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.	§	
	§	

DR. RACHEL TUDOR'S REPLY TO PLAINTIFFS' OPPOSITION TO INTERVENTION AND JOINDER

Dr. Rachel Tudor moved this Court to permissively intervene in the above captioned matter [hereinafter Texas Litigation] in order to protect her interests in expeditiously litigating her Title VII sex discrimination and retaliation case, now pending before the Western District of Oklahoma, styled as *United States and Rachel Tudor v. Se. Okla. State Univ. and Reg. Univ. System of Okla.*, 5:15-cv-324 (W.D.Okla. filed Mar. 30, 2015) [hereinafter Oklahoma Litigation].

Dr. Tudor's request—that this Court join her to the Texas Litigation and issue a declaratory judgment holding that an order in the Oklahoma Litigation precludes re-litigation of the scope of Title VII's sex proscription protection as to Tudor or, alternatively, deny Tudor's motion as moot and find that the Oklahoma Litigation is not enjoined (ECF Doc. 67 at 3)—is unique, but Plaintiffs' extraordinary overreach in the Texas Litigation has forced Tudor's hand.

Rather than attack the Oklahoma Litigation plaintiffs' victories head-on before the Honorable Judge Cauthron, the State of Oklahoma has sought to use this Court to re-litigate the threshold issue of the Oklahoma Litigation—whether Title VII's sex discrimination proscription reaches sex discrimination alleged by transgender persons. As a result of Plaintiff Oklahoma's stratagem, delay has been sowed in the Oklahoma Litigation and the resources of this Court are being squandered. To add insult to injury, Plaintiffs oppose Tudor's intervention in the Texas Litigation. Plaintiff Oklahoma's machinations should not be rewarded.

A. Dr. Tudor's motion to intervene is timely.

Plaintiffs argue in part that Tudor's intervention is untimely because she moved to intervene three and a half months after Plaintiffs filed their first complaint. ECF Doc. 82 at 3–4. Plaintiffs are mistaken as to the appropriate measure for timeliness analysis. The date a complaint is filed does not demarcate the time at which a party has notice that her interests are at issue in a suit. Depending on a variety of circumstances, a potential intervenor may not know that her interests are actually impinged by another litigation until long after a complaint is filed. Indeed, the Fifth Circuit has expressly rejected the timeliness rule Plaintiffs advocate. *Stallworth v. Monsanto Co.*, 558 F.2d 257, 264–65 (5th Cir. 1977) (setting forth three reasons to reject date complaint is filed rule); *id.* at 265 ("Therefore, the time that the would-be intervenor first became aware of the pendency of the case is not relevant to the issue of whether his application was timely.").

Dr. Tudor did not have actual notice that her interests were at issue in the Texas Litigation until late August 2016, when this Court denied Defendants' invitation to deem the Oklahoma Litigation outside the scope of the Preliminary Injunction. Defendants' Notice of Pending Litigation, ECF Doc. 61 (filed Aug. 30, 2016); Order, ECF Doc. 62 (filed Aug. 31,

2016). Prior to this Court's August 30 Order, the State of Oklahoma proceeded in the Oklahoma Litigation as if the Texas Litigation had no impact and Dr. Tudor reasonably assumed as much. Depositions were conduced both after the first complaint in the Texas Litigation was filed and after Plaintiffs sought a preliminary injunction. Other discovery, including several discovery motions, went forward in the Western District of Oklahoma without any indication from the State of Oklahoma that they believed the Texas Litigation affected the Oklahoma Litigation.[1] Moreover, the State of Oklahoma never filed a notice of related case with the Western District of Oklahoma, which would have at least given notice to Dr. Tudor prior to late August 2016 that the State of Oklahoma believed the litigations to be related. *See McDaniel v. Ocean Energy, Inc.*, CIVA. 87-2285, 1988 WL 15556, at *1 (E.D.La. Feb. 24, 1988) (observing that failure to comply with local rule requiring timely notice of related case is sanctionable).

Once she learned her interests were at stake, Dr. Tudor moved with all deliberate speed to intervene. Pursuant to this Court's local rules, Dr. Tudor requested an opportunity to meet and confer with counsel for Plaintiffs and Defendants prior to filing intervention papers with the Court. Exhibit 1 (Sept. 7, 2016 Ltr. to Counsel Requesting Meet and Confer). Conferences were held on the morning of September 12, 2016. Within hours of completing meet and confer conferences, Tudor moved to intervene. This is not the stuff of delay.

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[1] *See, e.g.*, Okla. (Amended) Deposition Notice to Feleshia Porter, 5:15-cv-00324, ECF Doc. 64 (W.D.Okla. June 6, 2016) (seeking to depose Tudor's therapist); Okla. Motion to Compel, 5:15-cv-00324, ECF Doc. 67 (W.D.Okla. June 23, 2016) (seeking to compel discovery responses and production from the United States); Order, 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); Okla. Response to Motion to Quash Porter Subpoena, 5:15-cv-00324, ECF Doc. 111 (W.D.Okla. Aug. 22, 2016) (claiming Oklahoma should be permitted to depose Feleshia Porter in part to glean information related to questioning of Cathy Conway concerning Tudor's restroom use); Order, 5:15-cv-00324, ECF Doc. 121 (W.D.Okla. Sept. 1, 2016) (granting Tudor's motion to quash Porter subpoena).

Plaintiffs' argument that Dr. Tudor should have been aware of her interest in the Texas Litigation sooner than late August 2016 given media coverage of the Texas Litigation and her counsel's expertise on the subject matter is inapposite. These arguments are, at their core, rehashed versions of the date a complaint is filed rule. *See, e.g.*, *Stallworth*, 558 F.2d at 265.

Plaintiffs' argument that Tudor could have elected to participate as *amici* earlier on in the Texas Litigation is also inapposite. Though Dr. Tudor's current firm sometimes participates as *amici* in cases of national importance concerning transgender persons,[2] Dr. Tudor does not personally possess the expertise or means to serve in this capacity. Moreover, even if appropriate, participation as *amici* in the Texas Litigation is no substitute for participation as a party. *See, e.g.*, *Newport News Shipbuilding & Drydock Co. v. Penisula Shipbuilders' Ass'n*, 646 F.2d 117, 121–22 (4th Cir. 1981) (noting that participation as amicus not a substitute for participation as a party because (a) an adverse ruling district court judgment would create a practical disadvantage which warrants intervention in the first instance and (b) putative *amici* would lack standing to challenge decision affecting its substantive interests).

B. There is no undue prejudice resulting from potential delay.

There is no undue delay or prejudice that would result if this Court were to rule that the preliminary injunction enjoins any part of the Oklahoma Litigation and Tudor were permitted to intervene in the Texas Litigation.

As Plaintiffs highlight in their opposition, the swift resolution of the preliminary injunction's scope was initially sought with the aim of providing "clarity to education authorities

[2] It should be noted that the Transgender Legal Defense and Education Fund ("TLDEF") was not Dr. Tudor's original counsel in the Oklahoma Litigation. Prior to July 13, 2016, Tudor was represented by Mr. Ezra Young and Ms. Jillian Weiss through the Law Firm of Jillian T. Weiss, a private New York based law firm. On July 13, both Young and Weiss started at TLDEF and Tudor's case was transferred to TLDEF shortly thereafter.

before the 2016–17 school year commences." ECF Doc. 82 at 4–5 (*citing* ECF Doc. 11 at 37). It is now mid-October 2016—however expeditious efforts to reach a resolution may have been up to this point, the animating reason for swiftly moving from the complaint stage to the preliminary injunction is now lost, thus this is no reason to deny Tudor's participation in the Texas Litigation at this stage.

Even if Tudor's intervention would result in some delay, "delay in and of itself does not mean that intervention should be denied," rather, this Court should assess whether any such delay would *unduly* delay adjudication of the merits. *U.S. v. N. Colorado Water Conservancy Dist.*, 251 F.R.D. 590, 599 (D.Colo. 2008). At present, there is no indication that Tudor's addition to this suit would unduly delay the entire proceedings. Indeed, at the September 30 hearing, this Court observed that for various reasons it might be appropriate to brief all claims pending before it prior to sending the case up on appeal. Transcript of Hearing at 40, *Texas et al. v. United States et al.*, 7:16-cv-00054-O (N.D.Tex. Sept. 30, 2016). If the Court were to pursue this avenue, Tudor's inclusion would not result in undue delay.

C. The existing parties' desire to keep Dr. Tudor out of this litigation should be afforded minimal weight.

Plaintiffs make much of the fact that both parties oppose Dr. Tudor's efforts to intervene in the Texas Litigation. However, the parties' opposition to Dr. Tudor's intervention is not dispositive. "The central question in examining a motion for permissive intervention is whether or not such intervention would further the interests of justice, the rights of the parties, and efficient judicial administration." *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 690 F.2d 1203, 1215 (5th Cir. 1982). Moreover, "[f]ederal courts should allow intervention 'where no one would be hurt and greater justice could be attained'." *Hill v. Gen. Motors LLC*, 7:14-cv-

00064-O, 2015 WL 11117873, at *2 (N.D.Tex. Apr. 28, 2015) (O'Connor, J.) (*quoting Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994)).

Insofar as this Court decides to enjoin any part of the Oklahoma Litigation, it is in the interests of justice to permit Dr. Tudor to intervene in the Texas Litigation. Dr. Tudor will be substantially harmed if this Court enjoins any part of the Oklahoma Litigation *and* Tudor is not joined to the Texas Litigation since she would be deprived the right to actively participate in proceedings that ultimately affect her merits Title VII case and she would be deprived of standing to appeal judgments enjoining the Oklahoma Litigation.

D. Special circumstances weigh in favor of joining Dr. Tudor to this case.

There are also special circumstances that weigh in favor of joining Dr. Tudor to the Texas Litigation. *See Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994) (noting that "unusual circumstances" are one of four factors to be assessed in determining whether an application for permissive intervention is timely).

First, Dr. Tudor is uniquely situated. Dr. Tudor is the first transgender person on whose behalf the federal government filed an enforcement action under Title VII. Dr. Tudor and her private counsel have worked closely with DOJ throughout the Oklahoma Litigation, sharing resources and closely coordinated litigation strategy to ensure a successful outcome. Interference of the ilk the Texas Litigation Plaintiffs are seeking from this Court, in the twilight of discovery in the Oklahoma Litigation and on the eve of trial, is more than an inconvenience to Tudor. Litigation of this type is complex, requiring the coordination of private and public counsel and has called for over a dozen witnesses, tens of thousands of documents, and several thoroughly litigated motions including the motion to dismiss decided in July 2015. Dr. Tudor has a right and

colorable interest in ensuring that her coordinated litigation team is afforded the opportunity to continue to proceed in the Oklahoma Litigation unimpeded.

Plaintiffs' bald assertion that Dr. Tudor will be unharmed if she is not joined to the Texas Litigation since "the injunction restrains the Defendants, [but] it will generally not apply to private parties" (ECF Doc. 82 at 6) overlooks Dr. Tudor's unique circumstances. Plaintiffs framing assumes that Tudor is not harmed by DOJ's impairment. Not so. As noted above, it is in Dr. Tudor's best interests to ensure that DOJ proceeds unimpaired in the Oklahoma Litigation given the high-level of coordination between her private counsel and DOJ throughout those proceedings and given the late stage of the same.

Second, Tudor's well-being is inextricably linked to the ultimate adjudication of the issues at the heart of the Texas Litigation. *Citizens for an Orderly Energy Policy, Inc. v. Cnty. of Suffolk*, 101 F.R.D. 497, 501 (E.D.N.Y. 1984). Tudor has a direct and substantial interest in the determination of the issues presented in the Texas Litigation. Among other things, the Texas Plaintiffs seek to use the Texas Litigation as a vehicle to collaterally attack Tudor's victories in the Oklahoma Litigation. For example, if this Court were to enjoin DOJ's discovery of restroom issues in the Oklahoma Litigation, Tudor would likely be deprived the benefit of a August 11, 2016 Order from the Western District granting the United States' motion to compel the re-deposition of a RUSO employee concerning conversations the employee had with others regarding Dr. Tudor's restroom use in 2007. 5:15-cv-00324, ECF Doc. 96 (W.D.Okla. Aug. 11, 2016). Dr. Tudor has an interest in ensuring that these heavily litigated disputes not be collaterally attacked.

Third, Dr. Tudor, as the only real person potentially participating as a party in the Texas Litigation, offers a unique and valuable perspective that will give context to the otherwise overly

abstracted issues of law and fact in this suit. *See, e.g.*, *Nat'l Assoc. for Advancement of Colored People v. New York*, 413 U.S. 345, 368 (1973) (noting that a potential intervenor alleging an injury "personal to him" would present unusual circumstances that warrant intervention); *Johnson v. Mortham*, 915 F.Supp. 1529, 1538–39 (N.D.Fla. 1995) (allowing NAACP to intervene in redistricting case where it offered a unique and valuable perspective). For example, Dr. Tudor's experiences at Southeastern Oklahoma State University and the defenses raised in the Oklahoma Litigation, shed light on the absurdity undergirding Plaintiffs' allegations in the instant lawsuit. Though Dr. Tudor alleges that she was denied access to the women's restroom on the Southeastern campus once she transitioned to female in 2007, the State of Oklahoma's own witnesses in the Oklahoma Litigation contend that no such rule existed. *See, e.g.*, Exhibit 2 (excerpts from deposition of Cathy Conway, former human resources director of Southeastern Oklahoma University). Indeed, other witnesses in the Oklahoma Litigation attest that there are no rules barring transgender people from using restrooms that match their gender identity on college campuses in Oklahoma. *See, e.g.*, Exhibit 3 (excerpt from deposition of Charles Babb, general counsel for the Regional University System of Oklahoma).

CONCLUSION

For the reasons stated above, if this Court determines that the Oklahoma Litigation is in any way enjoined by this Court's Preliminary Injunction Dr. Tudor's intervention should be granted. In the alternative, if this Court determines that the Oklahoma Litigation is not in any way enjoined by this Court's Preliminary Injunction Dr. Tudor's motions should be denied as moot.

Dated: October 17, 2016

Respectfully submitted,

/s/ Ezra Young_____
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CERTIFICATE OF SERVICE

I hereby certify that on October 17, 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.

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