

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

**STATE OF TEXAS et al.,**

**Plaintiffs,**

**v.**

**UNITED STATES OF AMERICA  
et al.,**

**Defendants.**

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**Civil Action No. 7:16-cv-00054-O**

**DR. RACHEL TUDOR’S MOTION  
AND INCORPORATED MEMORANDUM OF LAW IN  
SUPPORT OF MOTION TO INTERVENE & JOIN CLAIM**

Dr. Rachel Tudor, by her undersigned counsel, moves pursuant to Fed. R. Civ. P. 24 to intervene and pursuant to Fed. R. Civ. P. 18 to join her claim for declaratory relief. The facts supporting this motion are supported by the proposed verified pleading attached hereto as Exhibit 1.

**LIMITED SCOPE AND PURPOSE  
OF DR. TUDOR’S INTERVENTION**

Dr. Tudor is the aggrieved employee at the center of and is a party to *United States and Dr. Rachel Tudor v. Southeastern Oklahoma State University and Regional University System of Oklahoma*, 5:15-cv-324 (W.D. Okla. filed Mar. 2015) [hereinafter Oklahoma Litigation]. The Oklahoma Litigation is identified in Defendants’ Notice to this Court filed on August 30, 2016 (ECF Doc. 61) as well as Plaintiffs’ Notice of

Pending Litigation filed on September 9, 2016 (ECF Doc. 64).

Dr. Tudor desires to intervene in the above captioned matter [hereinafter Texas Litigation] as a third party plaintiff naming the State of Oklahoma as a third party defendant for the limited purpose of seeking a declaratory judgment recognizing that an order issued by the Honorable Judge Robin Cauthron of the Western District of Oklahoma in July 2015 finally decided the question of whether Dr. Tudor is a member of a protected class under Title VII. *United States et al. v. Southeastern Okla. State Univ. et al.*, civ-15-324-C, 2015 WL 4606079 at \*2 (July 10, 2015) [hereinafter July 2015 Order] (“Here, it is clear that Defendants’ actions as alleged by Dr. Tudor occurred because she was female, yet Defendants regarded her as male. Thus, the actions Dr. Tudor alleges Defendants took against her were based upon their dislike of her presented gender. . . . The factual allegations raised by Dr. Tudor bring her claims squarely within the Sixth Circuit’s reasoning as adopted by the Tenth Circuit in *Etsitty*. Consequently, the Court finds that the discrimination occurred because of Dr. Tudor’s gender, and she falls within a protected class.”).

Given that the July 2015 Order decided the scope of Title VII’s protection as to Dr. Tudor, Dr. Tudor believes that the Preliminary Injunction issued by this Court on August 21, 2016 (ECF Doc. 58) and any additional relief issued in *Texas et al. v. United States et al.* cannot disturb the issue already decided as to Dr. Tudor in the Oklahoma Litigation under the principle of collateral estoppel.<sup>1</sup>

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<sup>1</sup> *United States v. Stauffer Chem. Co.*, 464 U.S. 165, 172–73 (1984) (recognizing that collateral estoppel bars re-litigation of same issue of statutory interpretation by the

Insofar as this Court takes notice (or, in the alternative, the parties to the above captioned litigation stipulate) that the July 2015 Order precludes re-litigation of the scope of Title VII's protection as to Dr. Tudor, and this Court does not deem the U.S. Department of Justice as being enjoined or otherwise restricted from continued participation in the Oklahoma Litigation, and this Court does not later issue a declaratory judgment which conflicts with or otherwise restricts Dr. Tudor's or the U.S. Department of Justice's participation in the Oklahoma Litigation, Dr. Tudor's Intervention related motions should all be denied as moot.

### **GROUND FOR PERMISSIVE INTERVENTION**

Dr. Tudor moves to permissively intervene pursuant to Fed. R. Civ. P. 24(b)(1).

Federal Rule of Civil Procedure 24(b)(1) allows a party to permissively intervene where

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government; further recognizing that bar precludes re-litigation of issues of "government importance" where there is mutuality of parties); *Montana v. United States*, 440 U.S. 147, 153–55 (1979) ("To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions. These interests are similarly implicated when nonparties assume control over litigation in which they have a direct . . . interest and then seek to re-determine issues previously resolved.").

*See also In re Keaty*, 397 F.3d 264, 271 (5<sup>th</sup> Cir. 2005) (noting that under federal law, "there is no requirement of a trial or evidentiary hearing to conclude that an issue has been 'actually litigated' for collateral estoppel purposes and citing approvingly RESTATEMENT (SECOND) JUDGMENTS § 27, cmt. d); RESTATEMENT (SECOND) JUDGMENTS §27, cmt. d (recognizing that for collateral estoppel purposes, an issue may be submitted and determined on a motion to dismiss for failure to state a claim); *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S.Ct. 1293, 1303 (2015) (observing that "the idea of issue preclusion is straightforward, [but] it can be challenging to implement" and turning to the RESTATEMENT (SECOND) JUDGMENTS §27 for guidance); *United States v. 5 Unlabeled Boxes*, 572 F.3d 169, 175–76 (3d Cir. 2009) (applying *res judicata* to bar re-litigation of issue of statutory interpretation).

she has a “conditional right to intervene by a federal statute” or has a “claim or defense that shares with the main action a common question of law or fact.”

***Dr. Tudor’s shared claim or defense.*** If this Court determines that the Texas Injunction enjoins any aspect of the Oklahoma Litigation, then Dr. Tudor’s putative Complaint in Intervention (Exhibit 1) raises a claim that shares with the main action a common question of law or fact insofar as she seeks relief from the Texas Injunction and any further efforts by Plaintiffs to re-litigate issues and otherwise interfere with proceedings in the Oklahoma Litigation. Under such circumstances, the Oklahoma Litigation and the Texas Litigation have an overlapping issue of statutory interpretation insofar as both litigations contain the same threshold question of law concerning whether Title VII’s sex discrimination proscription can ever reach forms of sex discrimination experienced by transgender persons. More specifically, Dr. Tudor’s claim for declaratory judgment seeks application of collateral estoppel to preclude re-litigation of the overlapping issue of statutory interpretation insofar as this issue was already decided, as to Dr. Tudor, by the July 2015 Order.

***Dr. Tudor’s related interests.*** Dr. Tudor also has an interest in ensuring that this Court not issue a final judgment that has preclusive effect or which otherwise interferes with the Oklahoma Litigation. For example, Dr. Tudor is concerned that if this Court issues the declaratory judgments sought by the Texas Litigation Plaintiffs and further interprets Title VII’s sex discrimination proscription to not cover transgender persons, that the State of Oklahoma will claim that the *Texas* declaratory judgments preclude any relief Dr. Tudor personally seeks in the Oklahoma Litigation since the availability of

relief therein turns on the threshold interpretation of the scope of Title VII's sex discrimination proscription. *See United States v. Stauffer Chem. Co.*, 464 U.S. 165, 172–73 (1984) (holding that judgment on issue of statutory interpretation has preclusive effects on all other litigations involving the same parties and the same issue of statutory interpretation).

Relatedly, Dr. Tudor has an interest in meaningfully participating in the Texas Litigation proceedings so that she may directly advise this Court how any relief granted by this Court affects her continued participation in the Oklahoma Litigation as well as raise claims and defenses that further her unique interests. *Cf. Board of Education of the Highland Sch. Dist. v. United States*, 2:16-cv-524, 2016 WL 4269080, \*2 (S.D. Ohio Aug. 15, 2016) (holding that permissive intervention of transgender student should be granted insofar as the student otherwise satisfied intervention as of right standard and student's claims share common legal and factual questions with school district's claims). *See also Gen. Tel. Co. v. EEOC*, 446 U.S. 318 (1980) (recognizing that litigation strategy pursued by government may differ from that preferred by aggrieved employee and it is for this reason that the aggrieved has a right to intervene and represent her own interests).

***Fifth Circuit precedents weigh in favor of allowing Dr. Tudor's intervention.*** If this Court determines that the Texas Injunction enjoins any aspect of the Oklahoma Litigation, then under binding Fifth Circuit precedent Dr. Tudor's motion for permissive intervention should be granted. The Fifth Circuit teaches that there are two critical issues to consider when deciding whether to grant a motion for permissive intervention. First, the district court should consider whether the putative intervenor's interests are

adequately represented by other parties. Second, the court should consider whether the putative intervenor's interests will significantly contribute to the full development of the underlying factual issues of the suit. *New Orleans Public Serv., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 472 (5<sup>th</sup> Cir. 1984). *See also Cajun Elec. Power Co-op, Inc. v. Gulf States Utilities, Inc.*, 940 F.2d 117, 121 (5<sup>th</sup> Cir. 1991) (“Permissive intervention depends on the facts of each case.”).

As to the first issue, Dr. Tudor has a right to meaningfully contribute to all efforts touching on litigation of her discrimination case in chief including the Texas Litigation insofar as this Court deems the Texas Litigation can enjoin or otherwise curtail proceedings in the Oklahoma Litigation. Dr. Tudor intervened in the Oklahoma Litigation to ensure that her personal interests were furthered and that she had the opportunity to vigorously advocate her own interests throughout that litigation. Though—as in the Oklahoma Litigation—Dr. Tudor's and the United States' interest in ensuring that Title VII's scope is fairly adjudicated as to transgender persons is aligned, Dr. Tudor nevertheless has an overarching interest in ensuring that she personally contributes to these efforts. Among other things, Dr. Tudor has a vested interest in personal participation so that she is given every available opportunity to ensure she and the United States can continue the Oklahoma Litigation unencumbered. Dr. Tudor also has an interest in ensuring that if this Court issues broad final relief through a declaratory judgment that would have preclusive effect on relief sought in the Oklahoma Litigation, that she has standing to challenge that relief on appeal to the 5<sup>th</sup> Circuit. *Cf. United States v. Texas Eastern Transmission Corp.*, 923 F.2d 410 (5<sup>th</sup> Cir. 1991) (holding denial of

permissive intervention proper where putative intervenor would retain right to bring separate litigation to protect its interests after intervention is denied).

As to the second issue, insofar as this Court enjoins proceedings in the Oklahoma Litigation and/or issues broad relief affecting the Oklahoma Litigation, Dr. Tudor's participation in the Texas Litigation will contribute to the full development of underlying issues and equities. Among other things, Dr. Tudor has personal knowledge of the events underlying the Oklahoma Litigation. Dr. Tudor's counsel also has familiarity with decisions in the Oklahoma Litigation as well as evidence gathered throughout that litigation which this Court may deem relevant to the Texas Litigation. Indeed, the Texas Litigation Plaintiffs already appear to be deeply pre-occupied with the goings on in the Oklahoma Litigation, having just recently drawn this Court's attention to carefully curated excerpts from four depositions taken in the Oklahoma Litigation. *See* Plaintiffs' Notice of Pending Litigation, ECF Doc. 64, 3–6 (filed Sept. 9, 2016).

Insofar as Plaintiffs continue to point to claims, defenses, decisions, and/or discovery taken in the Oklahoma Litigation, the Texas Litigation will be better developed if Tudor is joined because Dr. Tudor and her counsel are uniquely well positioned to provide this Court with much needed context. As one example, Plaintiffs' Notice (ECF Doc. 64) fails to advise this Court that the parties to the Oklahoma Litigation have already vigorously litigated the Title VII statutory interpretation issue through a motion to dismiss [see discussion of July 2015 Order, *supra*] and that any injunctive relief this Court grants precluding the U.S. Department of Justice's participation in discovery which touches at all on restroom issues would directly conflict with other duly issued orders in

the Oklahoma Litigation. *See, e.g., United States and Dr. Rachel Tudor v. Southeastern Oklahoma State University and Regional University System of Oklahoma*, 5:15-cv-00324, ECF Doc. 96 (W.D. Okla. Aug. 11, 2016) (granting the United States' motion to compel the re-deposition of a RUSO employee concerning, *inter alia*, conversations the employee had with others regarding Dr. Tudor's restroom use in 2007 and further ordering the Oklahoma Litigation defendants pay costs for the continuation of a deposition and travel costs for the United States' and Dr. Tudor's counsel).

### **GROUND FOR JOINDER OF ADDITIONAL FEDERAL CLAIM**

Dr. Tudor also moves under Fed. R. Civ. P. 18(a) to join her federal claim for declaratory judgment. Dr. Tudor seeks declaratory judgment pursuant to the Declaratory Judgment Act and her claim arises out of the same case or controversy under Article III of the United States Constitution.

Rule 18(a) permits a party to join all claims that she may have against an opposing party in the same action. Fed. R. Civ. P. 18(a) ("A party asserting a claim, counterclaim, crossclaim, or third-party claim may join, as independent or alternative claims, as many claims as it has against an opposing party."). Insofar as federal courts have long recognized that an aggrieved employee has both a right to intervene in government litigation and a right to request joinder of claims or pursue legal theories of liability not originally pursued by the government, joinder is proper. *Cf. Gen. Tel. Co. v. EEOC*, 446 U.S. 318 (1980) (recognizing that the litigation strategy pursued by the EEOC in Title



VII cases may differ from that preferred by the aggrieved, and that for this reason the aggrieved has a right to intervene and represent her own interests).

Pursuant to Rule 18(c), a copy of Dr. Tudor’s proposed Complaint in Intervention is annexed hereto as Exhibit 1. Dr. Tudor further requests an Order permitting the filing of her Complaint in Intervention in the form annexed hereto as Exhibit A with the ECF system of the Court, and to amend the caption of the instant complaint to read as follows:

IN THE UNITED STATES DISTRICT COURT  
FOR THE 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.	§	
	§	
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DR. RACHEL TUDOR	§	
	§	
Intervenor Third-Party	§	
Plaintiff,	§	
v.	§	
	§	
STATE OF OKLAHOMA,	§	
	§	
Third-Party Defendant.	§	

Dated: September 12, 2016

Respectfully submitted,

/s/ Ezra Young

Ezra Young (NY Bar No. 5283114)  
Application for Admission *Pro Hac Vice* Pending  
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**ATTORNEYS FOR DR. RACHEL TUDOR**

**CERTIFICATE OF CONFERENCE**

I hereby certify that on September 12, 2016 Dr. Tudor’s counsel Mr. Ezra Young conferred via telephone with counsel for Defendants, Mr. Benjamin Berwick. During this conference, Defendants’ counsel indicated that they take no position as to Dr. Tudor’s motion to permissibly intervene and join claim, but reserve the right to oppose at a later time.

I further certify that on September 12, 2016 Dr. Tudor’s Mr. Ezra Young counsel conferred via telephone and email with Mr. Austin Nimocks, counsel for Plaintiffs. Mr. Nimocks indicated that Plaintiffs oppose Dr. Tudor’s motion to intervene because “[a]mong other reasons, Plaintiffs do not believe that Dr. Tudor has a sufficient interest in the litigation that would warrant intervention.”

/s/ Ezra Young  
Ezra Young (NY Bar No. 5283114)  
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**CERTIFICATE OF SERVICE**

I hereby certify that on September 12, 2016, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will serve all counsel of record.

/s/ Ezra Young  
Ezra Young (NY Bar No. 5283114)  
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