez, Office of Civil Rights, HHS, to Maya Rupert, Federal Policy Director, National Center for Lesbian Rights (July 12, 2012), *reprinted at* http://www.washingtonblade.com/content/files/2012/08/101981113-Response-on-LGBT-People-in-Sec-1557-in-the-Affordable-Care-Act-from-the-U-S-Dept-of-Health-and-Human-Services.pdf. In 2014, Attorney General Eric Holder issued a memorandum setting forth DOJ's understanding that Title VII protects transgender people (ROA.118 to ROA.119). In May 2016, *nine years after EEOC's first advisory letter*, DOJ and DOE released joint guidance advising schools that Title IX reaches transgender persons (ROA.142 to ROA.150).

II. Dr. Tudor's Merits Case in the Western District of Oklahoma[6]

Movant-Appellant Dr. Rachel Tudor is a female citizen of the Chickasaw Nation and the United States (ROA.1196 ¶¶ 10–11). Dr.

[6] Throughout her Brief, Dr. Tudor points to her filings, Oklahoma's filings, and orders issued in *U.S. and Rachel Tudor v. Southeastern Okla. State Univ. and Reg'l Univ. Sys. of Okla.*, 5:15-cv-324 (W.D.Okla. filed Mar. 30, 2015). Where possible, Dr. Tudor cites to excerpts of the aforementioned that were docketed as exhibits in the court below. Where materials were not docketed as exhibits below, Dr. Tudor cites to items by their docket entry in the Oklahoma court and/or decisions published in the digital Westlaw database. Fed. R. Ev. 201(b) allows this Court to take judicial notice of facts not subject to reasonable dispute where such facts are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Thus, this Court may take notice of these cited matters of public record.

Tudor holds a doctorate in English with an emphasis in Native American literature from the University of Oklahoma, Oklahoma's flagship public university. Dr. Tudor is a current resident of Texas, and holds a Texas driver's license which identifies her as female (ROA.1181 ¶11). Dr. Tudor is also a transgender woman and the aggrieved employee at the heart of a federal enforcement case styled as *U.S. and Rachel Tudor v. Southeastern Okla. State Univ. and Reg'l Univ. Sys. of Okla.*, 5:15-cv-324 (W.D.Okla. filed Mar. 30, 2015).

In 2004 Tudor began a tenure track English professor position at Southeastern Oklahoma State University (ROA.1199 ¶ 7), a public Oklahoma university under the governance of the Regional University of Oklahoma (ROA.1194 ¶ 2). In the summer of 2007, Tudor advised her employers that she planned to transition to female in the Fall 2007 term (ROA.1199 ¶ 39). Later that summer, a Southeastern administrator advised Tudor that Southeastern's Vice President for Academic Affairs ("VPAA") had inquired whether Tudor could be fired because her "transgender lifestyle" offended him (ROA.1199 to ROA. 1200 ¶40). Thereafter, Tudor was subjected to hostilities in the workplace and discriminatory policies.

Things worsened in Fall 2009 when Tudor applied for tenure and promotion. Despite being qualified, administrators at Southeastern (including the VPAA) denied Tudor's application (ROA.1201 to ROA.1202 ¶¶ 100–02). When Tudor informally and formally complained that the administrators would not give her an explanation for their actions, she was threatened with termination. In Fall 2010 Tudor filed several grievances at Southeastern (ROA.1215 ¶¶ 114–16) and reapplied for tenure and promotion. This time, Southeastern's VPAA advised Tudor she was not permitted to apply for tenure and promotion (ROA.1213 ¶¶ 106–07). In Spring 2011 Southeastern terminated Tudor (ROA.1216 ¶119). Shortly thereafter, Tudor filed charges of discrimination with the U.S. Equal Employment Opportunity Commission ("EEOC") (ROA.1194 to ROA.1195 ¶¶ 6–7). Between 2010 and early 2015 the EEOC and the DOJ investigated Tudor's charges.

On March 30, 2015, DOJ filed a Title VII enforcement action in against Southeastern and RUSO in the Western District of Oklahoma. *Tudor*, 5:15-cv-324, Doc. 1. DOJ's suit alleges that the Oklahoma sub-divisions discriminated and retaliated against Tudor. Shortly after the

suit was initiated, Tudor invoked her statutory right to intervene and joined an additional claim.

In May 2015, the Oklahoma Attorney General's Office moved to dismiss Tudor's Oklahoma case arguing, *inter alia*, that Tudor is not protected by Title VII because she is transgender. *Tudor*, 5:15-cv-324, Doc. 30. The motion to dismiss was fully litigated by Oklahoma. On July 10, 2015, the Oklahoma court denied Oklahoma's motion, ruling that under binding 10th Circuit precedent "the discrimination occurred because of Dr. Tudor's gender, and she falls within a protected class." *Tudor*, 5:15-cv-324, 2015 WL 4606079 at *2 (W.D.Okla. July 10, 2015) (Cauthron, J.).

Thereafter Tudor, DOJ, and Oklahoma continued to litigate Tudor's merits case in the Oklahoma court. By late August 2016, more than a dozen depositions of fact and 30(b)(6) witnesses were conducted, several discovery disputes were adjudicated, and the Oklahoma court retained power over the parties to enforce its orders. *See, e.g.*, ROA.1375 (notifying the court below that the Oklahoma court ordered re-deposition of a Regional University System of Oklahoma employee concerning

conversations he had with others regarding Dr. Tudor's restroom use) (*citing* 5:15-cv-324, Doc. 96 (W.D.Okla. Aug. 11, 2016)).

Shortly after the Northern District of Texas issued the preliminary injunction, the Oklahoma court stayed its proceedings.[7]

III. Proceedings in the Northern District of Texas

In March 2016, the State of North Carolina passed a law colloquially known as HB2. Among other things, HB2 expressly prohibits transgender people from using restrooms that match their sex. To effectuate this purpose, HB2 amends another state law establishing sex segregated multi-occupancy restrooms, and adds a definition of "sex" which denies the fact of gender transition. ROA.129 (defining sex to be "[t]he physical condition of being male or female, which is stated on a person's birth certificate"). To date, HB2 is the only state law which expressly excludes transgender people from restrooms matching their sex.

[7] *See* ROA.1078 (Defendants-Appellants' notice to District Court that they would seek stay from Oklahoma court as means to comply with preliminary injunction); *Tudor*, 5:15-cv-324, Doc. 123 (W.D.Okla. Sept. 6, 2016) (staying Oklahoma proceedings pending clarification of injunction's scope to Oklahoma case); *Tudor*, 5:15-cv-324, Doc. 130 (W.D.Okla. Nov. 16, 2016) (Oklahoma court's denial of DOJ's request to lift stay because District Court deemed Oklahoma court proceedings enjoined).

On May 9, 2016, DOJ sued North Carolina, alleging that HB2 violates Title VII, Title IX, and other laws. *U.S. v. North Carolina et al.*, 1:16-cv-425 (M.D.N.C. filed May 9, 2016).

Shortly thereafter, the Attorney General of Texas arranged with other Plaintiffs-Appellees to attack the federal agencies' transgender inclusive interpretations of remedial federal laws. They pinpointed a circuit they believed had not yet decided whether transgender people are protected under Title VII and Title IX. ROA.891 (arguing "[s]everal Plaintiffs[-Appellees] have selected this Court to avoid controlling authority in their home circuits"). *But see* Argument Part IV-B-3. To capture a favorable forum, Plaintiffs-Appellees recruited school districts within the Northern District of Texas, Wichita Falls division, urging them to adopt restroom policies which exclude transgender people from restrooms which match their sex. ROA.893 n.3 (arguing Plaintiffs-Appellees engaged in forum shopping) (*citing* Morgan Smith, *Paxton Shopped Transgender Policy to Second School District*, The Texas Tribune (May 26, 2016), https://www.texastribune.org/2016/05/26/paxton-shopped-transgender-policy-second-school/).

Plaintiffs-Appellees filed this case on May 25, 2016—*422 days after DOJ filed Tudor's Oklahoma case*—alleging that a slew of guidance documents[8] ("Guidance") memorializing federal agencies' transgender inclusive interpretations of Title VII and Title IX caused them injury. *See* First Complaint for Declaratory and Injunctive Relief, ROA.21 to ROA.52.

On July 6, 2016, *42 days after filing this case*, Plaintiffs-Appellees moved for a preliminary injunction (ROA.509 to ROA.547). In support of their motion, Plaintiffs-Appellees argued that their state laws conflict with the federal agencies' construal of federal laws, thereby purportedly establishing an injury (ROA.529 to ROA.531) and pointed to declarations and affidavits from officials purportedly evidencing a custom of excluding transgender students from restrooms which match their sex[9]. At an

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[8] Department of Education, "Dear Colleague Letter" (2010), ROA.21 to ROA.52; Department of Education, "Questions and Answers on Title IX and Sexual Violence" (2014), ROA.65 to ROA.117; Department of Justice Memorandum "Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964 (2014), ROA.118 to ROA.119; Department of Labor and Occupational Safety and Health Administration, "Best Practices: A Guide to Restroom Access for Transgender Workers (2015), ROA.120 to ROA.123; Equal Employment Opportunity Commission, "Fact Sheet: Bathroom Access for Transgender Employees Under the Civil Rights Act of 1964" (undated webpage), ROA.137 to ROA.138; Department of Education and Department of Justice, "Dear Colleague Letter" (2016), ROA.142 to ROA.150.

[9] *See, e.g.*, ROA.549 to ROA.550 (Wisconsin); ROA.558 to ROA.561 (Arizona); ROA.564 to ROA.565 (Arizona); ROA.567 to ROA.570 (Kentucky); ROA.572 to

August 12, 2016 hearing, Plaintiffs-Appellees walked back their claim of harm, conceding they could not point to laws or codified policies from all Plaintiffs-Appellees which expressly conflict with the Guidance, but nevertheless implored the District Court to take judicial notice of their existence (ROA.1601).

On August 21, 2016, the District Court issued a nationwide injunction (ROA.1030 to ROA.1067) enjoining Defendants-Appellees from "initiating, continuing, or concluding" investigations and litigation activities tied to their interpretation that Title VII and Title IX reach sex discrimination experienced by transgender persons (ROA.1066). *See also* ROA.1367 n.2 (clarifying scope of injunction to cover Tudor's Title VII case in Oklahoma).

In the preliminary injunction order, the District Court implicitly reasoned it was empowered to exercise jurisdiction because Plaintiffs-Appellees had standing (ROA.1038 to ROA.1043), the dispute is ripe (ROA.1043 to ROA.1048), and there were no alternative legal remedies available to redress Plaintiffs-Appellee's Administrative Procedure Act

ROA.574 (Tennessee); ROA.1010 to ROA.1028 (Tennessee); ROA.576 to ROA.579 (Alabama).

grievances (ROA.1048 to ROA.1050). The Court did not expressly assess whether it was empowered to grant the relief sought by this suit or whether its exercise of jurisdiction was prudent.

As to the injunction itself, the District Court reasoned it was appropriate because it deemed Plaintiffs-Appellees had collectively satisfied the four prerequisites for a preliminary injunction. Underlying this decision were findings that: Title VII and Title IX's sex discrimination proscriptions do not reach transgender persons,[10] threat of harm was demonstrated because DOJ's suit against North Carolina shows enforcement actions could occur if an injunction were not issued,[11] and the balance of hardships weighed in favor of an injunction because without an injunction Plaintiffs-Appellees would not be able to maintain their existing "policies" without threat of federal enforcement[12]. The District Court also reasoned that a nationwide scope (ROA.1065)—

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[10] ROA.1058 (articulating Plaintiffs-Appellees' position) and ROA.1060 (adopting Plaintiffs-Appellees' position).

[11] ROA.1056 (finding Plaintiffs-Appellees "are legally affected in a way they were not before Defendants issued the Guidelines"); ROA.1055 (asserting evidence of harm demonstrated during hearing) (*citing* ROA.1532 ["the enforcement action against the State of North Carolina is an enforcement on every state in this country because the principles that the Defendants are articulating and trying to enforce are, in their words and actions, universal").

[12] ROA.1064 (holding that without an injunction Plaintiffs-Appellees would be forced to choose between "maintaining their current policies in the face of the federal government's view that they are violating the law, or changing them to comply").

enjoining cases pending before co-equal federal courts beyond the 5th Circuit—was appropriate but nevertheless invited the parties to advise the court of pending litigations so the injunction's scope could be further clarified (ROA.1066).

On August 30, 2016, Defendants-Appellants noticed the District Court of Dr. Tudor's Oklahoma case and argued it should not be covered by the injunction. They further advised that Tudor's case was then scheduled for trial commencing November 1, 2016 and that uncertainty about the scope of the August 21 injunction had already interfered with those proceedings (ROA.1078).

On August 31, 2016, the District Court acknowledged Defendants-Appellants' August 30 notice and invited the parties to provide further briefing as to why the cases Defendants-Appellants identified should be deemed enjoined (ROA.1084).

On September 7, 2016, Dr. Tudor's counsel notified the parties of her intent to intervene (ROA.1353 to ROA.1354).

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[13] 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).

On September 12, 2016, Dr. Tudor moved to intervene. ROA.1167 to ROA.1177. *See also* ROA.1179 to ROA.1191 (Tudor's putative complaint-in-intervention). To date, the District Court has failed to rule on Tudor's motion to intervene. *See* ROA.1428 to ROA.1431 (Dr. Tudor's Oct. 27, 2016 request for ruling on intervention).

On September 30, 2016, the District Court held a hearing on the scope of the injunction. Though Dr. Tudor and her counsel attended the hearing and notified the District Court of their presence, they were not invited to participate (ROA.1428).

On October 17, 2017, Dr. Tudor filed a responsive motion to Plaintiffs-Appellees' opposition to her intervention (ROA.1369 to ROA.1377). Attached thereto, were two excerpts from depositions taken

[13] ROA.1101 to ROA.1004 (Bryon Clark Dep. excerpt); ROA.1106 to ROA.1109 (Charles Weiner Dep. excerpt); ROA.1111 to ROA.1116 (Douglas McMillan Dep. excerpt); ROA.1118 to ROA.1121 (Cathy Conway Dep. excerpt); ROA.1123 to ROA.1126 (Claire Stubblefield Dep. excerpt).

by DOJ and Tudor in the Oklahoma case. These deposition excerpts 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.").

On October 18, 2016, the District Court issued an order which purportedly clarified the scope of the preliminary injunction (ROA.1362 to ROA.1368). In that order, the court acknowledged Tudor's merits case was filed long before the present case, but nevertheless held it was enjoined (ROA.1367).

On October 20, 2016, Defendants-Appellants filed a timely notice of appeal of the preliminary injunction and the clarification order (ROA.1389 to ROA.1391). On November 3, 2016, Dr. Tudor filed a timely protective notice appeal of the same orders (ROA.1455 to ROA.1457).

SUMMARY OF THE ARGUMENT

At the outset, the District Court should have declined to exercise jurisdiction. The Declaratory Judgment Act affords district courts with discretion to decline jurisdiction. The District Court abused its discretion by failing to assess whether it had the authority to grant the relief sought and whether exercise of jurisdiction was prudent, skirting the mandatory three-part inquiry set forth in *Orix Credit Alliance, Inc. v. Wolfe*, 212 F.3d 891 (5th Cir. 2000). The District Court's failure to abide by *Orix* is itself sufficient to require reversal.

There are additional legal obstacles to the preliminary injunction. The extraordinary relief afforded by a preliminary injunction is only available where a movant carries its burden as to each of four prerequisites—likelihood of success on the merits, threat of irreparable injury, harm of denying the injunction outweighs not granting it, and issuance comports with the public interest. With no substantial record developed below and a host of legal obstacles weighing against issuance of an injunction for individual movants, Plaintiffs-Appellees urged the District Court to treat them as a unit, such that no individual movant should be required to (because no individual movant can) make a *prima*

facie showing as to the four prerequisites. Agreeing, the District Court issued an injunction to which no individual class member was entitled. The Supreme Court has made clear that where movants are differently situated and allege vastly different harms they must separately satisfy the preliminary injunction prerequisites. *See, e.g.*, *Juidice v. Vail*, 430 U.S. 327, 331–32 (1977). This principled rule is intended to prevent what happened below and is also sufficient to require reversal.

Looking at Oklahoma individually, it is abundantly clear that the preliminary injunction prerequisites are not met. Oklahoma has no likelihood of success on the merits. Oklahoma is a party to a DOJ enforcement action in a co-equal federal court that issued a decision before this case was initiated interpreting Title VII to reach sex discrimination experienced by transgender persons. The equitable doctrine of collateral estoppel bars Oklahoma from re-litigating that issue through this case. Alternatively, Title VII and Title IX necessarily reach sex discrimination experienced by transgender persons.

Oklahoma also cannot carry its burden as to the other prerequisites. There is no substantial threat of injury. Oklahoma failed to point to any laws or rules governing restroom access for transgender

people that directly conflict with the Guidance. Moreover, the fact that Oklahoma waited more than a year after Tudor's Oklahoma enforcement action was filed to seek this injunction weighs against a finding of irreparable harm. The public interest also weighs against issuance of an injunction as there is no important interest served by shielding Oklahoma from federal enforcement activities generally or those which Oklahoma has already acquiesced.

Defendants-Appellants will also draw this Court's attention to other staggering infirmities including issues of standing, ripeness, and the availability of alternative remedies. They will also argue that the Guidance are not final agency rules subject to notice and comment rulemaking. All those deficiencies are also sufficient to require reversal.

The decision below should be vacated, and the case remanded with instruction to dismiss the action.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews a district court's decision to exercise jurisdiction over a declaratory judgment action for abuse of discretion. *Mission Ins. Co. v. Puritan Fashions Corp.*, 706 F.2d 599, 601 (5th Cir. 1983).

This Court reviews a district court's balancing of preliminary injunction factors for abuse of discretion. *Texas et al. v. U.S.*, 809 F.3d 134, 150 (5th Cir. 2015) (*citing Sepulvado v. Jindal*, 729 F.3d 413, 417 (5th Cir. 2013)). Questions of law underlying the district court's decision to grant a preliminary injunction are subject to "broad review and will be reversed if incorrect." *Sepulvado*, 729 F.3d at 417 (*quoting Janvey v. Alguire*, 647 F.3d 585, 591–92 (5th Cir. 2011)). Questions of fact underlying the district court's decision to grant a preliminary injunction are subject to a clearly-erroneous standard of review. *Sepulvado*, 729 F.3d at 417 (*citing Janvey*, 647 F.3d at 591–92).

II. DISTRICT COURT ABUSED ITS DISCRETION IN EXERCISING JURISDICTION

Cases brought under the Declaratory Judgment Act do not automatically confer jurisdiction on federal courts. *Puritan Fashions*, 706 F.2d at 601. District courts must thus determine whether exercising

jurisdiction is appropriate. In this Circuit a district court's discretion to exercise jurisdiction over a declaratory judgment action is circumscribed by the three-step inquiry set forth in *Orix Credit Alliance, Inc. v. Wolfe*, 212 F.3d 891, 895 (5th Cir. 2000).

"First, the court must determine whether the declaratory action is justiciable. Typically, this becomes a question of whether an 'actual controversy' exists between the parties to the action." *Orix*, 212 F.3d at 895. "Second, if it has jurisdiction, then the district court must resolve whether it has 'authority' to grant declaratory relief in the case presented." *Id.* If the court does not have authority to grant declaratory relief, abstention is appropriate. *See Colorado River Water Conservation Dist. v. U.S.*, 424 U.S. 800, 817 (1976) ("As between federal district courts, however, though no precise rule has evolved, the general principle is to avoid duplicative litigation"). "Third, the court has to determine how to exercise its broad discretion to decide or dismiss a declaratory judgment action." *Orix*, 212 F.3d at 895. "[A] carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counseling against that exercise is required." *Colorado River*, 424 U.S. at 818–19 As to steps two and three, "[u]nless

the district court addresses and balances the purpose of the Declaratory Judgment Act and the factors relevant to abstention doctrine on the record, it abuses its discretion." *Travelers Insurance Co. v. Louisiana Farm Bureau Fed.*, 996 F.2d 774, 778 (5th Cir. 1993) (citations omitted).

The District Court did not determine whether it had authority to grant the relief sought by Plaintiffs-Appellees prior to issuing the preliminary injunction, in derogation of *Orix* step two. This was not harmless error. Under this Court's binding precedents, the design of Plaintiffs-Appellees' suit deprived the District Court of colorable authority to issue the relief sought, thereby requiring abstention.

Plaintiffs-Appellees' suit seeks to preempt substantially developed merits litigations in other federal fora, including Dr. Tudor's Oklahoma case. *See, e.g.*, ROA.1085 to ROA.1099 (pointing to cases, many filed before this case was initiated, which Plaintiffs-Appellees seek to preempt). It is well-settled that federal district courts lack the authority to take jurisdiction over such cases let alone grant relief sought therein. *See, e.g.*, *Gregory-Portland Indep. Sch. Dist. v. Texas Ed. Agency*, 576 F.2d 81, 82–83 (5th Cir. 1978) (directing second district court to dissolve injunction and transfer case back to first district court which still had

jurisdiction over the parties); *West Gulf Maritime Ass'n v. ILA Deep Sea Local 24, S. Atlantic and Gulf Distr. of ILA, AFL-CIO*, 751 F.2d 721, 731 (5th Cir. 1985) (holding that second district court's issuance of preliminary injunction in a purported effort to "preserve the status quo" intruded on decisional authority of first district court which still had jurisdiction over the parties and issues); *id.* at 732 (vacating preliminary injunction and remanding for entry of stay, transfer, or dismissal). *See also Ceres Gulf v. Cooper*, 957 F.2d 1199 (5th Cir. 1992) (reversing district court's denial of intervention motion and directing the court to dismiss case for lack of jurisdiction).

The District Court also failed to assess whether exercise of jurisdiction is prudent, in derogation of *Orix* step three. The only threshold issues the court considered were standing (ROA.1038 to ROA.1043), ripeness (ROA.1043 to ROA.1044), whether the guidance constituted final agency actions (ROA.1044 to ROA.1048), and the availability of alternative legal remedies (ROA.1048 to ROA.1050)—questions of justiciability. But a justiciability inquiry does not satisfy a district court's obligation to determine whether exercise of jurisdiction is appropriate. *Rowan Companies, Inc. v. Griffin*, 876 F.2d 26, 28 (5th Cir.

1989). Had the District Court conducted *Orix* step three it would have quickly discovered that exercise of jurisdiction is patently at odds with the animating purposes of the Declaratory Judgment Act and thus jurisdiction should be declined. *Travelers*, 996 F.2d at 778.

For example, rather than preventing the "multiplicity and circuity of actions," this case substantially duplicates issues presented in earlier filed litigations like Dr. Tudor's Oklahoma case. *Smith v. Transit Casualty Co.*, 281 F.Supp. 661, 670 (E.D.Tex. 1968), *aff'd*, 410 F.2d (5th Cir. 1969) ("One important function of a declaratory judgment is to avoid multiplicity and circuity of actions.").

Additionally, the fact that Plaintiffs-Appellees' case indulges in forum-shopping is at odds with a core purpose of the Declaratory Judgment Act. *See, e.g.*, *Puritan Fashions*, 706 F.2d at 602 n.3 ("The wholesome purposes of declaratory acts would be aborted by its use as an instrument of procedural fencing either to secure delay or to choose a forum.") (*quoting American Auto. Ins. Co. v. Freundt*, 103 F.2d 613, 617 (7th Cir. 1939)). As pointed out by *amici* below, several of the Plaintiffs-Appellees come from "circuits that already have concluded that sex discrimination includes discrimination against transgender people"

(ROA.891). "There is little doubt that these Plaintiffs would lose this lawsuit in their home state or anywhere in their home circuit and that these Plaintiffs joined this lawsuit in hope of avoiding this result" (ROA.891).

III. DISTRICT COURT ERRED IN TREATING PLAINTIFFS-APPELLEES AS A UNIT INSTEAD OF AS INDIVIDUALS

A preliminary injunction is an extraordinary remedy that should only be granted where a movant carries its burden of persuasion as to all prerequisites. *Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 621 (5th Cir. 1985). The District Court failed to follow this well-settled rule. Rather than assessing whether each movant carried its burden, the court treated Plaintiffs-Appellees as a unit, such that no single individual was required to demonstrate entitlement to the injunction. This is error.

This Court has repeatedly recognized that movants must meet a high mark to qualify for a preliminary injunction. Thus, in addition to settling questions of justiciability, a district court must make a finding that movants satisfy all pre-requisites for the injunction itself. *Bluefield Ass'n, Inc. v. City of Starkville, Miss.*, 577 F.3d 250 (5th Cir. 2009) (*citing Lake Charles, Inc. v. Gen. Motors Corp.*, 328 F.3d 192, 195–96 (5th Cir.

2003)) ("We have cautioned repeatedly that a preliminary injunction is an extraordinary remedy which should not be granted unless the party seeking it has 'clearly carried the burden of persuasion' on all four requirements.").

Where movants are differently situated, claiming substantially different harms, each must independently establish it meets the prerequisites. *See Juidice v. Vail*, 430 U.S. 327, 331–32 (1977); *Doran v. Salem Inn, Inc.*, 422 U.S. 922. 928–29 (1975). The onerous burden on movants that seek a preliminary injunction cannot be substantially diminished simply because they come to the courthouse as a group rather than as individuals. *Doran*, 422 U.S. at 928 ("[W]hile respondents are represented by common counsel, and have similar business activities and problems, they are apparently unrelated in terms of ownership, control and management. We thus think each of the respondents should be placed in the position required by our cases as if the respondent stood alone.").

The District Court erred in treating the Plaintiffs-Appellees as a unit because they are differently situated and claim an array of different harms. Below, the Plaintiffs-Appellees advised the court that though

they were united in their distaste for the Guidance, they had ostensibly different conflicts. Some Plaintiffs-Appellees states contended their laws conflicted with the Guidance. *See, e.g.,* ROA.541 (arguing that Wis. Stat. § 120.12(12)'s mandate that restrooms be segregated by sex conflicts with Guidance]). Some Plaintiffs-Appellees school districts claimed their existing policies conflicted with the Guidance. *See, e.g.*, ROA.1565 (pointing to written policy of Harrold Independent School District); ROA.553 to ROA.556 (similar); ROA.1562 (claiming unidentified Plaintiffs-Appellees' unwritten policies conflict with the Guidance). Other Plaintiffs-Appellees claimed the Guidance interfered with their discretion to create restroom policies at some future date. *See, e.g.*, ROA.1573 (citing Texas' nebulous interest in keeping unbridled power to create restroom policies in individual school districts). And Plaintiff-Appellee Oklahoma claimed it had a unique conflict—that it had an interest in being shielded from a federal enforcement suit against its sub-divisions initiated before much of the challenged Guidance was issued and the HB2 suit was filed. *See, e.g.*, ROA.1089.

IV. OKLAHOMA CANNOT ESTABLISH LIKELIHOOD OF SUCCESS

A. Collateral estoppel precludes Oklahoma's re-litigation of Title VII's scope.

Oklahoma cannot meet its showing of substantial likelihood to succeed on the merits because it is precluded by the equitable doctrine of collateral estoppel from re-litigating whether Title VII reaches sex discrimination experienced by transgender persons.

The United States, Oklahoma,[14] and Dr. Tudor are parties to a Title VII enforcement action still pending in the Western District of Oklahoma. Shortly after that case was filed, Oklahoma moved to dismiss one of Tudor's sex discrimination claims, arguing that Title VII does not reach sex discrimination experienced by transgender persons. After thorough litigation of this issue, the Oklahoma court deemed Tudor to be within the ambit of Title VII's protection. *U.S. and Rachel Tudor v. Southeastern Okla. State Univ. and Reg'l Univ. Sys. of Okla.*, 2015 WL 4606079 at *2 (W.D.Okla. July 10, 2015) ("Here, it is clear that Defendants' actions as alleged by Dr. Tudor occurred because she was

[14] ROA.1087 (admitting that Plaintiff-Appellee Oklahoma is party to Tudor's Oklahoma case).

female, yet Defendants regarded her as male. Thus, the actions Dr. Tudor alleges Defendants took against her were based upon their dislike of her presented gender. . . . The factual allegations raised by Dr. Tudor bring her claims squarely within the Sixth Circuit's reasoning as adopted by the Tenth Circuit in *Etsitty*. Consequently, the Court finds that the discrimination occurred because of Dr. Tudor's gender, and she falls within a protected class.").

The Oklahoma court's July 2015 decision should be afforded preclusive effect under the equitable doctrine of collateral estoppel. Though this Court has never directly decided whether a denial of a motion to dismiss premised upon an issue of law should be afforded preclusive effect, key principles animating collateral estoppel jurisprudence, respected treatises, and comity weigh heavily in favor of giving such a decision preclusive effect.

Collateral estoppel bars re-litigation of issues of law or fact actually litigated and necessary to the holding of an order in another litigation. Whereas "[r]es judicata operates only when there has been a prior 'judgment' on the merits'," collateral estoppel has "more limited preclusive effect," barring only re-litigation of issues actually litigated

and necessary to holdings in the prior litigation. *Keene Corp. v. U.S.*, 591 F.Supp. 1340, 1346 (D.D.C. 1984), *aff'd sub nom.*, *GAF Corp. v. U.S.*, 818 F.3d 901 (D.C. Cir. 1987) (giving preclusive effect to deficiencies in complaint scrutinized in prior litigations).

There is no principled reason not to afford preclusive effect to an order settling an issue of law on a motion to dismiss for failure to state a claim. As the Restatement (Second) of Judgments § 27 cmt. d (1982) teaches, "[a]n issue may be submitted and determined on a motion to dismiss for failure to state a claim. . . A determination may be based on a failure of pleading or of proof as well as on the sustaining of the burden of proof." *See also B&B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S.Ct. 1293, 1303 (2015) (observing that "the idea of issue preclusion is straightforward, [but] it can be challenging to implement" and turning to the Restatement (Second) of Judgments § 27 for guidance). Where a party, as Dr. Tudor did in the Oklahoma case, sustains her burden of proof at the motion to dismiss stage on a threshold issue of law, the issue was finally decided. *Cf. Champagne v. Jefferson Parish Sheriff's Office*, 188 F.3d 312 (5th Cir. 1999) (holding denial of motion to dismiss on

Eleventh Amendment or qualified immunity grounds are appealable collateral orders when based on issues of law).

Moreover, where a party seeks to invoke collateral estoppel to preclude re-litigation of a threshold issue of law already decided in another litigation that is still pending, equities and principles of judicial economy weigh heavily in favor of giving it preclusive effect. While such an order may not be final in the sense that parties to the original litigation may seek reconsideration from the first court or appeal it later, such an order should not be open to collateral attack in other fora. Deciding otherwise would invite non-prevailing parties to bring successive, parallel litigations in other fora seeking declaratory judgments on issues of law with the express purpose of enjoining earlier filed but still live litigations. Such a result would cut against the values undergirding collateral estoppel. *See, e.g.*, *SIL–FLO, Inc. v. SFHC, Inc.,* 917 F.2d 1507, 1521 (10th Cir.1990) (*citing Blonder–Tongue Labs., Inc. v. Univ. of Ill. Found.,* 402 U.S. 313, 334 (1971) ("The requirement that the party against whom the prior judgment is asserted had a full and fair opportunity to be heard centers on the fundamental fairness of

preventing the party from relitigating an issue [she] has lost in a prior proceeding.")).

Additionally, where there is mutuality of parties, it is incumbent upon courts to give prior adjudications settling an issue of statutory interpretation at the motion to dismiss stage preclusive effect. "In such a case, it is unfair to the winning party and an unnecessary burden on the courts to allow repeated litigation of the same issue in what is essentially the same controversy, even if the issue is regarded one of 'law'." *U.S. v. Stauffer Chemical Co.*, 464 U.S. 165, 171 (1984) (*quoting* Restatement (Second) of Judgments § 28, cmt. b (1982)). Collateral estoppel's threshold requirement that the parties had "one opportunity to litigate an issue fully and fairly" is enough to ensure fairness. *Continental Can Co. v. Marshall*, 603 F.2d 590, 594 (7th Cir. 1979).

Thus, even if not deemed "final" in most circumstances, in a unique situation like this where the same parties are disputing the same issue of law in quick, successive and overlapping litigations, a denial of a motion to dismiss deciding an issue of law should be granted preclusive effect. *Cf. Golman v. Tesoro Drilling Corp.*, 700 F.2d 249, 253 (5th Cir. 1983) (*citing In re Falstaff Brewing Co. Antitrust Litigation*, 441 F.Supp.

62, 66 (E.D.Mo.1977) (holding that an order granting partial summary judgment based upon pleadings and affidavits in a still-pending case "is, in the sense requisite for raising an estoppel, a final judgment on the merits.")).

Virtually every party would prefer a second bite at re-litigating an issue, and "there will always [be] a lingering question whether the party might have succeeded in proving his point if he had only been given a second chance . . . . [However, w]ithout more, this is not sufficient to outweigh the extremely important policy underlying the doctrine of collateral estoppel—that litigation of issues at some point must come to an end." *James Talcott, Inc. v. Allahabad Bank, Ltd.*, 444 F.2d 451, 463 (5th Cir. 1971), *cert. denied*, 404 U.S. 940 (1971).

B. Alternatively, the Guidance are interpretive rules not subject to notice and comment.

1. Amended Interpretive Rules Not Subject to Notice and Comment

The Administrative Procedures Act ("APA") obligates agencies to make legislative rules through formal notice and comment, which requires them to publish proposed rules in the Federal Register and accept public comment on those rules for a set period of time. 5 U.S.C. § 553. However, the APA does not require notice and comment where an

agency promulgates interpretive rules, general statements of policy, and rules of organization, procedure, or practice. *Perez v. Mortgage Bankers Ass'n*, 135 S.Ct. 1199, 1203–04 (2015).

Binding Supreme Court precedent teaches that agency guidance which merely sets forth the agency's construction of the statutes and regulations it administers are interpretive rules not subject to notice and comment. *Perez*, 135 S.Ct. at 1204 (the "prototypical example of an interpretive rule issued by an agency [as one] [that] advise[s] the public of its construction of the statutes and rules it administers") (*quoting Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 88 (1995)).

The District Court erred in holding that the Guidance could not be deemed interpretive rules simply because the Guidance evidence a change in Defendants-Appellants' interpretations of their organic statutes and regulations. *See* ROA.1047 (citing Holder Memorandum's [ROA.118 to ROA.119] claim that it memorializes change in the agency's interpretation of Title VII as basis for holding Guidance are legislative rules). The Supreme Court held in *Perez* that because the APA does not require agencies to use notice and comment to issue an initial interpretive rule, there is no requirement to use notice and comment

where an agency amends or repeals an interpretive rule. 135 S.Ct. at 1206 (*citing F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (the APA "make[s] no distinction . . . between initial agency action and subsequent agency action undoing or revising that action"). Because the Guidance set forth nothing more than Defendants-Appellants' statutory interpretations of Title VII and Title IX—even if those interpretations have changed over time—no APA violation is sown.

2. District Court's Errors of Statutory Interpretation

The District Court deemed transgender Americans to be categorically unable to redress all forms of sex discrimination under Title VII and Title IX, spuriously holding that the "plain meaning of sex . . . meant the biological anatomical differences between male and female [] as determined at their birth" (ROA.1060). The District Court's construction is contrary to principled statutory construction and in direct contravention of binding precedent.

Statutory construction begins with a statute's text. *CSX Transp., Inc. v. Alabama Dept. of Revenue*, 562 U.S. 277, 283 (2011) (citations omitted). Title VII prohibits discrimination "because of . . . sex." 42 U.S.C. §2000e-2(a)(1). Title IX prohibits discrimination "on the basis of sex." 20

U.S.C. §1681(a). Neither statute defines the term "sex." Neither statute expressly excludes transgender people from its ambit of protection.

As a threshold matter, the District Court erred in determining that there is a "plain meaning" of sex. Supreme Court precedents teach that the meaning of "sex" requires interpretation. *See, e.g., Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 679–83 (1983) (interpreting sex to include discrimination against men and to reach inequitable employer provided health benefits); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986) (interpreting sex to include sexual harassment); *Price Waterhouse*, 490 U.S. at 251 (interpreting sex to include gender and sex stereotyping); *Oncale*, 523 U.S. at 78–79 (interpreting sex to include same-sex sexual harassment). The District Court was thus not privileged to write on a blank slate by claiming "plain meaning" settled this matter.

The District Court's construction is also flawed because it seeks to resolve a statutory ambiguity by adding terms to the statutes which are utterly unsupported by their text. This is not statutory interpretation—it is legislating from the bench. *See De Soto Secs. Co. v. C.I.R.*, 235 F.2d 409, 411 (7th Cir. 1956) ("Courts have no right, in the guise of

construction of an act, to either add words to or eliminate words from the language used by congress.").

Neither Title VII nor Title IX come close to specifying what "sex" is, let alone purport to limit sex to "biological and anatomical differences between male and female [] as determined at their birth" (ROA.1060). If Congress desired to so specifically limit the ambit of these statutes' otherwise broad protections it would have done so in clear terms. *See Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 909–10 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.") (citations omitted).

The District Court's construction is also infirm because it deems transgender people unprotected from all forms of sex discrimination. This move is both in stark conflict with binding precedent and creates serious constitutional problems.

The Supreme Court has repeatedly directed lower courts to not engraft textually unsupported categorical exceptions to the protections afforded under Title VII and Title IX. *See, e.g.*, *Oncale*, 523 U.S. at 79 ("We see no justification in the statutory language or our precedents for

a categorical rule excluding same-sex harassment claims from the coverage of Title VII."); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005) ("Title IX is a broadly written general prohibition on discrimination, followed by specific, narrow exceptions to that broad prohibition. . . . Because Congress did not list *any* specific discriminatory practices when it wrote Title IX, its failure to mention one such practice does not tell us anything about whether it intended that practice to be covered.").

There is no concrete evidence that Congress intended to exclude transgender people from Title VII and Title IX's ambit.[15] But, even if there were, the District Court was not privileged to give legislative animus effect through its interpretation of the statutes. "The Constitution's guarantee of equality must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot justify disparate treatment of that group." *U.S. v. Windsor*, 133 S.Ct.

[15] The District Court's finding that congressional intent at the time of enactment supports its construction is without merit. ROA.1060 to ROA.1061. It is possible that the enacting legislatures did not conceive that Title VII and Title IX would be used to redress sex discrimination experienced by transgender people. However, the enacting legislatures' limited foresight should not be afforded significant weight. "[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale*, 523 U.S. at 79–80.

2675, 2693 (2013) (quotations omitted). The constitutional infirmity of due process and equal protection is no less egregious because the method of enactment is via judicial interpretation of legislative intent. The element of state action is present because the judicial provision of less protection to a category of persons is state action sufficient to uphold an equal protection claim. *See, e.g.*, *Edmonson v. Leesville Concrete*, 500 U.S. 614 (1991) (state action found in judicial act of peremptory challenges); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (state action found in judicial interpretation upholding of leases containing racially restrictive real estate covenants).

3. Title VII and Title IX Reach Sex Discrimination Experienced by Transgender Persons

This Court need not expend much effort construing Title VII and Title IX. Both statutes prohibit sex stereotype discrimination. *See generally Price Waterhouse*, 490 U.S. 228. Transgender discrimination is a form of sex stereotype discrimination since distaste for transgender persons is at its core animated by stereotypical assumptions that all persons will live as and identify with the gender they are assigned at birth.

Indeed, this Court already recognized in *EEOC v. Boh Bros. Const. Co.* that transgender people may redress sex discrimination under the sex stereotype theory. 731 F.3d 444, 454 & 454 n.4 (5th Cir. 2013) (*en banc*) ("[N]umerous courts, including ours, have recognized that a plaintiff can satisfy Title VII's because-of-sex requirement with evidence of a plaintiff's perceived failure to conform to traditional gender stereotypes.") (*citing Glenn*, 663 F.3d at 1316 and *Smith*, 378 F.3d at 573 (both holding that Title VII reaches sex discrimination experienced by transgender persons)). *Cf. U.S. v. Snarr*, 704 F.3d 368, 401 n.21 (5th Cir. 2013) ("Defendants' primary argument against the application of *Jackson* and *Kelly* seems to be that those cases merely addressed this issue via footnote. This is true, but it does not negate the force of the reasoning underlying those footnotes, nor does it disturb the binding nature of those cases upon this court.") (*citing Jacobs v. Nat'l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008)).

V. OKLAHOMA CANNOT SATISFY OTHER PREREQUISITES

A. No Threat of Irreparable Harm

The District Court's finding of irreparable harm is premised on the

holding that each of the Plaintiffs-Appellees states have laws which directly and substantially conflict with the Guidance—that is, that the laws of each Plaintiff-Appellee state mandate exclusion of transgender people from restrooms which match their sex. Motion, ROA.541 (claiming force of "policy change" from established state law is essence of irreparable harm); Injunction, ROA.1039 to ROA.1040 (adopting Plaintiffs-Appellees' position and delineating "various state constitutional and statutory codes" which purportedly conflict with Guidance). However, no such showing was made and none is possible.

None of the Plaintiffs-Appellees states have codified laws which mandate exclusion of transgender students or workers from restrooms which match their sex. Below, Plaintiffs-Appellees merely pointed to constitutional provisions and statutes, many of which generally vest public schools with power to administer facilities and a handful of which authorize schools to segregate restrooms by sex but do not reference treatment of transgender persons. *See* ROA.1039 to ROA.1040. Supplementing this, a handful of Plaintiffs-Appellees provided declarations and affidavits from officials purportedly evidencing customs of excluding transgender persons from restrooms which match their

sex.[16] These showings fall far short of evidencing a direct and substantial conflict between state laws and the Guidance.

State laws which simply vest local authorities with the power to make general policies are not in conflict with the Guidance. Schools in the Plaintiffs-Appellees states are at no risk of violating state law if they comply with the Guidance. State law does not require the schools to take *any* steps let alone steps which directly conflict with the Guidance.[17] *Cf. Jones v. Rath Packing Co.*, 430 U.S. 519, 540 (1970) ("Since it would be possible to comply with the state law without triggering federal enforcement action [] the state requirement is not inconsistent with federal law.").

Plaintiffs-Appellees' appeal to nebulous sovereign authority is not sufficient to demonstrate irreparable harm. Though sovereigns have unique interests in maintaining order within their boundaries, a showing

[16] See citations *supra* note 9.

[17] The District Court's finding that a federal enforcement action against the State of North Carolina evidences imminent threat (see discussion and citations *supra* note 11) is simply erroneous. North Carolina's HB2 mandates that restrooms be segregated by sex, and that for that purpose defines one's sex as either male or female by sex assigned at birth (ROA.129). Plainly, HB2 directly conflicts with the federal Guidance, and to the extent that HB2 is a constitutional exercise of sovereign power, North Carolina would face (and indeed has faced) threat of federal enforcement action.

of irreparable harm must spring from clear, existing, and real conflict with the Guidance. *See, e.g.*, *Texas et al.*, 809 F.3d at 186 (finding the sovereign movants pointed to codified laws which restricted benefits like driver's licenses which would be rendered nullities if the federal government's executive action were not enjoined; also finding "a concrete threatened injury in the form of millions of dollars of losses" thoroughly substantiated in the record below). Moreover, the Plaintiffs-Appellees' mere apprehension of potential federal enforcement actions is insufficient to demonstrate harm. *See, e.g.*, *Holland America Ins. Co. v. Succession of Roy*, 777 F.2d 992, 997 (5th Cir. 1985) (mere speculation that "multiple lawsuits could be filed and inconsistent judgments obtained" insufficient to demonstrate harm).

Additionally, Plaintiffs-Appellees are not entitled to equitable relief solely to create a shelter under which they might codify exclusionary restroom rules at some future time free from federal oversight. *Holland America*, 777 F.2d at 997 ("Speculative injury is not sufficient; there must be more than an unfounded fear on the part of the applicant.") (citations omitted). The bare fact that schools within Plaintiffs-Appellees states once may have had discretion under state law to create exclusionary

restroom rules is not evidence of irreparable harm. *See Parks v. Dunlop*, 517 F.2d 785, 787 (5th Cir. 1975) ("Maintenance of the status quo is only sometimes concomitant of preventing irreparable harm never the touchstone for such injunctive relief.").

The perils of the District Court's logic are well illustrated by looking more closely at Plaintiff-Appellee Oklahoma. Like the other Plaintiffs-Appellees, Oklahoma has no laws or rules which manifest a direct conflict with the Guidance. Below, the only proof of harm Oklahoma pointed to is Okla. Const. art. XII § 5 and Okla. Stat. tit. 70, § 5-117 which vest a state board of education to supervise public education and authorize local school boards to "operate and maintain facilities and buildings." Though Oklahoma's law undoubtedly vests powers to administer schools at the local level, it does not come close to speaking to the issues encapsulated by the Guidance let alone demonstrate an intractable conflict meriting extraordinary relief.

Construing Oklahoma's showing as evidencing an important and established sovereign interest in segregating restrooms by sex assigned at birth leads to patently absurd results. Oklahoma's legislature is notorious for introducing (and failing to enact) laws targeting

transgender citizens. Indeed, in May 2016, Oklahoma considered but failed to pass Senate Bill 1619, which among other things mandated sex segregated restrooms in public schools and defined sex for that purpose to be "as identified at birth by that individual's anatomy." Senate Bill 1619, 2d Sess. (Okla. 2016) *reprinted at* http://webserver1.lsb.state.ok.us/cf_pdf/2015-16%20INT/SB/SB1619%20INT.PDF. Given that Oklahoma plainly lacks the political will to codify laws which conflict with the Guidance, it strains credulity to find irreparable harm.

Additionally, sworn depositions in Tudor's Oklahoma case also evidence Oklahoma lacks a direct conflict with the Guidance. Several administrators from Southeastern attest that neither the school nor the State mandates transgender restroom exclusion. *See, e.g.*, ROA.1383 to ROA.1385. (Cathy Conway deposition excerpt). This observation was repeated by the Regional University System of Oklahoma's general counsel Mr. Charles Babb (ROA.1387 to ROA.1388).

B. Balance of Hardships and Public Interest

The District Court deemed the balance of hardships to favor Plaintiffs-Appellees because it found that without an injunction,

Plaintiffs-Appellees face imminent threat of enforcement actions and threat of suit from students, parents, or community members (ROA.1064). These findings are not reconcilable with Oklahoma's conduct throughout the Oklahoma case or its showing below.

Oklahoma waited an astounding 422 days after DOJ filed Tudor's case before joining this declaratory judgment action. Oklahoma then waited an additional 42 days before moving the District Court for the preliminary injunction. Though defending an enforcement suit is undoubtedly burdensome, Oklahoma bore this burden without complaint for a total of 464 days before seeking relief from the court below. These 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. *See, e.g.*, *Wireless Agents, LLC v. T-Mobile USA, Inc.*, 3:05-cv-94-D, 2006 WL 1540587, at *3 (N.D.Tex. June 6, 2006) ("Delay in seeking a remedy is an important factor bearing on the need for a preliminary injunction. Absent a good explanation, . . . a substantial period of delay . . . militates against the issuance of a preliminary injunction by demonstrating that there is no apparent urgency to the

request for injunctive relief.") (*citing High Tech Med. Instrumentation, Inc. v. New Image Indus., Inc.*, 49 F.3d 1551, 1557 (5th Cir. 1995)).

Even if threat of enforcement action were dispositive, Oklahoma did not point to evidence of a real or imminent threat of suit from students, parents, or community members if they comply with the Guidance. Indeed, excerpts from Charles Babb's deposition evidence such suits are unlikely. ROA.1387 to ROA.1388 (discussing transgender students using restrooms matching their sex at Regional University System of Oklahoma schools).

The District Court's finding that grant of an injunction to Oklahoma and the other Plaintiffs-Appellees is in the public interest is also flawed. There is no *per se* public interest in shielding Oklahoma or any other sovereign from federal enforcement actions. *See, e.g.*, *Gen. Tel. Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318, 326 (1980) (recognizing that the EEOC is guided by "the overriding public interest in equal employment opportunity . . . asserted through direct Federal enforcement") (citations omitted). *See also Fitzpatrick v. Bitzer*, 427 U.S. 445, 452 (1976) (when Congress amended Title VII, it clearly authorized suits against states); *Stewart v. Oklahoma*, 292 F.3d 1257 (10th Cir.

2002) (rejecting argument that Oklahoma's Attorney General has power under Title VII to individually decide which employees may sue Oklahoma in federal court).

Moreover, the District Court's finding that the public at large is split as to which restroom transgender persons should use (ROA.1065 to ROA.1066 [finding states to be split]) rendered, at best, the public interest factor neutral. *Texas v. Seatrain Inter., S.A.*, 518 F.2d 175, 179–80 (5th Cir. 1975) ("This case is shot through with public interests, but it is not one in which an overriding public interest can be identified independent of the interests which the various parties represent. It is evident that some segments of the public . . . are disserved by the preliminary injunction; it is equally apparent that others . . . would be disserved by its vacation . . . On balance, the public interest factor seems essentially neutral.").

VI. INCORPORATION OF ARGUMENTS MADE BY DEFENDANTS-APPELLANTS

Due to a change in the briefing schedule, Dr. Tudor is filing her merits brief three days prior to Defendants-Appellants. Below, Defendants-Appellants argued that Plaintiffs-Appellees lack standing and their claims are not ripe (ROA.929 to ROA.932; ROA.1304 to

ROA.1305 [arguing this Court's vacating of a panel decision undercuts the district court's finding of law that Plaintiffs-Appellees have standing[18]]), the federal guidance documents are not final agency actions (ROA.934 to ROA.937), and Plaintiffs-Appellees have adequate alternative remedies including the ability to challenge the statutory interpretations embedded within the guidance documents as a defense to enforcement actions (ROA.933 to ROA.934). Dr. Tudor assumes Defendants-Appellants will make substantially similar arguments before this Court and hereby incorporates those arguments by reference.

CONCLUSION

Having heavily litigated Tudor's merits case through the twilight of discovery and eve of trial in the Western District of Oklahoma, Plaintiff-Appellee Oklahoma asked the court below to supplant the judgment of the Oklahoma court with its own. In addition to being in contravention of well-settled precedent, the District Court's machinations are unjust.

[18] *Texas v. EEOC*, 827 F.3d 372 (5th Cir. 2016), *reh'g en banc granted, opinion withdrawn*, 838 F.3d 511 (5th Cir. 2016).

For all the foregoing reasons, Dr. Tudor urges that the preliminary injunction relief be reversed and the preliminary injunction be vacated in its entirety. In the alternative and without waiving the foregoing, Dr. Tudor urges that the case be remanded with instructions for the court below to preclude Dr. Tudor's Oklahoma case from its preliminary injunctive relief without need for her intervention. In the second alternative and without waving the foregoing, Dr. Tudor urges that the preliminary injunction be vacated in its entirety with instruction that the court below allow her to intervene.

Dated: January 3, 2017

Respectfully submitted,

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FRAP 32(a)(7) CERTIFICATE OF COMPLIANCE

I certify that this Brief has been prepared in Microsoft Word using 14-point, proportionally spaced font, and that based on word processing software, the brief contains 10,654 words, excluding the items excluded pursuant to Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I certify that on January 3, 2017, I electronically filed the foregoing Brief for Movant-Appellant Dr. Rachel Jona Tudor using the Court's CM/ECF systems, which constitutes service under the Court's rules.

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