

No. 16-11534

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;

(For Continuation of Caption See Reverse Side of Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS (WICHITA FALLS)
DISTRICT COURT CASE NO. 7:16-CV-54

**BRIEF OF *AMICUS CURIAE* OKLAHOMANS FOR EQUALITY, INC.,
IN SUPPORT OF DEFENDANTS-APPELLANTS
and MOVANT-APPELLANT**

On the Brief:

ROBERT H. STROUP
80 Eighth Avenue, 8th Floor
New York, New York 10011
(212) 627-8100

– and –

ALYSSA J. BRYANT
OKLAHOMANS FOR EQUALITY, INC.
621 East 4th Street
Tulsa, Oklahoma 74120
(918) 743-4297

GENE MICAH WISSINGER
LEVY RATNER
*Attorneys for Amicus Curiae
Oklahomans for Equality, Inc.*
80 Eighth Avenue, 8th Floor
New York, New York 10011
(212) 627-8100

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.

CERTIFICATE OF INTERESTED PERSONS

Pursuant to 5th Cir. Rule 28.2.1, 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) Oklahomans for Equality is a non-profit association and is not a publicly held corporation that issues stock.
- 3) The undersigned counsel of record hereby certifies that the following listed persons and entities, including those described in the fourth sentence of Rule 28.2.1, have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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 before the District Court:

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

Counsel:

For Defendants-Appellants:

Spencer Amdur, U.S. Department of Justice
Benjamin L. Berwick, U.S. Department of Justice
James Bickford, U.S. Department of Justice
Beth C. Brinkmann, U.S. Department of Justice
Megan A. Crowley, U.S. Department of Justice
Marleigh D. Dover, U.S. Department of Justice

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

For Plaintiffs-Appellees:

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

For Movant-Appellant:

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

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

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

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

Cally Younger, Office of Governor C.L. “Butch” Otter

For Amicus Curiae Eagle Forum Education & Legal Defense Fund:

Karen Bryant Tripp

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

Molly Thomas-Jensen, Office of the Public Advocate for 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):

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

Counsel for *Amicus Curiae* Oklahomans for Equality

Gene Micah Wissinger
Robert H. Stroup
LEVY RATNER, P.C.
80 Eighth Avenue, Floor 8
New York, New York 10011
Telephone: (212) 627-8100
Facsimile: (212) 627-8182

Alyssa J. Bryant
OKLAHOMANS FOR EQUALITY, INC.
621 East 4th Street
Tulsa, Oklahoma 74120
(918) 743-4297

Respectfully Submitted,

/s/ Gene Micah Wissinger
Gene Micah Wissinger
Counsel for Amicus Curiae

STATEMENT PURSUANT TO RULE 29(a)(4)(E)

Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, the undersigned states that no party or party's counsel authored any part of this brief and no party or party's counsel contributed money to fund any part of the preparation or submission of this brief.

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS.....i

STATEMENT PURSUANT TO RULE 29(a)(4)(E).....vi

IDENTITY AND INTEREST OF AMICUS CURIAE1

INTRODUCTION2

ARGUMENT.....3

 I. Oklahoma Failed to Pass State Laws that Conflict with Agency Guidance...4

 II. Contrary to the Position of the Attorney General, Many Oklahoma
 Educational Institutions Have Adopted Non-Discriminatory Policies
 Concerning Transgender Individuals6

CONCLUSION.....9

CERTIFICATE OF COMPLIANCE11

CERTIFICATE OF SERVICE12

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>United States v. Southeastern Okla. Univ.</i> , No. 15:15-cv-324 (W.D. Okla).....	10
RULES	
Rule 29(a)(4)(D) of the Federal Rules of Appellate Procedure.....	1
PROPOSED STATE STATUES	
House Bill 3049, 2d Sess. (Okla. 2016).....	5
Senate Bill 1014, 2d Sess. (Okla. 2016).....	5
Senate Bill 1289, 2d Sess. (Okla. 2016).....	5
Senate Bill 1323, 2d Sess. (Okla. 2016).....	4
Senate Bill 1619, 2d Sess. (Okla. 2016).....	4
MISCELLANEOUS	
Eger, Andrea: <i>Tulsa Public Schools Lead State on Policy Protection for Transgender Youth</i> , Tulsa World (May 16, 2016)	7

IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Rule 29(a)(4)(D) of the Federal Rules of Appellate Procedure, Oklahomans for Equality, Inc. (“Oklahomans for Equality”) respectfully submits this brief in support of Defendants-Appellants, United States *et al.* and Movant-Appellant Dr. Rachel Jona Tudor (“Dr. Tudor”).

Amicus curiae sought and obtained consent for this filing from counsel for parties Plaintiffs-Appellants State of Texas, *et al.*, Defendants-Appellees United States of America, *et al.* and Movant-Appellant Dr. Tudor.

Oklahomans for Equality is a not-for-profit membership organization that has operated in Tulsa, Oklahoma for the last thirty-seven (37) years seeking equal rights for Lesbian, Gay, Bisexual, and Transgender (LGBT) individuals and families through advocacy, education, programs, and alliances in the state of Oklahoma. Oklahomans for Equality operates the Dennis R. Neill Equality Center, Oklahoma’s first LGBT Community Center which is open seven days a week providing, *inter alia*, resources and support for transgender Oklahomans. Oklahomans for Equality advocates for, and represents the interests of, transgender and gender non-conforming people in Oklahoma.

Oklahomans for Equality believes that the district court’s finding of irreparable harm—based on a holding that each of the Plaintiff-Appellee States has laws in conflict with federal agency guidance—was in error.

The case is of great significance to Oklahomans for Equality because the preliminary injunction directly and immediately impacts the lives of the transgender members of Oklahomans for Equality and the larger transgender population served by the organization.

Movant-Appellant Dr. Tudor explained in her brief the lack of conflict between Oklahoma law and the federal agency guidance at issue here. Oklahomans for Equality brings to the Court's attention additional facts in support of that position. Specifically, in this brief *amicus curiae*: (1) describes the failed attempts of the Oklahoma legislature to enact laws in conflict with the federal agency guidance and (2) shows that policies enacted by Oklahoma schools are consistent with the federal agency guidance at issue in this case.

INTRODUCTION

As *amicus curiae* Oklahomans for Equality demonstrates herein, the State of Oklahoma has no state law or policy contrary to the federal agency guidance documents ("Guidance") that protect the rights of transgender individuals, as demonstrated by: (1) the adoption of policies consistent with the Guidance by multiple public, educationally based institutions in Oklahoma which tens of thousands of Oklahomans attend; and (2) the express rejection of proposed laws that conflict with the Guidance, on multiple occasions, by the elected representatives of the people of Oklahoma. Therefore, the district court's

conclusion that Plaintiffs-Appellees made a showing of irreparable harm on the basis of such a law or policy is clearly erroneous. *See* October 18, 2016 Order at 34-35 (ROA 1362 to ROA 1368).

While the Appellants and other *amici* have skillfully briefed the reasons why this Court should overturn the preliminary injunction issued by the Northern District of Texas, Oklahomans for Equality seeks to bring to the Court's attention underlying facts which demonstrate the impropriety of the injunction with respect to the Plaintiff State of Oklahoma and, by inference, other States as well.

ARGUMENT

Neither the district court's preliminary injunction, nor its subsequent clarifying order entered on October 18, 2016 provide a basis for entry of a preliminary injunction against the United States with respect to the State of Oklahoma. No Oklahoma state law or policy is in conflict with the Guidance, which was the basis for the district court's order finding irreparable harm. The district court's October 18, 2016 clarifying Order, at footnote 1, itself suggests the lack of any basis for an injunction against the United States respecting Oklahoma. That footnote states: "Those states who do not want to be covered by this injunction can easily avoid doing so by state law that recognizes the permissive nature of § 106.33 [of Title IX]. It therefore only applies to those states whose laws direct separation." (ROA 1362 to 68). The preliminary injunction, by its

express terms, is, therefore, only to be applied to states where there are laws proscribing restroom usage in conflict with the Guidance. Oklahoma is not such a state. There is no law or legal authority governing the use of intimate facilities by any adult or child in the state of Oklahoma. Moreover, sub-sovereigns of Oklahoma, like school districts and state universities, have actually adopted policies consistent with the Guidance.

I. Oklahoma Failed to Pass State Laws that Conflict with Agency Guidance.

In her brief to this Court, Movant-Appellant Dr. Tudor noted that the Oklahoma legislature failed to pass Senate Bill 1619,¹ which sought to mandate sex segregated restrooms in public schools and defined sex for that purpose “as identified at birth by that individual’s anatomy.” *See* January 3, 2017 Brief of Movant-Appellee Dr. Tudor at 50-51. Dr. Tudor also referred to other unsuccessful attempts during the Oklahoma Legislature’s 2016 Second Session to enact laws that would have made opposition to the agency Guidance the law of the State of Oklahoma:

- S.B. 1323 sought to define “sex” as that which was identified at birth by an individual’s anatomy and threatened school districts’ aid if they accommodated a transgender student’s use of a restroom comporting with the student’s gender identity. Under this proposed bill, if one parent complained about a school’s inclusive restroom policies, the only recourse of a district to save its funding would be to reverse the

¹ Hereinafter designated as “S.B.” for Senate Bill or “H.B.” for House Bill.

policy and force the student to use single-occupancy facilities. *See* <http://www.oklegislature.gov/BillInfo.aspx?Bill=sb1323&Session=1600> (last visited 1/8/17).

- S.B. 1014 sought to provide that: “It shall be unlawful for a person to use a gender specific restroom when that person’s biological gender is contrary to that of the gender-specific restroom. *See* <http://www.oklegislature.gov/BillInfo.aspx?Bill=sb1014&Session=1600> (last visited 1/8/17).
- H.B. 3049 would have required school districts to adopt policies that prohibited transgender students from using sex-segregated facilities in accordance with their gender identity. The only accommodations the proposed bill would have permitted were unisex restrooms or “controlled use” of employee facilities. *See* <http://www.oklegislature.gov/BillInfo.aspx?Bill=hb3049&Session=1600> (last visited 1/8/17).

In addition to these bills directly opposing the Guidance, the Oklahoma Legislature unsuccessfully attempted to remove authority from local municipalities via introduction of S.B. 1289, 2d Sess. (Okla. 2016), a “preemption” bill dictating that no municipality in Oklahoma could pass a law going beyond what is set by state law. This proposed legislation, like the others above, was not adopted. *See* <http://www.oklegislature.gov/BillInfo.aspx?Bill=sb1289&Session=1600> (last visited 1/8/17). Thus, despite Oklahoma’s attempts in the district court to show that state laws existed that were in direct conflict with the Guidance, Oklahoma cannot and more importantly did not below point to any law or policy that mandates the intimate facilities that may be used by any person in Oklahoma.

II. Contrary to the Position of the Attorney General, Many Oklahoma Educational Institutions Have Adopted Non-Discriminatory Policies Concerning Transgender Individuals.

Plaintiffs-Appellees' briefing to the district court is full of highly-charged rhetoric concerning state sovereignty and custom related to local control over intimate facilities. Plaintiffs-Appellees, however, fail to include in their discussion of "custom" surrounding the protections afforded transgender Oklahomans several facts about which the Court should be aware.

Notably, the second largest school district in Oklahoma, the Tulsa Public Schools serving approximately 42,000 students in 86 schools on 88 campuses,² is not only governed by a non-discrimination policy that includes gender identity but has a policy created in 2015 in response to a local need, allowing transgender students to use restrooms matching their gender identity. The Tulsa Public School's guidelines on creating a gender inclusive learning environment state, *inter alia*, that:

- Transgender students are allowed to use the bathrooms and locker rooms consistent with their gender identity with parental knowledge.

² See http://www.tulsaschools.org/4_About_District/INDEX.asp (last visited 1/5/17).

- In the absence of parental knowledge, the transgender student may access a gender-neutral bathroom open to all students.

See Eger, Andrea: Tulsa Public Schools Lead State on Policy Protection for Transgender Youth, Tulsa World, published May 16, 2016, available at http://www.tulsaworld.com/news/education/tulsa-public-schools-leads-state-on-policy-protection-for-transgender/article_dd5ba185-410b-54e5-9acd-681fb1976f7a.html (last visited 1/5/17).

Although a private entity, the Oklahoma Secondary Student Activities Association (“OSSAA”) which regulates the conduct of activities and sports competition for students of secondary public schools within Oklahoma responded to the needs of athletes within the state by not only supporting the participation of transgender students in any school-sponsored activity or team that matches their gender identity but also created a framework for determining the gender-specific athletic teams on which a transgender student can participate. *See Board Policies of OSSAA for 2016-2017, section LVII “Transgender Students Participating in Athletic Activities”* available at http://www.ossaa.net/docs/2016-17/OSSAAInfo/MF_2016-17_Policies.pdf (last visited 1/5/17).

At the collegiate level, Oklahoma State University (“OSU”) has a policy explained in their residential life handbook which explicitly adopts the Department of Education’s interpretation of Title IX, providing:

In accordance with the Department of Education and Department of Justice, OSU Housing and Residential Life's Housing and Overnight Accommodations are as follows: Title IX allows a school to provide separate housing on the basis of sex. But a school must allow transgender students to access housing consistent with their gender identity and may not require transgender students to stay in single-occupancy accommodations or to disclose personal information when not required of other students....

See Residential Life Handbook for School Year 2016-2017 at page 20 which can be accessed at http://www.reslife.okstate.edu/policies/handbook_2016-2017.pdf. (last visited 1/5/17).

The University of Central Oklahoma (“UCO”) also affirmatively supports transgender students using intimate facilities consistent with their gender identity, stating on their website that:

UCO is committed to providing a safe, inclusive, supportive, and nondiscriminatory environment for all community members, including persons who identify as transgender. Consistent with this commitment and guidance issued by the Department of Education on May 13, 2016, the University recognizes the rights of transgender community members to...participate in activities and access facilities consistent with their gender identity.

See UCO Website <https://www.uco.edu/central/title-ix/FAQ/faq-BGLTQIA.asp> (last visited 1/5/17).

Several of the state's other colleges and universities including its flagship research institution, the University of Oklahoma, have adopted non-discrimination

policies that include gender identity and can be accessed on their websites. *See* The University of Oklahoma at <http://www.ou.edu/content/eoo/policies-procedures/non-discrimination.html> (last visited 1/6/17); Oklahoma State University at <https://eoo.okstate.edu/> (last visited 1/6/17); University of Central Oklahoma at https://www.uco.edu/administration/legal/files-legal/files-policies/1-1_DisHar_EO%20Statement.pdf (last visited 1/6/17); Southeastern Oklahoma State University at <http://www.se.edu/dept/student-life/files/2010/05/2016-2017-Student-Handbook.pdf> (last visited 1/8/17); Oklahoma City Community College at <http://www.occc.edu/policy/pdf/1011.pdf#search=non%20discrimination> (last visited 1/6/17); Tulsa Community College at <http://www.tulsacc.edu/campus-life/campus-safety/title-ix-non-discrimination-policy> (last visited 1/6/17).

These facts demonstrate that the policies and customs in Oklahoma are far from monolithic or consistent with the position of the State of Oklahoma argued to the district court in this case.

CONCLUSION

Plaintiffs did not meet their extraordinary burden of showing irreparable harm on the basis of conflict with an Oklahoma law or policy and, therefore, this Court should reverse the grant of the preliminary injunction as to Oklahoma in light of this evidence. And, given the paucity of evidence with respect to the other Plaintiffs, the Court should reverse the injunction as to other states as well.

For all of these forgoing reasons, and those put forth in the briefs of Appellants and their supporting *amici*, Oklahomans for Equality urges the Court to reverse and vacate the preliminary injunction in its entirety. In the alternative, *amicus curiae* urges that the district court's orders granting a preliminary injunction be reversed in its entirety, or in the alternative, reversed with respect to the State of Oklahoma and particularly, with respect to the case styled *United States v. Southeastern Okla. Univ.*, No. 15:15-cv-324 (W.D. Okla).

Dated: January 10, 2017
New York, New York

Respectfully Submitted,

/s/ Gene Micah Wissinger
By: Gene Micah Wissinger
LEVY RATNER, P.C.
80 Eighth Avenue, Floor 8
New York, New York 10011
(212) 627-8100
(212) 627-8182 (facsimile)

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(g)(1) of the Federal Rules of Appellate Procedure, the foregoing brief is in 14-Point Times New Roman proportionally spaced font and contains 1,929 words and thus is in compliance with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure.

Dated: January 10, 2017
New York, New York

/s/ Gene Micah Wissinger
Gene Micah Wissinger
Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of January 2017, I filed the foregoing via the CM/ECF system and served the foregoing via the CM/ECF system on all counsel who are registered CM/ECF users. Consent was sought with respect to service of all parties via CM/ECF.

Dated: January 10, 2017
New York, New York

/s/ Gene Micah Wissinger
Gene Micah Wissinger
Counsel for Amicus Curiae