No. 17-10135

In the United States Court of Appeals for the Fifth Circuit

FRANCISCAN ALLIANCE, INC., ET AL.,

Plaintiffs-Appellees,

v.

THOMAS E. PRICE, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES

Defendants-Appellants.

On Appeal from the U.S District Court for the Northern District of Texas, Wichita Falls Division
No. 7:16-cv-00108-0

PLAINTIFFS'-APPELLEES' MOTION TO DISMISS PUTATIVE INTERVENORS' APPEAL

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to 5th Cir. Rules 27.4 and 28.2.1, I hereby certify as follows:

(1) This case is *Franciscan Alliance, Inc., et al., v. Price, et al.,* No. 17-10135 (5th Cir.).

(2) 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:

Putative Intervenors-Appellants:

American Civil Liberties Union of Texas
River City Gender Alliance

Counsel:
Brigitte Amiri, American Civil Liberties Union Foundation
Brian Hauss, American Civil Liberties Union Foundation
Joshua Block, American Civil Liberties Union Foundation
James Esseks, American Civil Liberties Union Foundation
Louise Melling, American Civil Liberties Union Foundation
Daniel Mach, American Civil Liberties Union Foundation
Rebecca Robertson, American Civil Liberties Union of Texas
Kali Cohn, American Civil Liberties Union of Texas
Amy Miller, American Civil Liberties Union of Nebraska

Defendants-Appellees:

Thomas E. Price, in his official capacity as Secretary of the U.S. Department of Health and Human Services
U.S. Department of Health and Human Services

Counsel:
Adam Anderson Grogg, U.S. Department of Justice
Bailey Wilson Heaps, U.S. Department of Justice
Emily Brooke Nestler, U.S. Department of Justice

Plaintiffs-Appellees:

Franciscan Alliance, Inc.
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State of Texas
State of Wisconsin
State of Nebraska
Commonwealth of Kentucky, by and through
Governor Matthew G. Bevin
State of Kansas
State of Louisiana
State of Arizona
State of Mississippi, by and through Governor Phil Bryant

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/s/ Luke W. Goodrich
Luke W. Goodrich

INTRODUCTION

Unhappy with how the district court is managing its docket, putative intervenors have filed a premature appeal. They ask this Court to opine on the issue of intervention before the district court has fully resolved it. They also seek a stay of the district court's preliminary injunction order before the district court has decided whether they can be a party to the case. To be sure, putative intervenors can file an interlocutory appeal *after* the district court has resolved their motion to intervene. But at this juncture, the appeal is premature, and this Court lacks jurisdiction. Accordingly, pursuant to Federal Rule of Appellate Procedure 27 and Fifth Circuit Rule 27.4, the appeal should be dismissed.[1]

BACKGROUND

This case involves a challenge to a federal Rule that would require doctors and hospitals to perform and provide insurance coverage for gender transition procedures and abortions in violation of their religious beliefs and medical judgment. Plaintiffs–Appellees consist of eight states (Texas, Wisconsin, Nebraska, Kentucky, Kansas, Louisiana, Arizona, and Mississippi), a Catholic hospital system (Franciscan Alliance and Specialty Physicians of Illinois), and an association of Christian

[1] Under Fifth Circuit Rule 27.4, Plaintiffs–Appellees request that putative intervenors be directed to file their response by February 24, 2017; that Plaintiffs–Appellees reply by March 3, 2017; and that this Court rule on this Motion before requiring further briefing in this appeal.

healthcare professionals (Christian Medical & Dental Associations). The Defendants are the U.S. Department of Health and Human Services (HHS) and Acting Secretary of HHS, which are responsible for promulgating the Rule.

The Rule at issue purports to interpret Section 1557 of the Affordable Care Act, which prohibits discrimination in any federally-funded health program on various grounds, including "sex." 45 C.F.R. § 92.1. The Rule defines "sex" to include "gender identity," which it defines as "an individual's internal sense of gender, which may be male, female, neither, or a combination of male and female, and which may be different from an individual's sex assigned at birth." 45 C.F.R. § 92.4. It also defines "sex" to include "termination of pregnancy." *Id.* The Rule applies to "nearly every healthcare provider in the country," and it requires them "to perform and provide insurance coverage for gender transitions and abortions, regardless of their contrary religious beliefs or medical judgment." Dist. Ct. Op., Dkt. No. 62 at 1-2.

On August 23, 2016, Plaintiffs filed suit, challenging the Rule as a violation of the Administrative Procedure Act (APA), the Religious Freedom Restoration Act (RFRA), and several other federal laws. They asked the court to issue a preliminary injunction by January 1, 2017, which is when key provisions of the Rule were to take effect. The district court did

so, issuing a preliminary injunction on December 31, and finding that the Rule likely violates the APA and RFRA. The deadline for appealing this preliminary injunction is March 1, and Defendants have not yet indicated whether they will appeal.

The putative intervenors are the ACLU of Texas and River City Gender Alliance, which filed a motion to intervene on September 16, 2016. They speculated that some of their members may be harmed if the Rule is not upheld, and they asserted an ideological interest in upholding the Rule.

Because a key question on any motion to intervene is whether the intervenors' interest is adequately represented by another party, the district court ordered briefing on the motion to intervene to be completed after Defendants responded to Plaintiffs' Complaint. Dkt. No. 20. This would provide an indication of whether Defendants were adequately representing intervenors' interests. In the meantime, the district court allowed the putative intervenors to file an over-length *amicus* brief addressing Plaintiffs' motion for a preliminary injunction.

After the district court issued a preliminary injunction, putative intervenors moved for a stay of the preliminary injunction and requested an immediate ruling on their motion to intervene. Dkt. No. 63. The district

court denied the stay, but ordered expedited briefing on the motion to intervene, which was completed on January 19, 2017.

Five days later, on January 24, the district court issued a partial ruling on the motion to intervene, concluding that putative intervenors "may not presently intervene as of right," because they "share the same ultimate objective as Defendants—namely, a finding that the Rule is lawful"—and because they have not demonstrated inadequacy of representation. Dkt. No. 69 at 7. Nevertheless, the district court suggested that putative intervenors might be permitted to intervene if the Defendants change their position. Noting that Defendants had not yet taken a position on permissive intervention, the court ordered further briefing on that issue, to be completed by February 15. *Id.* Plaintiffs and Defendants filed briefs addressing permissive intervention on February 8, 2017; putative intervenors' reply is due February 15.

ARGUMENT

A. Putative intervenors cannot appeal the issue of intervention because the district court is still considering their motion to intervene.

Putative intervenors cannot appeal the issue of intervention because the district court has not resolved it yet. Of course, "a denial of intervention is immediately appealable as a collateral order." *Valley Ranch Dev.*

Co. v. F.D.I.C., 960 F.2d 550, 555 (5th Cir. 1992). But "in order to be immediately appealable, an order denying a motion to intervene must be truly final with respect to the proposed intervenor—that is, the order must rule definitively on the party's participation in the litigation before the district court." *United States v. City of Milwaukee*, 144 F.3d 524, 528 (7th Cir. 1998).

That has not happened yet. Rather than "rul[ing] definitively on [putative intervenors'] participation in the litigation," *id.*, the district has called for further briefing on their request for permissive intervention. The briefing on that request will be complete by February 15. If the request is granted, there will be no basis for an appeal, because putative intervenors will have received the relief they requested. *See Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 375 (1987) (no appeal from the denial of intervention as of right when the court granted permissive intervention). And if that request is denied, putative intervenors can appeal the "definitive" ruling on their motion to intervene. But right now, any appeal is premature.

The same conclusion follows from considering the elements of the collateral order doctrine, on which any appeal from the denial of intervention is based. A denial of intervention is obviously not a "final decision[]" under 28 U.S.C. § 1291 because it does not "'end[] the litigation on the

merits.'" *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)). Nor is it one of the appealable interlocutory orders listed in 28 U.S.C. § 1292. So the only basis for appealing the denial of a motion to intervene is if the denial is a "collateral order." *See Valley Ranch*, 960 F.2d at 555.

Collateral orders are those that "[1] conclusively determine the disputed question; [2] resolve an important issue completely separate from the merits of the action; and [3] [are] effectively unreviewable on appeal from a final judgment." *Stringfellow*, 480 U.S. at 375 (internal quotations omitted). Here, the district court's ruling on only *part* of the motion to intervene fails to meet all three criteria. It does not "conclusively determine" the question of intervention. *Id.* It does not "resolve" that issue, either. *Id.* And it is not "effectively unreviewable," because it can easily be reviewed once the district court rules on the request for permissive intervention. *Id.* Only then will the district court's ruling be "truly final with respect to the proposed intervenor." *City of Milwaukee*, 144 F.3d at 528; *accord* 15B Charles Alan Wright et al., Fed. Prac. & Proc. Juris. § 3914.18 n.35 (2d ed. 2016) (stating that the rule considering denial of intervention to be a collateral order "rests on the premise that the denial concludes the litigation as to the would-be intervenor, who would not have occasion to appeal from any later order").

B. Putative intervenors cannot appeal the preliminary injunction because they are not parties to this suit.

Nor can putative intervenors appeal the grant of a preliminary injunction, because, as non-parties, they lack standing to appeal. "It is well-settled that one who is not a party to a lawsuit, or has not properly become a party, has no right to appeal a judgment entered in that suit." *Edwards v. City of Houston*, 78 F.3d 983, 993 (5th Cir. 1996) (en banc); *see also Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (per curiam). This Court has recognized that "would-be intervenors" who "never obtained the status of party litigants" generally cannot appeal orders unrelated to their attempt to intervene. *Edwards*, 78 F.3d at 993.

That is precisely the case here. Putative intervenors are still "would-be intervenors"—not parties. Thus, they lack standing to appeal. *See United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 933 (2009) ("[I]ntervention is the requisite method for a nonparty to become a party to a lawsuit."); *Marino*, 484 U.S. at 304 ("[A] nonparty [should] seek intervention for purposes of [an] appeal."). Indeed, in seeking intervention below, putative intervenors admitted as much, stating that "as non-parties, Proposed Intervenors [are] powerless to appeal an adverse decision on the preliminary injunction motion or seek a stay of the preliminary injunction pending appellate review." Dkt. No. 38 at 10. They cannot change their position now. *Cf. Gabarick v. Laurin Mar. (Am.) Inc.*,

753 F.3d 550, 553 (5th Cir. 2014) (judicial estoppel "prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding").

In fact, just last week, this Court dismissed a nearly identical attempt from a putative intervenor to appeal a preliminary injunction. Op. granting Mot. to Dismiss, *State of Texas v. United States*, No. 16-11534 (5th Cir. Feb. 9, 2017) (attached as Ex. A). There, as here, the lower court had not yet ruled on the putative intervenor's motion to intervene; there, as here, the putative intervenor attempted to appeal the district court's grant of a preliminary injunction. *Id.* at 3. But this Court dismissed the appeal for lack of standing, concluding that the putative intervenor "had an effective means of obtaining review, which was to seek intervention." *Id.* at 4-5 (internal quotation marks and alterations omitted). The same reasoning applies to the improper appeal here.

Nor can putative intervenors demonstrate that they are entitled to the rare exception allowing appeals by non-parties who participate without objection in the district court and are functionally treated as parties. *See Taylor ex rel. Gordon v. Livingston*, 421 F. App'x 473, 475 (5th Cir. 2011) (non-party could not appeal where she "ha[d] not shown that an exception is warranted and she has not asserted any other cognizable basis for her appeal"). As this Court recently noted, it was aware of no authority "in

which this [C]ourt has allowed a nonparty to appeal without intervening and without having actually participated in the proceedings below." Op. granting Mot. to Dismiss at 5, *State of Texas v. United States*, No. 16-11534 (5th Cir. Feb. 9, 2017) (attached as Ex. A). This Court has required a substantial showing of participation in proceedings below to allow an unsuccessful intervenor to appeal a court's judgment, including "participat[ing] in all critical stages of the hearing," "submitting briefs and evidence," and "arguing issues before the court" that other parties were unable or unwilling to raise. *See Sanchez v. R.G.L.*, 761 F.3d 495, 501-03 (5th Cir. 2014). Here, by putative intervenor's own admission, they were not "able to participate as parties in proceedings related to Plaintiffs' Motions for Preliminary Injunction." Dkt. No. 38 at 1-2. They emphasized that they could not, for example, "raise defenses, present evidence, appeal a grant of preliminary injunction, [or] request a stay of injunction pending appeal." *Id.* Thus, where there has been no intervention and the putative intervenors have not functioned as parties below, no exceptional appeal by a non-party is warranted.

This does not mean that putative intervenors are excluded from the case. The district court permitted them to file an over-length *amicus* brief expressing their views. They have already filed a motion to intervene, which will soon be fully briefed, and which the district court will soon

resolve. If that motion is granted, they will be a party to the case. If it is denied, they can appeal. And if this ordinary procedure is not enough, putative intervenors can seek mandamus—something they have already threatened below. Dkt. No. 63 at 2. But what putative intervenors cannot do is litigate a premature appeal when the district court has not resolved their motion to intervene and they are not parties.

CONCLUSION

The Court should dismiss the appeal for lack of jurisdiction.

Respectfully submitted,

/s/ Luke W. Goodrich

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Counsel for Plaintiffs Christian Medical & Dental Associations, Franciscan Alliance, Inc., Specialty Physicians of Illinois, LLC

CERTIFICATE OF CONFERENCE

On February 13, 2017, Plaintiffs' counsel conferred via email with Will Havemann, counsel for Defendants, who stated that Defendants take no position on this Motion. On February 13, 2017, Plaintiffs' counsel also conferred via email with Brian Hauss, counsel for putative intervenors–appellants, who stated that putative intervenors will oppose this Motion.

CERTIFICATE OF SERVICE

I certify that on February 15, 2017, this motion was (1) served via the Court's CM/ECF Document Filing System, https://ecf.ca5.uscourts.gov, upon all registered CM/ECF users; and (2) transmitted to Mr. Lyle W. Cayce, Clerk of the United States Court of Appeals for the Fifth Circuit, via the Court's CM/ECF Document Filing System, https://ecf.ca5.uscourts.gov. I further certify that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ *Luke W. Goodrich*
Luke W. Goodrich
Attorney for Plaintiffs-Appellees

CERTIFICATE OF COMPLIANCE

This motion complies with the word limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts exempted by Fed. R. App. P. 32(f), it contains 2,128 words. This motion complies with the requirements of Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface (Century Schoolbook) using Microsoft Word 2010.

/s/ Luke W. Goodrich
Luke W. Goodrich
Attorney for Plaintiffs-Appellees

Dated: February 15, 2017

EXHIBIT A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
February 9, 2017

Lyle W. Cayce
Clerk

No. 16-11534

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; ELISABETH PRINCE DEVOS, in her Official Capacity as United States Secretary of Education; UNITED STATES DEPARTMENT OF JUSTICE; JEFF SESSIONS, in his 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; EDWARD C. HUGLER, Acting, 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.

No. 16-11534

Appeals from the United States District Court
for the Northern District of Texas
USDC No. 7:16-CV-54

Before OWEN, ELROD, and COSTA, Circuit Judges.

PER CURIAM:*

The Appellees, which we will collectively refer to as the States, have filed a motion with this court to dismiss Dr. Rachel Jona Tudor's appeal. The United States Appellants do not oppose the motion to dismiss. We grant the motion.

I

The United States Department of Justice (DOJ) sued Southeastern Oklahoma State University and its governing board in the Western District of Oklahoma (the *Southeastern* Litigation), asserting a Title VII claim for alleged discrimination and retaliation against Dr. Tudor, a professor who is transgender. Dr. Tudor subsequently intervened. Oklahoma moved to dismiss on the ground that Dr. Tudor was not a member of a protected class for Title VII purposes. The District Court for the Western District of Oklahoma denied the motion, reasoning that Dr. Tudor fell within a protected class because the defendants' actions "were based upon their dislike of her gender."

Over a year later, the District Court for the Northern District of Texas issued the preliminary injunction that is currently at issue in the appeal pending before this court. In its order clarifying the preliminary injunction, the District Court for the Northern District of Texas noted that because the

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Southeastern Litigation "was substantially underway before the issuance of this injunction, DOJ's legal arguments in the case fall outside the scope of this injunction." However, the clarification stated that the preliminary injunction "still 'enjoin[s] [the United States] from enforcing the Guidelines against [the States] and their respective schools, school boards, and other public, educationally-based institutions' (including Southeastern Oklahoma State University) and 'enjoin[s] [the United States] from initiating, continuing, or concluding any investigation based on [the United States'] interpretation that the definition of sex includes gender identity in Title IX's prohibition against discrimination on the basis of sex.'" Thereafter, the district court for the Western District of Oklahoma stayed the *Southeastern* Litigation.

Dr. Tudor then moved pursuant to Rule 24(b) to intervene in the Northern District of Texas case.[1] She sought a declaratory judgment in that court that the order issued by the district court in the *Southeastern* Litigation "finally decided the question of whether Dr. Tudor is a member of a protected class under Title VII." Both the States and the United States opposed Dr. Tudor's motion to intervene in the district court. Although the District Court for the Northern District of Texas has not ruled on the motion to intervene,[2] Dr. Tudor has filed a notice of appeal seeking review of the preliminary injunction. The States moved in this court to dismiss her appeal, and the United States does not oppose that motion.

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[1] FED. R. CIV. P. 24(b).

[2] When a motion to intervene is denied, the movant may appeal that ruling. *Edwards v. City of Houston*, 78 F.3d 983, 992 (5th Cir. 1996) (en banc). If a district court unreasonably delays in ruling on a motion, mandamus relief requiring a prompt ruling may be available. *See In re Scott*, 163 F.3d 282, 283-84 (5th Cir. 1998) (per curiam); *In re Sch. Asbestos Litig.*, 977 F.2d 764, 792 (3d Cir. 1992).

II

A

"It is well-settled that one who is not a party to a lawsuit, or has not properly become a party, has no right to appeal a judgment entered in that suit."[3] Dr. Tudor is not a party: she is neither "[o]ne by or against whom a lawsuit is brought" nor a successful intervenor.[4] Nevertheless, she argues that "[w]here a non-party is injured or directly aggrieved by an appealable order issued by the district court, the nonparty may appeal it without formally moving to intervene." To support this proposition, she relies on this court's unpublished decision in *In re Taxable Municipal Bond Securities Litigation*.[5] But in that case, not only did we expressly "decline to rule on the dictum of this court . . . that '[i]f an injunction extends to non-parties, they may appeal from it,'" we also *granted* the motion to dismiss the nonparty's appeal because "the appellants clearly ha[d] an effective means of obtaining review," which was to seek intervention.[6]

We have recognized an exception to this well-settled rule that allows nonparties to "rely on a vague balancing test to overcome the general presumption against non-party appeals."[7] If the court were to apply this test, it would assess "whether 'the non-parties actually participated in the proceedings below, the equities weigh in favor of hearing the appeal, and the

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[3] *Edwards v. City of Houston*, 78 F.3d 983, 993 (5th Cir. 1996).

[4] *See United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 933 (2009) (internal quotation marks omitted) (quoting BLACK'S LAW DICTIONARY 1154 (8th ed. 2004)); *see id.* (noting that the Supreme Court has "indicated that intervention is the requisite method for a nonparty to become a party to a lawsuit").

[5] 979 F.2d 1535, 1535 (5th Cir. 1992) (unpublished) (quoting *United States v. Chagra*, 701 F.2d 354, 359 (5th Cir. 1983)).

[6] *Id.*

[7] *In re Lease Oil Antitrust Litig.*, 570 F.3d 244, 249 (5th Cir. 2009).

non-parties have a personal stake in the outcome.'"[8] Dr. Tudor, however, has not referenced this test in her brief, and as a result, she has forfeited its application.[9] Even absent forfeiture, Dr. Tudor has not cited any authority, and we have found none (outside of those involving collateral orders[10]), in which this court has allowed a nonparty to appeal without intervening and without having actually participated in the proceedings below.

B

Alternatively, Dr. Tudor requests that we treat her appellate brief as a motion to intervene because it serves the "purpose" of such a motion in that it "timely apprise[s] the parties and court of the nonparty's interest in the appeal." Although timely notice of a nonparty's interest might be *a* purpose of a motion to intervene, it is not the *principal* purpose; it does not establish that a nonparty *can* intervene, that is, that the nonparty "has a claim or defense that shares with the main action a common question of law or fact."[11] Dr. Tudor's appellate brief is not the equivalent of a motion to intervene.

III

Dr. Tudor also argues that the States' motion to dismiss should be denied because it is untimely. She acknowledges that neither the Federal Rules of Appellate Procedure nor this court's rules "prescribe a deadline for filing a motion to dismiss an appeal." Instead, she asserts that we should deny the motion to dismiss because "it is in the interests of justice and doing so will avoid prolonging litigation for no good reason." Dr. Tudor has provided no case

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[8] *Searcy v. Philips Elecs. N. Am. Corp.*, 117 F.3d 154, 157 (5th Cir. 1997) (quoting *EEOC v. La. Office of Cmty. Servs.*, 47 F.3d 1438, 1442 (5th Cir. 1995)).

[9] *Miller v. Metrocare Servs.*, 809 F.3d 827, 832 n.5 (5th Cir. 2016).

[10] *See Chagra*, 701 F.2d at 358–59 (5th Cir. 1983); *see also Devlin v. Scardeletti*, 536 U.S. 1, 16–17 (2002) (SCALIA, J., dissenting) (explaining that non-parties have been "allowed to appeal from the collateral orders to which they *were* parties").

[11] FED. R. CIV. P. 24(b)(1)(B).

in which a court has dismissed a motion to dismiss an appeal as untimely, and we are not convinced that it would be in the interest of justice to allow a nonparty to pursue an appeal. It is also unclear how granting the motion to dismiss will prolong the litigation, a point which Dr. Tudor's brief does not elucidate.

* * *

For the foregoing reasons, we GRANT the States' motion to dismiss.