

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

STATE OF TEXAS, et al.	§	
	§	
Plaintiffs,	§	
	§	
v.	§	CIVIL ACTION NO. 7:16-cv-00054-O
	§	
UNITED STATES OF AMERICA, et al.	§	
	§	
Defendants.	§	

PLAINTIFFS’ NOTICE OF PENDING LITIGATION

In accordance with the Court’s orders (ECF No. 58 at 37; ECF No. 62), and in response to Defendants’ Notice of Pending Litigation (ECF No. 61), Plaintiffs file this notice to address cases and matters impacted by the Court’s injunction (hereinafter “the injunction”). Defendants listed seventeen pending cases (ECF No. 61), each of which they contend fall outside the scope of the injunction. Plaintiffs agree in part, and disagree in part, with Defendants, and also bring to the Court’s attention additional matters and considerations.

As Plaintiffs read the injunction, there are four general categories of consideration that impact whether matters fall within its scope.

(1) “This subject”

The first filter or parameter of the injunction pertains to whether litigation or disputes involve “this subject.” ECF No. 58 at 37. Plaintiffs aver that “this subject” refers precisely to whether federal law permits entities subject to Titles VII and IX to separate the sexes in intimate facilities. Plaintiffs address whether certain matters

involve “this subject” on a case-by-case basis, *infra*.

(2) Whether Defendants are involved

The injunction extends to Defendants and, thus, does not generally extend to litigation involving private parties. *See* n.2, *infra*. However, Plaintiffs contend that the injunction generally precludes Defendants from involving themselves in private party litigation in any capacity, including participation as *amicus curiae* or the filing of a Statement of Interest. Plaintiffs address this argument more thoroughly, *infra*.

(3) Whether Plaintiffs or their schools are involved

As the Court made clear, the injunction applies to “Plaintiffs and their respective schools, school boards, and other public, educationally-based institutions.” (ECF No. 58 at 37). This category of application does not appear to be temporally limited. In other words, while the Court concerns itself with when certain litigation was initiated in other matters, Plaintiffs read the injunction to apply fully to cases involving “Plaintiffs and their respective schools, school boards, and other public, educationally-based institutions,” irrespective of when the litigation commenced.

The following cases involve “Plaintiffs and their respective schools, school boards, and other public, educationally-based institutions,” or surround disputes within the borders of Plaintiffs, to wit:

- *Broussard v. First Tower Loan, LLC*, No. 2:15-cv-1161 (E.D. La.) (filed Apr. 13, 2015)

In *Broussard*, Plaintiff, a female who identifies as male, alleged that Defendant terminated her in violation of Title VII. *Id.* (No. 2:15-cv-1161, ECF No. 1 ¶ 1). Plaintiff asserts that Defendant indicated that she could continue working at the company only if she agreed to be treated as a female. *Id.* (No. 2:15-cv-1161, ECF No. 1 ¶ 4).

Plaintiff further alleges that Defendant terminated her when she refused to agree to those conditions. *Id.* (No. 2:15-cv-1161, ECF No. 1 ¶ 4). EEOC intervened in the case and claims that Defendant violated Title VII based on the same facts that Plaintiff alleges. *Id.* (No. 2:15-cv-1161, ECF No. 71 ¶¶ 32–41). Because this dispute does not appear to involve “this subject,” the injunction does not appear to apply to this case.

- *U.S. Equal Employment Opportunity Comm’n v. Help at Home, Inc.*, No. 2:16-mc-1188 (N.D. Ala.) (filed July 20, 2016)

In *Help at Home*, EEOC is seeking to enforce a subpoena in connection with its investigation into Defendant’s termination of a male nursing assistant who identifies as female. *Id.* (No. 2:16-mc-1188, ECF No. 1-2; ECF No. 1-4). Defendant contends that substandard work performance was the sole cause of the firing, while the former employee asserts that he was let go for refusing to inform his patients that he identified as the opposite sex. *Id.* (No. 2:16-mc-1188, ECF No. 1-4; ECF No. 3). The district court has not ruled on the subpoena. Because this dispute does appear to not involve “this subject,” the injunction does not appear to apply to this case.

- *United States v. Southeastern Okla. State Univ.*, No. 5:15-cv-324 (W.D. Okla.) (filed Mar. 30, 2015)

Plaintiffs disagree, in part, with Defendants’ assessment that the injunction does not affect this case—a case with allegations brought by both DOJ and a private party. While the injunction impacts DOJ’s ability to continue the case in the W.D. Okla., it does not preclude the private party from continuing in their claim.

Because Oklahoma is a Plaintiff in the case *sub judice*, the case in W.D. Okla. clearly involves “Plaintiffs and their respective schools, school boards, and other public, educationally-based institutions.” ECF No. 58 at 37. And because “this subject” appears to be at the forefront, the injunction applies to the case in W.D. Okla.

even though it was filed in 2015.

The case was brought by DOJ against a public university in Oklahoma for allegedly failing to promote a professor for identifying as the opposite sex. No. 5:15-cv-324, ECF No. 1. And while DOJ's complaint doesn't make "this subject" a feature of the litigation, the employee at issue, Professor Rachel Tudor, filed a complaint in intervention and alleged that the university improperly denied Dr. Tudor access to restrooms designated for the opposite sex. *Id.* (No. 5:15-cv-324, ECF No. 24 at ¶¶ 43–63). Since that time, DOJ has deposed no less than thirteen current and former university employees about "this subject."¹ The following are examples DOJ's foray into "this subject":

- During the deposition of the former Associate Vice President for Academic Affairs, DOJ asked: "Were any of those conversations regarding the restroom that Dr. Tudor was using?" "Did you have any conversations at any point with anybody at Southeastern about which restroom Dr. Tudor had been using?" "Did you personally have an opinion about which restroom Dr. Tudor should use after her transition to female?" Clark Deposition, attached hereto as Exhibit 1, p. 89, ln. 18–19, p. 89, ln. 22–24, p. 90, ln. 24 – p. 91, ln. 1.
- Deposing former professor and Assistant Vice President, DOJ asked: "Did you ever speak with anybody about the issue of what restroom Dr. Tudor would use after her gender transition?" "Do you remember what these female professors were concerned about with respect to Dr. Tudor using the women's restroom?" "Were you involved in a discussion with somebody about asking Dr. Tudor to use the unisex restroom?" Weiner Deposition, attached hereto as Exhibit 2, p. 39, ln. 2–4, p. 40, ln. 2–4, p. 42, ln. 3–5.
- In questioning the former Vice President for Academic Affairs, DOJ asked: "Did you talk to Ms. Conway about Dr. Tudor's use of rest rooms?" "Do you know whether Dr. Tudor ever used the woman's rest room at Southeastern?" "Did someone express a concern that some people might be uncomfortable using the rest room with Dr. Tudor?" "Was there ever a discussion of Dr. Tudor after her gender transition using the men's rest room?" "Do you think transgender people should be able to use the rest rooms consistent with the gender they identify with?" McMillan Deposition, attached hereto as Exhibit 3, p. 54, ln. 1–2, p. 62, ln. 19–20, p. 63, ln. 9–11, p. 65, ln. 15–16, p. 66, ln. 4–6.

¹ Rule 15(b) of the Federal Rules of Civil Procedure ("FRCP") permits that issues not pled can nonetheless be tried by consent. This can occur particularly when "parties actually recognize the issue to have been litigated." *Trinity Carton Co. v. Falstaff Brewing Corp.*, 767 F.2d 184, 192 (5th Cir. 1985).

- Deposing the former HR Director, DOJ asked: “Do you know what restroom Dr. Tudor used after this June 1st conversation that you had with her?” “Why was the fact that Dr. Tudor was preoperative relevant to the conversation about restroom facilities?” “Was there anyone else other than you, that you know of, who was concerned that female students and female employees who knew Dr. Tudor as a male may be uncomfortable with or threatened by male preoperative Dr. Tudor in the female restroom while presenting as female?” Conway Deposition, attached hereto as Exhibit 4, p. 56, ln. 21–23, p. 91, ln. 2–4, p. 94, ln. 2–7.
- During the deposition of the former Director of the Office of Diversity, DOJ asked: “Have you ever spoken to anybody about the issue of what restroom Dr. Tudor used after she started presenting as a woman at work?” “So had Ms. Conway, at that point, made a decision about what she thought was appropriate with respect to Dr. Tudor’s restroom use when you had this conversation with her?” “I think you referred to the – the restroom issue as one of the biggest issues in dealing with the gender transition. Did Ms. Conway explain why? Stubblefield Deposition, attached hereto as Exhibit 5, p. 86, ln. 21–23, p. 88, ln. 13–16, p. 92 ln. 8–10.

Under the injunction, Defendants are prohibited from action regarding “this subject” in Oklahoma, a Plaintiff State, and “their respective schools, school boards, and other public, educationally-based institutions.” Accordingly, Defendants must cease requesting information through interrogatories, deposition testimony, or any other means. Further, they should cease seeking relief in the Oklahoma case based on “this subject” as long as the injunction remains in place.

At the same time, however, the injunction does not prevent Professor Tudor’s case and claims from moving forward. While the injunction restrains the Defendants, it will generally not apply to private parties.² Dr. Tudor moved to intervene as of right under FRCP 24(a), and the Court granted the motion. No. 5:15-cv-324, ECF No. 7; ECF No. 23. This procedural avenue was open to Dr. Tudor because Title VII provides a statutory right to intervene to aggrieved parties. 42 U.S.C. § 2000e5(f)(1). Dr. Tudor, who is named throughout the main complaint, meets that definition. No. 5:15-

² Injunctive relief will generally extend to those that are in privity with (or controlled by) those enjoined. *See, e.g., Thompson v. Freeman*, 648 F.2d 1144, 1147 (8th Cir. 1981) (quoting *In Regal Knitwear Co. v. NLRB*, 324 U.S. 9 (1944)) (citations omitted).

cv-324, ECF No. 1. Dr. Tudor asserts several claims that are not part of DOJ's complaint, including the specific allegation that the university improperly restricted access to intimate areas. No. 5:15-cv-324, ECF No. 24 at ¶¶ 43–63. In addition to granting the intervention, the W.D. Okla. also joined Dr. Tudor's claims to the case. (No. 5:15-cv-324, ECF No. 23). Thus, there are no jurisdictional or other hurdles preventing Dr. Tudor from proceeding against the university.

- *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, No. 2:16-cv-00943 (E.D. Wisc.) (filed July 19, 2016)

This case is pending in a Plaintiff State, Wisconsin. In *Whitaker*, a female student, who identifies as male, alleged that school officials discriminated against her by, among other things, denying her access to the intimate areas designated for boys. *Whitaker*, ECF No. 12 ¶¶ 27–68. However, while *Whitaker* generally involves “this subject,” Defendants are not parties. For that reason, the injunction does not necessarily extend to *Whitaker*.

However, in that *Whitaker* involves a dispute between a student and a school district, it is postured like the Fourth Circuit case arising out of Gloucester County, VA. In that litigation, DOJ filed a Statement of Interest and argued that the school board's policy of designating restrooms on the basis of sex violates Title IX. *G.G. v. Gloucester Cnty. Sch. Bd.*, 4:15-cv-00054-RGD-DEM (E.D. Va.) (ECF No. 28). Therefore, while the injunction does not prevent the current parties in *Whitaker* from moving forward, it should preclude Defendants' prospective participation, via a Statement of Interest, brief as *amicus curiae*, or other involvement, either before the district court of the Seventh Circuit Court of Appeals.

- *U.S. Dep't of Educ. v. Sumner Cnty. Sch. Dist., Tenn.*, Complaint # 04-16-1526 (filed June 15, 2016)

As the Court may recall, after the briefing and argument on Plaintiffs' motion

for preliminary injunction was completed, but before this Court's ruling was issued, Plaintiffs received notice of a new investigation by DOE into a public school in Sumner County, Tennessee (one of the Plaintiff States).³ This investigation is squarely within the portion of the injunction precluding the Defendants from commencing new investigations, or pursuing ongoing ones, on the matter of access to intimate areas in public educational facilities.

As in many of the cases/investigations already documented by Plaintiffs, ECF No. 52 at 2–8, the investigation represented by the proposed Exhibit W was triggered by a claim that a school prohibited a student from accessing an intimate area belonging to the opposite sex. ECF No. 57-1 at 10. Accordingly, DOE demanded that the Sumner County School District turn over, *inter alia*, copies of all correspondence regarding “the Student’s access to bathrooms and locker rooms” and “[a]ll complaints . . . regarding the Student using the girls’ bathroom or locker room.” *Id.* at 12.

Through counsel, the Sumner County School Board informed DOE that it will not produce any information or otherwise cooperate with the investigation as long as the injunction remains in place, and that the Board considers the investigation closed in light of the injunction. *See* Exhibit 6, attached hereto. Indeed, the Sumner County investigation is squarely within the scope of the Court’s order. Thus, the Sumner County investigation should cease immediately, and Defendants should desist from continuing or commencing any similar efforts.

³ Plaintiffs promptly moved the Court for leave to file a new exhibit pertaining to the investigation. ECF No. 57. The proposed Exhibit W (ECF No. 57-1) details a new investigation by Defendants that, Plaintiffs aver, is now enjoined by the Court’s order. Although Plaintiffs reference this proposed exhibit herein, Plaintiffs note that their motion to admit Exhibit W to the evidentiary record supporting their motion for preliminary injunction remains pending and respectfully renew our request that the Court admit Exhibit W to the record.

(4) “Defendants are enjoined from using the Guidelines or asserting the Guidelines carry weight in any litigation initiated following the date of this Order.”

This restriction speaks for itself and applies to the entirety of Defendants’ “Guidelines” notwithstanding the circumstances presented in any given litigation, or whether that litigation involves “this subject.” Under the APA, successful challenges impact the *entirety* of an agency initiative. *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 890 n.2 (1990).

(A) Cases within the injunction

- *Privacy Matters v. United States*, No. 16-cv-03015 (D. Minn.) (filed Sept. 7, 2016).

The Plaintiffs in *Privacy Matters* assert that Defendants exceeded their authority by promulgating a new rule that forces them to share intimate areas in public schools with the opposite sex in violation of fundamental dignity and personal privacy rights. *Id.* (No. 16-cv-03015, ECF No. 1). As the suit was filed after the injunction, Defendants “are enjoined from using the Guidelines or asserting the Guidelines carry any weight” in *Privacy Matters*. ECF No. 58 at 37.

- *Nebraska v. United States*, No. 4:16-cv-3117 (D. Neb.) (filed July 8, 2016).

Though this case was instituted on July 8, 2016, it appears that the Court’s overriding concern regarding when litigation was initiated was so that the injunction “should not unnecessarily interfere with litigation currently pending before other federal courts on this subject” ECF No. 58 at 37. Whether the injunction will “unnecessarily interfere” with other litigation, Plaintiffs respectfully suggest, should not turn on when a case was filed, but the depth and stage of the litigation at issue.

The lawsuit in D. Neb., brought by multiple States, is nearly substantively identical to this matter. As here, the Plaintiff States in D. Neb. claim that Defendants’ “Guidelines” violated the APA’s “notice and comment” requirement and prohibition

against agency action in excess of statutory authority. *Id.* (No 4:16-cv-3117, ECF. No. 1 at ¶¶ 62–92). They base these claims on an understanding of the controlling federal laws and regulations—and the reasons why the new obligations imposed by Defendants are invalid under them—which is identical to that which the Plaintiffs set forth in this case. *Id.* (No 4:16-cv-3117, ECF. No. 1 at ¶¶ 23–47).⁴

More importantly, nothing has happened on the case in D. Neb. since its filing. Because the Plaintiffs in D. Neb. have not moved for injunctive relief, and no responsive pleading has been filed, extending the injunction to that litigation will not unnecessarily interfere with those proceedings, or otherwise harm the Plaintiffs in those proceedings from seeking relief. Rather, since the Plaintiffs in D. Neb. seek the same result as the Plaintiffs herein, principles of judicial economy suggest that enjoining Defendants as to that case is proper.

- *U.S. Equal Employment Opportunity Commission v. Bojangles Restaurants, Inc.*, No. 5:16-cv-654 (E.D.N.C.) (filed July 6, 2016)

This case, filed shortly before the injunction, is in nearly the same posture as D. Neb.—nothing happened until after the injunction. On Sept. 6, 2016, Bojangles filed an answer in response to Defendant’s lawsuit. Thus, enjoining Defendants as to these cases will not unnecessarily interfere with that litigation.

- *Women’s Liberation Front v. U.S. Department of Justice*, 1:16-cv-915 (D.N.M.) (filed Aug. 11, 2016)

This case, filed shortly before the injunction, is in the exact same posture as D. Neb.—nothing substantive has happened since the case was filed. Thus, enjoining Defendants as to this case will not unnecessarily interfere with that litigation.

⁴ Because of the nearly identical nature of the Nebraska lawsuit, and the relief sought by the Plaintiffs in that case, the complaint in that matter should functionally serve as a brief in support of Plaintiffs herein.

(B) Additional matters within the injunction

Since the institution of investigations, complaints, and litigation involving Titles VII and IX is virtually a daily occurrence, there are likely myriad cases that commenced at or around the time of the injunction. While matters instituted after the injunction certainly fall within the ambit of the injunction, Plaintiffs respectfully ask the Court to extend the injunction to matters instituted before the injunction but on which no responsive pleading has yet been filed. Where no responsive pleading exists, there can be no unnecessary interference, and justice should not be inhibited just because something has been filed, though no responsive pleadings have been filed, or substantive rulings issued.

(C) Known matters that may fall outside the injunction

The following matters, Plaintiffs aver, may fall outside of the injunction in light of when they were filed, the identity of the parties, what has happened in the case since the filing, and/or whether they involve “this subject.”

- *McCrorry v. United States*, 5:16-cv-238 (E.D.N.C.) (filed May 9, 2016)
- *North Carolinians for Privacy v. U.S. Department of Justice*, No. 1:16-cv-845 (M.D.N.C.) (filed May 10, 2016)
- *United States v. North Carolina*, No. 1:16-cv-425 (M.D.N.C.) (filed May 9, 2016)
- *Carcaño v. McCrorry*, No. 1:16-cv-236 (M.D.N.C.) (filed Mar. 28, 2016)
- *Berger v. United States Dep’t of Justice*, No. 1:16-cv-844 (M.D.N.C.) (filed June 29, 2016)
- *Board of Education of the Highland Local School District v. U.S. Department of Education*, No. 2:16-cv-524 (S.D. Ohio) (filed June 10, 2016)
- *Doe v. Anoka-Hennepin School District No. 11*, No. 11-cv-1999 (D. Minn.) (filed July 21, 2011) (Intervenor-Complaint filed by DOJ on Mar. 6, 2012)

- *Students and Parents for Privacy v. U.S. Department of Education*, No. 1:16-cv-4945 (N.D. Ill.) (filed May 4, 2016)

These matters (a) all involve “this subject,” (b) all involve Defendants as parties, and (c) have all seen extensive substantive action since their filings, all of which were before the injunction.

- *Robinson v. Dignity Health*, No. 4:16-cv-3035 (N.D. Cal.) (filed June 6, 2016)

The pleadings in this matter (a) do *not* involve “this subject,” and (b) do *not* involve Defendants as parties. However, since Defendants filed their Notice of Pending Litigation in this matter (ECF No. 61), the Court in *Robinson* granted EEOC’s motion (dated Aug. 22, 2016) to file an *amicus curiae* brief. No. 4:16-cv-3035, ECF No. 48. Thus, Plaintiffs request that the Court’s treatment of this, and other like matters as to Defendants should be like *Whitaker, supra*—that the injunction does not prevent the current parties from moving forward, but it does preclude Defendants’ participation, via a Statement of Interest, brief as *amicus curiae*, or other participation as to “this subject.” Since EEOC’s motion to participate as *amicus curiae* was filed after the injunction, EEOC should be required to withdraw the motion.

- *U.S. Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc.*, No. 2:14-cv-13710 (E.D. Mich.) (filed Sept. 25, 2014)
- *U.S. Equal Employment Opportunity Commission v. Rent-A-Center East, Inc.*, No. 2:16-cv-2222 (C.D. Ill.) (filed July 18, 2016)

Defendants are parties in these matters. However, the pleadings do *not* involve “this subject.” Thus, Plaintiffs believe that the injunction does not prevent the current parties from moving forward, but it does preclude Defendants from raising, as new or litigated issues in these matters, “this subject.”

- *Tooley v. Van Buren Public Schools*, No. 2:14-cv-13466 (E.D. Mich.) (filed Sept. 5, 2014)

Defendants are not parties to this matter. However, the center of the dispute in this case does involve “this subject.” Moreover, Defendants did file a Statement of Interest in this matter on Feb. 20, 2015, in the same way that they did in the Gloucester County, VA case. Like an *amicus curiae* brief, a Statement of Interest does not carry any binding effect, *see Spectrum Stores, Inc. v. Citgo Petroleum Corp.*, 632 F.3d 938, 951 n.14 (5th Cir. 2011), or enduring right to participate in litigation. Rather, such a filing is tantamount to a one-time “suggestion.” *United States v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826, 867 n.55 (5th Cir. 1975). Thus, while the injunction does not prevent the current parties in *Tooley* from moving forward, it should preclude Defendants’ future participation in the case, both before the district court and the Sixth Circuit Court of Appeals.

(5) The Gloucester County, VA case

- *G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.*, No. 4:15-cv-54 (E.D. Va.) (initially filed June 11, 2015), *rev’d on appeal*, 822 F.3d 709 (4th Cir. 2016), *stayed and mandate recalled pending disposition of petition for certiorari*, 136 S. Ct. 2442 (U.S. Aug. 3, 2016) (No. 16A52), *petition for cert. filed*, (U.S. Aug. 29, 2016) (No. 16-273).

With a petition for certiorari presently pending before the Supreme Court, this case is in somewhat of a unique status. As the Court may recall, Defendants participated in it by filing a Statement of Interest under 28 U.S.C § 517 when the case was in the district court. Defendants also filed a brief as *amicus curiae* before the Fourth Circuit. 2015 WL 6585237. While the injunction could be reasonably construed to preclude Defendants from further participation in this matter, Rule 37(4) of the Supreme Court Rules expressly contemplates the participation of the Solicitor General’s Office (part of DOJ) in any Supreme Court proceeding at the will

of the Solicitor General. Sup. Ct. R. 37(4) (“No motion for leave to file an amicus curiae brief is necessary if the brief is presented on behalf of the United States by the Solicitor General . . .”). Thus, Plaintiffs do not contend that the injunction should operate to impede upon the Supreme Court’s perpetual invitation to the Solicitor General to participate in matters pending before it.

Respectfully submitted this the 9th day of September, 2016,

LUTHER STRANGE
Attorney General of Alabama

BRAD D. SCHIMEL
Attorney General of Wisconsin

PATRICK MORRISEY
Attorney General of West Virginia

HERBERT SLATERY, III
Attorney General of Tennessee

MARK BRNOVICH
Attorney General of Arizona

SCOTT PRUITT
Attorney General of Oklahoma

JEFF LANDRY
Attorney General of Louisiana

SEAN REYES
Attorney General of Utah

SAM OLENS
Attorney General of Georgia

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

BRANTLEY STARR
Deputy First Assistant Attorney General

PRERAK SHAH
Senior Counsel to the Attorney General

ANDREW D. LEONIE
Associate Deputy Attorney General for
Special Litigation

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

MICHAEL TOTH
Senior Counsel for Special Litigation

Office of Special Litigation
OFFICE OF THE ATTORNEY GENERAL
OF TEXAS
P.O. Box 12548, Mail Code 009
Austin, Texas 78711-2548
Tel: 512-936-1414

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I, Austin R. Nimocks, hereby certify that on this the 9th day of September, 2016, a true and correct copy of the foregoing document was transmitted via using the CM/ECF system, which automatically sends notice and a copy of the filing to all counsel of record.

/s/ Austin R. Nimocks
Austin R. Nimocks