

No. 16-2424

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Equal Employment Opportunity Commission

Plaintiff-Appellant,

v.

R.G. & G.R. Harris Funeral Homes, Inc.,

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Michigan
Case No. 2:14-cv-13710-SFC-DRG

**REPLY IN SUPPORT OF MOTION TO INTERVENE
AS PLAINTIFF-APPELLANT**

INTRODUCTION

Aimee Stephens moved to intervene in this appeal based on her reasonable apprehension that, as a result of the change in presidential administration, the government may no longer adequately represent her interests in this case. The Equal Employment Opportunity Commission (“EEOC”) did not oppose the motion; Defendant-Appellee R.G. & G.R. Harris Funeral Homes, Inc. (“Funeral Home”) opposes it.¹

Ms. Stephens’s concern about the government’s ability to adequately represent her interests has been borne out by recent events. On February 10—just two days after Attorney General Sessions was confirmed—the Department of Justice withdrew its objections to a nationwide preliminary injunction that blocks agency guidance regarding the rights of transgender people to use restrooms and other facilities consistent with their gender identity. Although the EEOC has filed a brief in this case, its position may change once the agency’s General Counsel is confirmed. Moreover, Attorney General Sessions will determine the government’s litigating position with respect to Supreme Court review.

These extraordinary circumstances amply justify intervention as of right. But even if this Court concludes that Ms. Stephens is not entitled to intervene as of

¹ It is unnecessary and offensive for the Funeral Home to challenge Ms. Stephens’s female identity by referring to her by her former name and male pronouns throughout its opposition to the intervention motion.

right, it should nevertheless grant permissive intervention to prevent even the possibility of significant prejudice to Ms. Stephens's interests.

ARGUMENT

I. Ms. Stephens Is Entitled to Intervene as of Right.

The Funeral Home does not dispute that Ms. Stephens has a legally protectable interest at stake in this litigation and that her interests may be impaired by the disposition of the case. Instead, the Funeral Home argues that the motion to intervene should be denied because the government will adequately represent Ms. Stephens's interests on appeal and because the motion to intervene is untimely. These arguments are unconvincing. First, the government has already reversed course in other litigation involving the civil rights of transgender people, and there is considerable reason to believe that changes in EEOC and Department of Justice leadership may lead to a similar reversal in the government's litigating position in this appeal or in subsequent Supreme Court proceedings flowing from this appeal. These considerations more than suffice to establish that the government's representation *may* prove inadequate. Second, the motion to intervene is timely because Ms. Stephens moved to intervene as soon as she had reason to believe that her interests may not be adequately protected on appeal.

A. Ms. Stephens Has Shown that Defendants May Not Adequately Represent Her Interests.

To meet her “minimal” burden for showing inadequacy of representation, Ms. Stephens “need show only that there is a *potential* for inadequate representation.” *Grutter v. Bollinger*, 188 F.3d 394, 400 (6th Cir. 2000) (emphasis in original); *see also, e.g., Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972). That standard is satisfied here. Although the Funeral Home accuses Ms. Stephens of “sheer speculation,” Def.-Appellee’s Opp. to Mot. to Intervene at 10, developments over just the past several days amply support her concern about the adequacy of the government’s representation.²

On February 8, Jeff Sessions was confirmed as the Attorney General of the United States. Just two days later, the Department of Justice reversed course in an appeal over government guidance documents stating that transgender students and workers should be able to use restrooms and other facilities consistent with their gender identity. Sandhya Somashekhar & Moriah Balingit, *Trump Administration*

² The Funeral Home misleadingly argues that this Circuit considers three factors to determine adequacy of representation: “(1) whether there is collusion between the representative and an opposing party; (2) whether the representative fails in the fulfillment of his duty; and (3) whether the representative has an interest adverse to the proposed intervenor.” Def.-Appellee’s Opp. to Mot. to Intervene at 9 (citing *Triax Co. v. TRW, Inc.*, 724 F.2d 1224, 1227–28 (6th Cir. 1984)). *Triax* itself, however, held that “[t]hese three factors . . . cannot be said to be a comprehensive list of the circumstances where intervention of right ought to be granted.” *Triax*, 724 F.2d at 1228.

Signals Change in Policy for Transgender Students, Wash. Post, Feb. 11, 2017.³ In that case, the district court had issued a nationwide preliminary injunction, which restrains the government from taking any action based on the guidance documents anywhere throughout the country. *Texas v. United States*, --- F. Supp. 3d ----, Civil Action No. 7:16-cv-00054-O, 2016 WL4426495 (N.D. Tex. Aug. 21, 2016). Under the Obama Administration, the Department of Justice appealed the preliminary injunction and filed a motion asking the United States Court of Appeals for the Fifth Circuit to limit the injunction to the twelve plaintiff states. Defs.-Appellants' Mot. for Partial Stay Pending Appeal, *Texas v. United States*, Case No. 16-11534 (5th Cir. Nov. 23, 2016). Oral arguments on the motion were scheduled to take place on February 14. On February 10, however, the Department of Justice and the plaintiffs filed a joint motion withdrawing the government's request to limit the injunction and asking the court to cancel arguments, explaining that "the parties are currently considering how best to proceed in this appeal." Defs.-Appellants' Notice of Withdrawal of Mot. for Partial Stay Pending Appeal & Joint Mot. to Cancel Argument, *Texas v. United States*, Case No. 16-11534 (5th Cir. Feb. 10, 2017). The Fifth Circuit immediately granted the request. Order, *Texas v. United States*, Case No. 16-11534 (5th Cir. Feb. 10, 2017).

³ https://www.washingtonpost.com/national/trump-administration-signals-change-in-policy-for-transgender-students/2017/02/11/c2fd138e-f051-11e6-b4ff-ac2cf509efe5_story.html?utm_term=.7d7d1e9b7717.

In this case, although the EEOC has now filed a brief on appeal, its actions over the past several days also provide considerable grounds for concern. On January 26, the day the government's opening brief was due, it requested a thirty-day extension of the briefing deadline "because of Administration-related changes at the Commission." Pl.-Appellant's Motion for Extension of Time. One news outlet reported that the EEOC "may be planning to withdraw from this case." Mark Joseph Stern, *Due to "Administration-Related Changes" the EEOC May Withdraw from a Trans Rights Case*, Slate (Jan. 27, 2017).⁴ "A high-ranking attorney at the EEOC . . . not[ed] that the agency has not yet formally withdrawn from the litigation," but the attorney "would not . . . say that the agency plans to continue representing Stephens." *Id.* The government could have attempted to dispel these concerns by responding to the intervention motion and reaffirming its commitment to represent Ms. Stephens's interests throughout this appeal and any subsequent litigation, but it has remained conspicuously silent on that count.

As in the *Texas* case, the government's litigating position here may well change. The EEOC's General Counsel position is currently vacant. Robert Iafolla, *EEOC General Counsel David Lopez to Resign in December*, Reuters, Oct. 11,

⁴ http://www.slate.com/blogs/outward/2017/01/27/eec_is_withdrawing_from_a_transgender_rights_case.html.

2016.⁵ The President has the authority to appoint a new General Counsel for the EEOC, who will be responsible for the agency's conduct of litigation to enforce Title VII, as well as new members of the Commission itself. 42 U.S.C. § 2000e-4. Similar changes in federal agency leadership have led to reversals in the government's litigating position. *See* Ann E. Marimow, *A Federal Case Over the Prices Inmates Pay for Phone Calls Turned "Really Strange,"* Wash. Post (Feb. 6, 2017).⁶ Even if the EEOC does not change its position in this case, the Attorney General is responsible for the agency's litigation before the Supreme Court. 42 U.S.C. § 2000e-4(b)(2). Given the Department of Justice's recent actions in the *Texas* case, Ms. Stephens is reasonably concerned that the government may not adequately represent her interests in any Supreme Court proceedings that flow from this appeal. In light of these developments, Ms. Stephens has plainly "established the possibility of inadequate representation." *Grutter*, 188 F.3d at 401.

The Funeral Home argues that a presumption of adequacy arises because Ms. Stephens and the government allegedly share the same ultimate objective. Def.-Appellee's Opp. to Mot. to Intervene at 9–10. But Ms. Stephens has demonstrated a reasonable apprehension that the government may decide at some

⁵ <http://www.reuters.com/article/usa-employment-eeoc-idUSL1N1CH25H>.

⁶ https://www.washingtonpost.com/local/public-safety/a-federal-case-over-the-prices-inmates-pay-for-phone-calls-turned-really-strange/2017/02/06/08ceb79a-ec93-11e6-b4ff-ac2cf509efe5_story.html?utm_term=.1717c0f60bf4.

point in the future that it no longer shares the same ultimate objective in vindicating her rights. Even if the government does continue to share the same ultimate objective, it may no longer make all the arguments Ms. Stephens would make in defense of her interests. That consideration alone—which amounts to more than a mere difference in litigation strategy—suffices to demonstrate inadequacy of representation. *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1247 (6th Cir. 1997).

B. The Motion to Intervene Is Timely.

The motion to intervene is timely because Ms. Stephens moved to intervene promptly after she learned that the government may not continue to adequately represent her interests. The Funeral Home argues at length that the motion to intervene is untimely based on the amount of time that has elapsed since this lawsuit was filed. Def.-Appellee’s Opp. to Mot. to Intervene at 3–7. But, as Ms. Stephens pointed out in the Motion to Intervene, timeliness under these circumstances is measured “from the time [a prospective intervenor] became aware that [their interest] would no longer be protected by the existing parties to the lawsuit.” *Edwards v. City of Houston*, 78 F.3d 983, 1000 (5th Cir. 1996) (en banc); *see also, e.g., United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394–96 (1977); *Triax*, 724 F.2d at 1228 (holding that a postjudgment motion to intervene was timely, even though the litigation had progressed to final judgment and the

proposed intervenor “knew of his interest in the litigation for some time,” because the proposed intervenor “had no reason to seek intervention prior to the decision of [plaintiff] not to appeal”).⁷

The Funeral Home also argues that allowing Ms. Stephens to intervene would significantly prejudice its interests, because Ms. Stephens will allegedly introduce “legal arguments and facts not tested in the extensive proceedings below.” Def.-Appellee’s Opp. to Mot. to Intervene at 7. Generally speaking, though, no party to an appeal may broaden the scope of litigation beyond the issues raised before the district court. *See, e.g., Thomas v. Arn*, 474 U.S. 140, 148 (1985). Ms. Stephens seeks only to raise arguments already within the scope of this appeal, which would not unfairly prejudice either of the existing parties. Ms. Stephens is reasonably concerned that the government may not *continue* to represent her interests or make the arguments she intends to raise, which could significantly prejudice Ms. Stephens’s legally protectable interests.

Although the Funeral Home may not like the prospect of responding to Ms. Stephens’s brief on appeal, that has no bearing on the timeliness of the motion to intervene. “The only prejudice relevant to the timeliness determination is

⁷ *In re Troutman Enterprises, Inc.*, 286 F.3d 359 (6th Cir. 2002), cited by the Funeral Home, is inapposite. There, the proposed intervenor waited more than a year after learning that its interests might not be adequately represented before seeking to intervene. *Id.* at 365.

incremental prejudice from a would-be intervenor's delay in intervening, not prejudice from the intervention in and of itself." *Davis v. Lifetime Capital, Inc.*, 560 F. App'x 477, 493 (6th Cir. 2014) (citing *Stotts v. Memphis Fire Dep't*, 679 F.2d 579, 584 (6th Cir. 1982)). Here, Ms. Stephens moved for intervention as soon as she had reason to believe that her interests may not be adequately protected. And, even if there were some minimal delay, the Funeral Home has not explained how such delay would result in any prejudice. The motion to intervene is therefore timely.

II. Alternatively, the Court Should Grant Permissive Intervention so that Ms. Stephens Can Protect Her Interests on Appeal.

Even if this Court concludes that Ms. Stephens is not entitled to intervene as of right, it should nevertheless grant permissive intervention. If the government does not adequately represent Ms. Stephens's interests in litigating this appeal, she may permanently lose her right to relief for the unlawful discrimination she suffered. *See EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 466 (6th Cir. 1999) ("[W]hile Title VII affords recovery through private action or an action by the EEOC, it does not allow both."); *id.* at 462 ("[T]he lawsuit of one will preclude the lawsuit of another."). Even the possibility of such significant prejudice to Ms. Stephens's interests counsels strongly in favor of permissive intervention. On the other hand, allowing Ms. Stephens to intervene and file a separate brief on appeal

would not impose any substantial prejudice on either the government or the Funeral Home.

CONCLUSION

For the foregoing reasons, the Court should grant Ms. Stephens's motion to intervene and allow her to file her brief on February 26, 2017.⁸

Dated: February 13, 2017

Respectfully submitted,

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*Applications for admission forthcoming

⁸ February 26 is the date this Court set for the EEOC's brief.

CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limitations of Fed. R. App. P. 27(d)(2) because it contains 2,124 words.
2. This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2017, I submitted the foregoing document to the Clerk of the Court for filing, which will use the ECF system to send notification of such filing to all counsel of record. I further certify that on February 13, 2017, I directly served the foregoing document on all counsel of record by electronic mail sent to:

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