

**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.¹

¹ *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

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 (5th 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 (5th Cir. 1984). *See also Cajun Elec. Power Co-op, Inc. v. Gulf States Utilities, Inc.*, 940 F.2d 117, 121 (5th 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 5th Circuit. *Cf. United States v. Texas Eastern Transmission Corp.*, 923 F.2d 410 (5th 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.	§	
	§	
<hr/>		
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

Transgender Legal Defense and Education

Fund, Inc.

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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)
Application for Admission *Pro Hac Vice* Pending
Transgender Legal Defense and Education
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949-291-3185
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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)
Application for Admission *Pro Hac Vice* Pending
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Exhibit 1

INTRODUCTION

1. Dr. Rachel Tudor is a transgender woman, and a party to *United States and Dr. Rachel Tudor v. Southeastern Oklahoma State University and Regional University System of Oklahoma, State of Oklahoma ex rel.*, 5:15-cv-324 (W.D. Okla. filed Mar. 2015) [hereinafter “Oklahoma Litigation”], a litigation identified in Defendants’ Notice to this Court of pending litigations (ECF Doc. 61).

2. The defendants in the Oklahoma Litigation are Southeastern Oklahoma State University (“SEOSU”) and the Regional University System of Oklahoma (“RUSO”). The Oklahoma Litigation defendants are sub-divisions of the State of Oklahoma and represented by the Oklahoma Attorney General’s Office (“OAG”).

3. The United States is a plaintiff in the Oklahoma Litigation and is represented by the U.S. Department of Justice (“DOJ”).

4. Dr. Tudor seeks to intervene in this above captioned litigation [hereinafter “Texas Litigation”] for the limited purpose of seeking a declaratory judgment recognizing that collateral estoppel attaches to a July 2015 Order issued by Judge Cauthron of the Western District of Oklahoma insofar as (a) the July 2015 Order holds and finally decides that Dr. Tudor is a member of a protected class for Title VII purposes, (b) the legal issue of whether Dr. Tudor is a member of a protected class cannot be re-litigated in the Texas Litigation, and (c) DOJ’s participation in the Oklahoma Litigation thereby cannot be enjoined by the Preliminary Injunction issued by this Court on August 21, 2016 (ECF Doc. 58). Dr. Tudor also seeks all necessary injunctive relief related thereto.

PARTIES

5. Third-Party Plaintiff Dr. Rachel Tudor is an English professor who worked for Southeastern Oklahoma State University (“SEOSU”) as a tenure track Assistant Professor from 2004 to 2011. Dr. Tudor is also a party to the Oklahoma Litigation.

6. Third-Party Defendant the State of Oklahoma is a party to the Texas Litigation and, with other Plaintiffs, has moved this Court for declaratory relief concerning the interpretation of Title VII and more specifically whether Title VII prohibits forms of sex discrimination experienced by transgender persons. OAG currently represents and otherwise directs the litigation strategy of SEOSU and RUSO in the Oklahoma Litigation. OAG currently represents and otherwise directs the litigation strategy of the State of Oklahoma in the Texas Litigation.

JURISDICTION AND VENUE

7. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331.

8. Venue is proper in the Northern District of Texas.

9. The Court is authorized to award the requested declaratory relief under the Declaratory Judgment Act (“DJA”), 28 U.S.C. §§ 2201–2202.

FACTUAL ALLEGATIONS

10. Dr. Tudor is a female citizen of the United States.

11. Dr. Tudor is also a female citizen and resident of the State of Texas. Dr. Tudor holds a duly issued Texas driver’s license that identifies her sex as female.

12. Dr. Tudor has a feminine gender expression.

13. Dr. Tudor has a female gender identity.

14. Dr. Tudor is a transgender woman.

Dr. Rachel Tudor's Employment at Southeastern Oklahoma State University

15. In 2004, Dr. Tudor began working at SEOSU as a tenure-track Assistant Professor. At that time, Dr. Tudor presented as male and had a traditionally male name.

16. In the summer of 2007, Dr. Tudor notified SEOSU that she planned to transition from male to female and begin to present as female at work during the 2007-08 academic year.

17. Thereafter, as Dr. Tudor alleges in her Complaint-in-Intervention in the Oklahoma Litigation, Dr. Tudor was subjected to sex discrimination, retaliation, and a sex-based hostile work environment in violation of Title VII. *See generally* Exhibit A.

Scope of Title VII Protection as to Dr. Tudor Decided in the Oklahoma Litigation

18. In March 2015 DOJ, pursuant to its Title VII enforcement powers, initiated the Oklahoma Litigation against SEOSU and RUSO in the Western District of Oklahoma.

19. DOJ's Complaint in the Oklahoma Litigation has two claims, alleging that Dr. Tudor was subjected to discrete act sex discrimination and retaliation in violation of Title VII.

20. Dr. Tudor's Complaint-in-Intervention in the Oklahoma Litigation has three claims, alleging that Dr. Tudor was subjected to discrete act sex discrimination, retaliation, and a sex-based hostile work environment. *See generally* Exhibit A.

21. On May 26, 2015 the Oklahoma Litigation defendants SEOSU and RUSO, at the direction and under the control of OAG, filed a motion to dismiss Dr. Tudor's hostile work environment claim. Among other things, OAG argued that Dr. Tudor could not bring a sex-based hostile work environment claim because Dr. Tudor, as a transgender woman, was not a member of a protected class.

22. On June 16, 2015, Dr. Tudor responded to OAG's motion to dismiss. Among other things, Dr. Tudor argued that Defendants did not carry their burden of establishing that Dr. Tudor failed to state a claim.

23. On June 23, 2015 OAG replied to Dr. Tudor's response. In its reply, OAG once again argued that Dr. Tudor is not a member of a protected class under Title VII.

24. On July 10, 2015 Judge Cauthron issued an order denying the OAG's motion to dismiss [hereinafter July 2015 Order].

25. Judge Cauthron's July 2015 Order held, *inter alia*, that Dr. Tudor is a member of a protected class for Title VII purposes. *See United States et al. v. Southeastern Okla. State Univ. et al.*, civ-15-324-C, 2015 WL 4606079 at *2 (July 10, 2015) ("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.").

26. Based upon the holding that Dr. Tudor is a member of a protected class for Title VII purposes, Judge Cauthron's July 2015 Order denied OAG's Motion to Dismiss for failure to state a claim.

Attempted Re-litigation of Dr. Tudor's Membership in Protected Class through OAG's Participation in the Texas Litigation

27. On May 25, 2016 the State of Oklahoma and other states and state sub-divisions initiated the above captioned litigation [hereinafter "Texas Litigation"] against DOJ and other federal entities and federal officers in their official capacity. *See generally* Plaintiff's Complaint for Declaratory and Injunctive Relief, ECF Doc. 1.

28. In their Complaint, the Texas Litigation Plaintiffs allege that the State of Oklahoma is an employer "covered by Title VII." ECF Doc. 1 ¶3.

29. In their Complaint, the Texas Litigation Plaintiffs further allege that they are entitled to declaratory and injunctive relief from any enforcement actions involving DOJ against Plaintiffs (including the State of Oklahoma).

30. In their Complaint, the Texas Litigation Plaintiffs further allege that the text of Title VII "does not support the term 'sex' as anything other than one's immutable, biological sex as determined at birth." ECF Doc. 1 ¶87.

31. In their Complaint, the Texas Litigation Plaintiffs request that this Court grant declaratory and injunctive relief, which implicitly requires that this Court interpret whether Title VII's sex discrimination proscription reaches forms of sex discrimination alleged by transgender persons.

32. In their Complaint, the Texas Litigation Plaintiffs request that this Court grant declaratory and injunctive relief, which implicitly requires that this Court interpret whether transgender persons are members of a protected class pursuant to Title VII's sex discrimination proscription.

33. On July 6, 2016, the Texas Litigation Plaintiffs filed an application with this Court seeking a preliminary injunction. *See* ECF Doc. 11 [hereinafter Texas Injunction Request].

34. Among other things, the Texas Injunction Request seeks a nationwide preliminary injunction enjoining DOJ and other named defendants from enforcing or otherwise continuing enforcement litigations for aggrieved transgender persons where DOJ proffers a respondent in such litigation violated Title VII by discriminating on the basis of sex against a transgender person.

35. On August 21, 2016 this Court issued a nationwide preliminary injunction. *See* ECF Doc. 58 [hereinafter Texas Preliminary Injunction].

36. As part of the Texas Preliminary Injunction, this Court noted that the injunction "should not unnecessarily interfere with litigation currently pending before other federal courts on this subject regardless of the state law." Texas Preliminary Injunction, ECF Doc. 58 at 37.

37. As part of the Texas Preliminary Injunction, this Court ordered that all parties to the Texas Litigation "file a pleading describing those cases [referring to litigations currently pending before other federal courts] so the Court can appropriately narrow the

scope [of the Texas Preliminary Injunction] if appropriate.” Texas Preliminary Injunction, ECF Doc. 58 at 37.

38. On August 30, 2016, the Texas Litigation Defendants filed a notice with the Court advising it, *inter alia*, of the Oklahoma Litigation. Defendants further requested that the Court grant “immediate confirmation” that DOJ’s continued participation in Oklahoma Litigation is not enjoined by the Texas Preliminary Injunction. *See* ECF Doc. 61 at 2.

39. On August 31, 2016, this Court issued an Order in response to ECF Doc. 61. In the August 31 Order (ECF Doc. 62), this Court declined to issue immediate confirmation that the Oklahoma Litigation is not subject to the Texas Preliminary Injunction. This Court further set an expedited briefing schedule for Texas Litigation Plaintiffs (including OAG) and Defendants (including DOJ) to make filings concerning whether, *inter alia*, the Texas Preliminary Injunction enjoins DOJ’s continued participation in the Oklahoma Litigation.

40. On September 7, 2016 Dr. Tudor’s counsel notified the Texas Litigation Defendants and Plaintiffs that Dr. Tudor desired to intervene in the Texas Litigation in order to ensure that the July 2015 Order’s final determination of Tudor’s protected class status be given preclusive effect and any further attempts by the Texas Litigation Plaintiffs to re-litigate this issue cease.

41. On September 9, 2016 the Texas Litigation Plaintiffs filed a Notice with this Court advising, *inter alia*, that Plaintiffs believed that that August 21 Injunction “impacts DOJ’s ability to continue the [Oklahoma Litigation] in the W.D. Okla.” ECF Doc. 64 at 3.

Collateral Estoppel Attaches to Judge Cauthron's July 2015 Order

42. Collateral estoppel bars re-litigation of, *inter alia*, issues of law decided in prior litigations where there (a) is a full and fair opportunity to litigate an identical legal issue, (b) the issue was fully litigated in the prior action, (c) the issue was decided, and (d) the party against whom collateral estoppel is asserted as a party or in privity with a party to the prior action.

43. The Restatement (Second) of Judgments § 27 cmt. d teaches that “An issue may be submitted and determined on a motion to dismiss for failure to state a claim . . . A determination may be based on a failure of pleading or of proof as well as on the sustaining of the burden of proof.”

44. After initiating the motion to dismiss in the Oklahoma Litigation, OAG was given a full and fair opportunity to litigate whether Dr. Tudor is a member of a protected class pursuant to Title VII's sex discrimination proscription.

45. Dr. Tudor and the OAG fully and fairly litigated whether Dr. Tudor is a member of a protected class pursuant to Title VII's sex discrimination proscription at the motion to dismiss stage.

46. Judge Cauthron's July 2015 Order definitively decided the issue of whether Dr. Tudor is a member of a protected class for Title VII purposes.

47. In the Oklahoma Litigation, OAG is in privity with the defendants SEOSU and RUSO because OAG directs the litigation strategy of SEOSU and RUSO.

48. The Texas Litigation Plaintiffs admit that the Oklahoma Litigation Defendants are, for the purposes of assessing preclusive effects, in privity with the State of

Oklahoma. *See* Plaintiffs’ Notice of Pending Litigation, ECF Doc. 64 at 3 (“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’.”) (*quoting* ECF Doc. 58 at 37).

CLAIM FOR RELIEF

COUNT I

Declaratory Judgment Under 28 U.S.C. §§ 2201–2202

49. The allegations in paragraphs 1 through 48 are reincorporated herein.

50. Dr. Tudor, DOJ, and the OAG are presently involved in an active litigation in the Western District of Oklahoma (titled above as the “Oklahoma Litigation”).

51. The Honorable Judge Robin Cauthron issued an Order in the Oklahoma Litigation in July 2015 holding, *inter alia*, that Dr. Tudor is a member of a protected class for Title VII purposes.

52. Judge Cauthron’s July 2015 Order finally decided the legal issue of the scope of Title VII’s protection as to Dr. Tudor.

53. The legal issue of whether Dr. Tudor is a member of protected class for Title VII purposes cannot be re-litigated by the State of Oklahoma through the Texas Litigation under the doctrine of collateral estoppel.

54. Thus, this Court should declare that, as to Dr. Tudor and the Oklahoma Litigation, the State of Oklahoma is estopped from arguing and otherwise re-litigating whether Dr. Tudor, a transgender woman, can claim and otherwise seek relief under Title VII.

REQUEST FOR RELIEF

For the foregoing reasons, Dr. Tudor respectfully requests that the Court grant her the following relief:

- A. A declaration that the July 2015 Order finally decided the issue of whether Dr. Tudor is a member of a protected class under Title VII and further recognizing that Dr. Tudor is a member of a protected class under Title VII's sex discrimination proscription.
- B. Preliminary relief enjoining the State of Oklahoma and its sub-divisions from re-litigating whether Dr. Tudor is a member of a protected class pursuant to Title VII's sex discrimination proscription.
- C. A final, permanent injunction prohibiting the State of Oklahoma and its sub-divisions from re-litigating whether Dr. Tudor is a member of a protected class pursuant to Title VII's sex discrimination proscription.
- D. All other relief to which Dr. Tudor may show herself to be entitled, including attorneys' fees and costs of court; and
- E. Such other relief as the Court deems just and proper.

Dated: September 12, 2016

Respectfully submitted,

/s/ Ezra Young
Ezra Young (NY Bar No. 5283114)
Application for Admission *Pro Hac Vice* Pending
Transgender Legal Defense and Education
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ATTORNEYS FOR DR. RACHEL TUDOR

VERIFICATION

I, Dr. Rachel Tudor, a citizen of the United States and the Chickasaw Nation, and a resident of the State of Texas, hereby declare that I have reviewed the foregoing Complaint-In-Intervention, and that the factual statements set forth therein are true and to the best of my knowledge, information, and belief.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 12 day of September, 2016, in Collin County, Texas.



Dr. Rachel Tudor

Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)	CASE NO. 5:15-CV-00324-C
)	
Plaintiff,)	
)	
v.)	
)	
1. SOUTHEASTERN OKLAHOMA)	
STATE UNIVERSITY, and)	
)	
2. THE REGIONAL UNIVERSITY)	
SYSTEM OF OKLAHOMA,)	
)	
)	
Defendants.)	

**COMPLAINT IN INTERVENTION OF
PLAINTIFF/INTERVENOR DR. RACHEL TUDOR**

This is an action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* (“Title VII”). Dr. Tudor intervenes in this action as an aggrieved person pursuant to 42 U.S.C. § 2000e-5(f). As set forth below, Plaintiff/Intervenor Dr. Rachel Tudor (“Plaintiff/Intervenor”) alleges that Defendants Southeastern Oklahoma State University (“Southeastern”) and the Regional University System of Oklahoma (“RUSO”) subjected Dr. Tudor to sex discrimination, including an unlawful hostile work environment based on sex, and retaliation in violation of Title VII.

PARTIES

1. Plaintiff/Intervenor Dr. Rachel Tudor is an English professor who worked

for Southeastern as a tenure track Assistant Professor from 2004 to 2011.

2. Defendant Southeastern is a member of the Oklahoma state system of higher education and is part of the Regional University System of Oklahoma (“RUSO”). Defendant RUSO’s Board of Regents is the governing board for several Oklahoma state universities, including Southeastern. RUSO’s Policy Manual explains how the operations of RUSO and Southeastern interrelate. RUSO has the power to fix compensation and duties of personnel at its regional universities, including Southeastern. RUSO has the power and duty to adopt rules and regulations to govern its regional universities, including Southeastern. Southeastern’s President must report to RUSO on all matters related to employment, discipline, and termination of faculty. For these reasons, Southeastern and RUSO are a single employer for all relevant purposes.

JURISDICTION AND VENUE

3. This Court has jurisdiction over this action under 42 U.S.C. §2000e-5(f) and 28 U.S.C. §1345.

4. Venue is proper in this judicial district under 42 U.S.C. §2000e-5(f)(3) and 28 U.S.C. § 1391(b). Both Southeastern and RUSO are agencies of the State of Oklahoma. At all relevant times, RUSO’s principal place of business has been in Oklahoma City, Oklahoma, and Southeastern’s principal place of business has been in Durant, Oklahoma.

5. Southeastern and RUSO are “persons” within the meaning of 42 U.S.C. §2000e(a) and “employers” within the meaning of 42 U.S.C. §2000e(b).

6. On or about September 9, 2010, Dr. Tudor filed a timely charge of

discrimination alleging, among other things, that Southeastern subjected her to sex discrimination when it denied her application for promotion and tenure during the 2009-10 academic year. Dr. Tudor filed this charge with the U.S. Department of Education, Office for Civil Rights (“DOE”). After notifying Southeastern of the charge, DOE referred the charge to the U.S. Equal Employment Opportunity Commission (“EEOC”) for investigation of Dr. Tudor’s Title VII claim.

7. On or about July 12, 2011, Dr. Tudor supplemented her charge of discrimination filed with the EEOC. She alleged, among other things, that Southeastern subjected her to sex discrimination and retaliated against her because she complained about Southeastern’s discrimination. Specifically, Dr. Tudor alleged that Southeastern unlawfully refused to permit her to re-apply for promotion and tenure during the 2010-11 academic year. Dr. Tudor’s supplemented charge was simultaneously filed with the EEOC and with the Oklahoma Human Rights Commission.

8. Pursuant to Section 706 of Title VII, the EEOC notified the Defendants of Dr. Tudor’s supplemented charge of discrimination. After conducting an investigation of Dr. Tudor’s charges, the EEOC found reasonable cause to believe that Southeastern discriminated against Dr. Tudor because of her sex and retaliated against her because she engaged in protected activity. The EEOC did not render a determination on the issue of hostile work environment based on sex raised by the facts alleged in Dr. Tudor’s original charge and supplemental charge. The EEOC notified the Defendants of its reasonable cause findings, unsuccessfully attempted to conciliate the charges, and subsequently referred the charges to the U.S. Department of Justice.

9. All conditions precedent to the filing of suit have been performed or have occurred.

FACTS

10. Dr. Tudor is a female citizen of the Chickasaw Nation.

11. Dr. Tudor is also a female citizen of the United States.

12. Dr. Tudor has a feminine gender expression.

13. Dr. Tudor has a female gender identity.

14. Dr. Tudor is a transgender woman.

Sex, Gender, Gender Expression and Gender Identity

15. *Sex* is an ambiguous term of art that includes gender, gender expression and gender identity within its meaning.

16. *Sex stereotyping* refers to the application by an employer of stereotypes related to sex assigned at birth to restrict or disparage an employee's gender expression or gender identity.

17. *Gender* refers to cultural or attitudinal characteristics (as opposed to physical characteristics) distinctive to the sexes.

18. *Gender expression* refers to a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth. *Transgender expression* is a form of *gender expression*.

19. *Gender identity* refers to characteristics related to a person's internal sense of gender, being male, female, or other. *Transgender identity* is a form of gender

identity.

20. *Gender identity* is intractably rooted in the psyche by the age of two, and cannot be changed.

21. Discrimination against transgender persons for being transgender is based on their gender expression and gender identity, and the discrimination described herein against Dr. Tudor was based on her gender expression and gender identity.

22. Transgender individuals often seek out legal, social, and medical means of aligning external manifestations of their gender with their gender identity. This process is colloquially known as *gender transition* or *transition*.

23. A core component of gender transition entails publicly expressing one's gender as a member of the gender that comports with one's gender identity.

24. Transgender individuals are persons who have a gender expression or gender identity that does not match the sex they were assigned at birth.

25. Native Americans traditionally believe that transgender persons are blessed and have a spiritual responsibility to live their blessing.

26. Dr. Tudor subscribes to the traditional Native American belief that she, as a transgender woman, has a responsibility to discover the nature of her blessing and walk the sacred path set before her.

27. Scientific studies have shown that transgender persons have brain structures that are typical of nontransgender persons with the same gender identity. For example, women with transgender identity (i.e. those assigned male sex at birth but who have female gender identity) have brain structures that are similar to those of

nontransgender women. It is appropriate to refer to a transgender woman who has transitioned with female titles, honorifics (e.g., Miss, Ms. or Mrs.), and pronouns (e.g., her, hers, and she).

28. It is appropriate for a nontransgender woman to use a women's multi-stall restroom.

29. It is appropriate for a transgender woman who has transitioned to use a women's restroom.

30. It is appropriate for a nontransgender woman to wear traditionally female clothing, such as a skirt.

31. It is appropriate for a transgender woman who has transitioned to wear traditionally female clothing, such as a skirt.

32. Another core component of gender transition is utilizing medical therapies to align the patient's body with the patient's gender identity.

33. Myriad peer-review studies demonstrate that medical therapies, including hormone treatments, are one form of medically necessary care for transgender persons.

34. The American Medical Association, the American Psychological Association, the American Academy of Family Physicians, the American College of Obstetricians and Gynecologists, and the World Professional Association for Transgender Health ("WPATH") have all publicly endorsed the efficacy of medical therapies, including hormone treatments, for transgender persons.

35. The American Medical Association, the American Psychological Association, the American Academy of Family Physicians, the American College of

Obstetricians and Gynecologists, and WPATH all recognize that medical therapies, including hormone treatments, are a form of medically necessary care for transgender persons.

36. The American Medical Association, the American Psychological Association, the American Academy of Family Physicians, the American College of Obstetricians and Gynecologists, and WPATH have all publicly called for both private and public insurers to eliminate transgender-specific exclusions in health insurance plans.

Dr. Tudor's Employment at Southeastern and Transition to Female

37. In 2004, Dr. Tudor began working at Southeastern as a tenure-track Assistant Professor in the Department of English, Humanities, and Languages (the "English Department"). At that time, she presented as male and had a traditionally male name.

38. Dr. Tudor was the first transgender professor at Southeastern.

39. In the summer of 2007, Dr. Tudor notified Southeastern that she planned to transition from male to female and begin to present as female at work during the 2007-08 academic year.

40. After she informed Southeastern about her transition, Dr. Tudor received a phone call from an employee of Southeastern's human resources office to discuss various issues related to her gender transition. During that call, the human resources employee warned Dr. Tudor that Southeastern's Vice President for Academic Affairs, Dr. Douglas

McMillan, had inquired whether Dr. Tudor could be fired because her “transgender lifestyle” offended his religious beliefs. The human resources employee told Dr. Tudor that Vice President McMillan had been told that Southeastern could not fire her because she is transgender.

41. During the 2007-08 academic year, Dr. Tudor began to present as female at work by, among other things, wearing women’s clothing, styling her hair in a feminine manner, and going by the traditionally female name Rachel.

42. After Dr. Tudor began presenting as female, Jane McMillan, the director of Southeastern’s Counseling Center, told her that she should take safety precautions because some people were openly hostile towards transgender people. She also told Dr. Tudor that Vice President McMillan (who is her brother) considered such people to be a “grave offense to his [religious] sensibilities.”

43. After Dr. Tudor informed Southeastern about her gender identity and intent to transition, she was subjected to disadvantageous terms by unwarranted restrictions on her use of restrooms.

44. Use of male restrooms would subject Dr. Tudor to an unwarranted risk of harassment by males in those restrooms who would likely be severely surprised by her presence there, and who might thereby learn of her transgender identity. It would also subject her to humiliation as a visible woman who was forced to go into a male gender-segregated space.

45. She was instructed by an employee of Southeastern’s human resources office that, once she started presenting as female full-time at work, she should not use the

multi-stall women's restroom located on the same floor as her office or any other multi-stall women's restroom on campus.

46. The employee directed Dr. Tudor to only use a specific single-stall, all-genders restroom for persons with disabilities located on a different floor than Dr. Tudor's office. This restroom was the only single-stall, all-genders restroom for persons with disabilities located within a three-story building that served hundreds of people a day.

47. Dr. Tudor was told that she should use the only single-stall restroom for persons with disabilities in the building her office was located in because Southeastern was concerned that students or other faculty would complain if she used any of the multi-stall female-designated restrooms on campus.

48. Southeastern's human resources office has never counseled a nontransgender professor on which gender-segregated restroom they may use nor has the office ever directed a nontransgender professor to not use a gender-segregated multi-stall restroom that is immediately adjacent to the professor's office.

49. Southeastern's human resources office has never counseled a nontransgender professor to use a gender-segregated restroom that did not match the professor's gender identity.

50. Southeastern's human resources office counseled Dr. Tudor to use the single-stall restroom described above because the employee was uncomfortable with a transgender woman, based on her gender expression and gender identity, using a multi-stall women's restroom frequented by nontransgender women.

51. Southeastern's human resources office counseled Dr. Tudor to use the single-stall restroom described above because a Southeastern administrator told the human resources office that they were uncomfortable with a transgender woman using a multi-stall women's restroom frequented by nontransgender women.

52. Once Dr. Tudor transitioned to female, she followed the direction of Southeastern's human resource office and only used the single-stall, all genders restroom for persons with disabilities described above.

53. For nearly four years, whenever Dr. Tudor was on Southeastern's campus she was only permitted to use the single-stall, all genders restroom for persons with disabilities described above.

54. As a direct result of the restroom use restriction imposed by Southeastern's human resources office, Dr. Tudor was unable to use the restroom on a regular basis whenever she was on Southeastern's campus.

55. Dr. Tudor's busy class schedule made it nearly impossible for her to regularly utilize the only restroom she was permitted to use on campus. For example, Dr. Tudor's teaching schedule often left only ten to fifteen minutes between classes. On many occasions, Dr. Tudor found that she either did not have enough time to travel from the building where she was teaching classes back to the building where the single-stall restroom was located or that the only restroom she was permitted to use was in use for the duration of her break between classes.

56. On occasions where Dr. Tudor was unable to use the single-stall restroom described above, she felt great physical discomfort and humiliation.

57. On occasions where Dr. Tudor was able to use the single-stall restroom described above, she felt profound guilt and humiliation knowing that her use of the restroom for persons with disabilities often inconvenienced persons with physical disabilities including other faculty members and students.

58. On occasions where Dr. Tudor used the single-stall restroom described above and found a line outside the restroom she apologized to those waiting in line for the inconvenience. Having to routinely apologize to persons with physical disabilities whom were inconvenienced by Dr. Tudor's use of the restroom for persons with disabilities made her feel profound guilt and humiliation.

59. Starting in Summer 2007, Dr. Tudor used public women's restrooms whenever she was not on Southeastern's campus.

60. Dr. Tudor never had a negative response from women who used the women's restrooms she frequented off Southeastern's campus.

61. Transgender women routinely use multi-stall women's restrooms in the State of Oklahoma, including restrooms located in state and federal government facilities.

62. The presence of transgender women in gender-segregated multi-stall restrooms poses no threat to nontransgender women.

63. If a nontransgender woman is offended by the prospect of sharing gender-segregated facilities with transgender women, the nontransgender woman is free to seek out and use a single-stall restroom.

64. After Dr. Tudor informed Southeastern about her transition she was also

instructed by an employee of Southeastern's human resources office to not wear certain traditionally female articles of clothing going forward. Among other things, Dr. Tudor was counseled against wearing short skirts.

65. No nontransgender female professor was ever counseled by Southeastern's human resources office against wearing skirts of any length.

66. Both junior and senior female professors with traditional gender identity routinely wore traditionally female articles of clothing, including skirts of varying lengths, during the years Dr. Tudor was employed by Southeastern.

67. From the 2007-08 through the 2010-11 academic years the health insurance plan that Southeastern provided to professors, including Dr. Tudor, had an explicit exclusion that prohibited health care benefits to transgender persons.

68. As a result of the exclusion described above, Dr. Tudor was unable to get her insurance to cover various medically necessary treatments she needed as part of her medical transition to female. This included, but is not limited to, coverage for exogenous hormones and routine blood level tests needed to monitor her hormone levels.

69. Upon information and belief, the health insurance plan Southeastern provided to faculty members otherwise covered medically necessary exogenous hormone treatments and routine blood level tests needed to monitor blood levels as a result of such treatment.

70. As a result of the exclusion described above, Dr. Tudor was forced to pay for her hormone therapy and blood level tests out of pocket.

71. Upon information and belief, if Dr. Tudor were a nontransgender woman,

she could have received full coverage for her hormone treatment and blood level tests under Southeastern's health insurance plan.

Southeastern's Process for Promotion and Tenure

72. At Southeastern, Assistant Professors must obtain tenure before the end of their seventh year as an Assistant Professor or else their employment is terminated.

73. The process governing applications for promotion and tenure is set forth in Southeastern's "Procedure for Granting Promotion and Tenure." First, the applicant must submit a written application to her Department Chair, along with a portfolio that contains documentation pertinent to an assessment of her qualifications. Second, the applicant is reviewed by a Promotion and Tenure Review Committee ("P&T Review Committee") comprised of tenured faculty in the applicant's Department. Next, the application is reviewed sequentially by the Department Chair, the Dean of the applicant's school, and the Vice President for Academic Affairs, each of whom must consider whether to recommend the applicant to receive promotion and tenure and then forward his or her recommendation to the next reviewing official. Following the Vice President for Academic Affairs' review, the President of SOSU decides whether to approve or deny the application for promotion and tenure and, if the President approves the application, he submits his recommendation to the RUSO Board of Regents for their approval.

74. It is Southeastern's policy to notify applicants of the intermediate decisions in the process as they occur. On a candidate's request, administrators may provide

explanations of negative recommendations so that candidates for promotion and tenure can address deficiencies before the next level of review.

75. According to Southeastern's Academic Policies and Procedures, to attain a promotion to the position of Associate Professor an applicant must have: (1) an earned doctorate relevant to the teaching field awarded by a regionally accredited or internationally recognized institution of higher learning; (2) five years of successful higher education teaching experience in full-time appointments; (3) five years of experience at the Assistant Professor rank; (4) demonstrated effective classroom teaching, research/scholarship, contributions to the institution and profession (also referred to as "service"), and, in appropriate instances, successful performance of non-teaching or administrative duties; and (5) noteworthy achievement in classroom teaching, research/scholarship, and service, or, in appropriate instances, performance of non-teaching or administrative duties.

76. According to Southeastern's Academic Policies and Procedures, to attain tenure a professor must have: (1) five years of service at Southeastern in a tenure-track appointment as an Assistant Professor, Associate Professor, or Professor; (2) demonstrated effective classroom teaching, research/scholarship, service, and, in appropriate instances, successful performance of non-teaching or administrative duties; (3) demonstrated ability to work cooperatively to strengthen the academic quality of the institution; and (4) noteworthy achievement in classroom teaching and on at least one other criterion: research/scholarship, service, or, in appropriate instances, performance of non-teaching or administrative duties.

77. Southeastern's Academic Policies and Procedures state that, "[f]aculty status and related matters are primarily faculty responsibility; this area includes . . . promotions [and] the granting of tenure." The Academic Policies and Procedures further state that, in considering applications for promotion and tenure, the "governing board and president should . . . concur with the faculty judgment except in rare instances and for compelling reasons which should be stated in detail."

Dr. Tudor Prepares to Apply for Promotion and Tenure

78. In the summer of 2009, as Dr. Tudor was about to enter her sixth year as an Assistant Professor, she made preparations to apply for tenure and promotion to the position of Associate Professor.

79. At the end of August 2009, Dr. Tudor met with the Dean of the School of Arts and Sciences, Dr. Lucretia Scoufos. It was Dean Scoufos' customary practice to meet with professors applying for promotion and tenure to discuss the format and content of the portfolio that they had to prepare in support of their applications.

80. Dean Scoufos learned that Dr. Tudor was a transgender woman. Despite being informed of this fact, Dean Scoufos intentionally misgendered Dr. Tudor (i.e., used inappropriate male pronouns such as he and his) in subsequent meetings.

81. Misgendering is the practice of using incorrect gender referents (e.g., pronouns, titles, and name) in describing or conversing with a transgender person. When intentional, the purpose of misgendering is to communicate one's belief that the subject is not truly a member of their post-transition gender and/or to express disregard for the

subject's gender identity.

82. During this meeting, Dr. Tudor told Dean Scoufos that she believed another faculty member in her Department had been discriminating against her since she had begun to present as female at work. Dr. Tudor said that she would prefer if this faculty member did not serve on the Faculty Committee that would review her portfolio. Dean Scoufos did not report Dr. Tudor's concern to Southeastern's Affirmative Action Officer—the person at Southeastern responsible for investigating discrimination complaints.

Dr. Tudor's Application for Promotion and Tenure

83. In October 2009, Dr. Tudor submitted her application for tenure and promotion to the position of Associate Professor to the Chair of the English Department, Dr. John Mischo.

84. Both the P&T Review Committee assigned to review Dr. Tudor's application and portfolio, as well as Dr. Mischo, recommended that she receive promotion and tenure.

85. On or about November 29, 2009, Dr. Mischo notified Dean Scoufos that he and the P&T Review Committee recommended that Dr. Tudor receive a promotion to the tenured position of Associate Professor.

86. In January 2010, Dean Scoufos sent Dr. Tudor a letter informing her that, despite the recommendations of Dr. Tudor's Department Chair and the P&T Review Committee, she had decided to oppose Dr. Tudor's application for promotion and tenure.

Dean Scoufos' letter contained no explanation for her decision.

87. Dean Scoufos passed her recommendation that tenure and promotion be denied and Dr. Tudor's portfolio along to Vice President McMillan.

88. In February 2010, Vice President McMillan sent Dr. Tudor a letter informing her that he also had decided to oppose her application for promotion and tenure. Like Dean Scoufos' letter, Vice President McMillan's letter contained no explanation for his decision.

89. Shortly afterwards, Vice President McMillan forwarded Dr. Tudor's portfolio to the President of Southeastern, Dr. Larry Minks. He also forwarded to President Minks his own negative recommendations for Dr. Tudor's promotion and tenure, as well as the recommendations of the P&T Review Committee, the Chair of the English Department, and Dean Scoufos.

90. Dr. Tudor asked Vice President McMillan and Dean Scoufos to explain why they had decided to oppose her application. That information would have enabled Dr. Tudor to supplement her portfolio before the President reviewed it.

91. Both Vice President McMillan and Dean Scoufos refused to explain to Dr. Tudor why they decided to oppose her application.

92. In refusing to discuss with Dr. Tudor why he opposed her application, Vice President McMillan treated Dr. Tudor differently than similarly-situated nontransgender professors. Indeed, in the previous academic term Vice President McMillan treated differently a similarly situated nontransgender male English professor, to wit: Vice President McMillan met with the other professor to discuss how that professor could

strengthen his portfolio. The other professor followed Vice President McMillan's advice and supplemented his portfolio before it was submitted to the President of Southeastern for a final decision on his application. Based on his supplemented portfolio—and the guidance that he received from Vice President McMillan—the nontransgender professor.

93. In February 2010, Dr. Tudor filed a grievance with President Minks and requested a hearing before Southeastern's Faculty Appellate Committee ("FAC"). In her grievance, she alleged that Dean Scoufos and Vice President McMillan had denied her the due process provided by Southeastern's policies when they refused to explain why they had opposed her application for promotion and tenure.

94. The following month, the FAC ruled in Dr. Tudor's favor and recommended to President Minks' designee that Vice President McMillan and Dean Scoufos explain to Dr. Tudor why they had opposed her application.

95. Pursuant to Southeastern policy, President Minks designated the Assistant Vice President for Academic Affairs ("Assistant Vice President") to communicate to Dr. Tudor both the FAC's recommendation and his decision whether to comply with that recommendation. Southeastern policy also required that Dr. Tudor receive this information within ten workdays. Dr. Tudor would have the right to appeal the Assistant Vice President's decision to President Minks.

96. The Assistant Vice President decided not to follow the FAC's recommendation. Vice President McMillan directed the Assistant Vice President to wait until after President Minks made his decision on Dr. Tudor's promotion and tenure application before informing her that he had decided not to follow the FAC's

recommendation. Thus, Dr. Tudor received no notification within the ten workday deadline.

97. By violating Southeastern policy and withholding timely notification of the Assistant Vice President's decision, Southeastern denied Dr. Tudor the ability to appeal Vice President McMillan's and Dean Scoufos' refusals to provide explanation of their negative recommendations prior to President Minks' ultimate decision on her tenure and promotion application. Thus, she was deprived of the opportunity to supplement her portfolio to address their reasoning prior to President Minks' decision.

98. In April 2010, President Minks sent Dr. Tudor a letter informing her that he had decided to deny her application for promotion and tenure. In that letter, President Minks did not explain why Dr. Tudor's application was denied, but he did let her know that Vice President McMillan would inform her of the reasons for the denial in a separate communication.

99. President Minks' decision was the first time Southeastern had denied an English professor's application for tenure and promotion after he or she had obtained a favorable tenure recommendation from a P&T Review Committee and the Department Chair.

100. In June 2010, Dr. Tudor received a letter from Vice President McMillan. That letter—which purported to be dated over a month earlier, on April 30, 2010—stated that President Minks had denied Dr. Tudor's application because her record in the areas of “research/scholarship” and “university service” were deficient.

101. Dr. Tudor's qualifications for promotion and tenure were comparable, if

not superior to, the qualifications of at least three other similarly-situated nontransgender English professors who were considered for, and received, tenure during Dr. Tudor's time at Southeastern. For example, the number of publications Dr. Tudor had in her portfolio was greater than the number of publications that another successful applicant had in hers. One applicant received promotion and tenure even though she, unlike Dr. Tudor, had no peer-reviewed publications. Likewise, in the area of university service, Dr. Tudor's performance was also comparable to her nontransgender departmental peers who successfully applied for promotion and tenure.

102. Vice President McMillan's criticisms of Dr. Tudor's record in the area of scholarship also rested on his assertion that the Southeastern administration had been unable to verify that Dr. Tudor had served as an editor for two symposia listed in her portfolio. However, no one in the Southeastern administration ever requested that Dr. Tudor provide additional documentation to verify that she had served as an editor of the symposia. Moreover, copies of the published proceedings from the symposia were available in a reading room on Southeastern's campus and Dr. Tudor's role as editor was prominently displayed on the covers of both publications.

Dr. Tudor's Re-application and Grievances

103. Southeastern permits faculty members who have been denied promotion or tenure to reapply as long as they remain within their seven-year term of initial employment. In at least one other RUSO institution, professors have re-applied for promotion and tenure the year after the President denied their applications.

104. In August 2010, Dr. Tudor informed her Department Chair that she intended to re-apply for promotion and tenure during the 2010-11 academic year.

105. That same month, Dr. Tudor also filed a grievance in which she requested a hearing with the FAC so that she could dispute Southeastern's decision to deny her 2009-10 application for promotion and tenure. In September 2010, the FAC informed Dr. Tudor that it had no authority to overrule the President's decision to deny her promotion and tenure.

106. A few weeks later, in October 2010, Vice President McMillan sent Dr. Tudor a letter stating that Southeastern would not permit her to re-apply for promotion and tenure during the 2010-11 academic year. In the letter, which had been approved by President Minks, Vice President McMillan recognized that Southeastern policy did not prohibit Dr. Tudor from re-applying. But he nevertheless announced that he had decided that it was not in the "best interests of the university" to permit her to re-apply.

107. In his letter, Vice President McMillan offered several explanations for denying Dr. Tudor's request to re-apply for promotion and tenure. Among his reasons was his belief that deficiencies in Dr. Tudor's application from the prior academic year could not be corrected that quickly. Vice President McMillan also expressed concern that if the administration once again overruled positive recommendations from the P&T Review Committee and the Department Chair, its action would potentially "inflame the relationship between faculty and administration."

108. In October 2010, Dr. Tudor filed a grievance with the FAC and President Minks challenging Southeastern's decision not to let her re-apply for promotion and

tenure during the 2010-11 academic year.

109. In response to Dr. Tudor's grievance, Vice President McMillan sent a letter to the FAC stating that he had opposed Dr. Tudor's 2009-10 application for promotion and tenure because she had submitted "the poorest portfolio [he had] ever reviewed in the 20 years" he worked at Southeastern, and there was "very little chance" that Dr. Tudor could have corrected the deficiencies in the period since the initial decision.

110. In support of her grievance, Dr. Tudor submitted four letters of recommendation from tenured English professors at Southeastern detailing their positive assessments that Dr. Tudor was qualified for promotion and tenure.

111. Another tenured English professor submitted a letter to the FAC, in support of Dr. Tudor's grievance, which pointed out that "Dr. Tudor ha[d] published more research than any other member of the [English] department, tenured or untenured." The letter writer therefore maintained that Vice President McMillan was "clearly mistaken in his opinion that consideration of Dr. Tudor's tenure file would be a waste of time."

112. In December 2010, the FAC recommended that Southeastern permit Dr. Tudor to re-apply for promotion and tenure during the 2010-11 academic year.

113. President Minks designated Southeastern's Vice President for Business Affairs, Ross Walkup, to respond to the FAC's decision. In January 2011, Vice President Walkup sent a letter to the FAC stating that Southeastern would not comply with the FAC's recommendation because Southeastern policy prohibited professors from re-applying for promotion and tenure after the President denied their applications. In his letter, Vice President Walkup indicated that President Minks agreed with this

interpretation of Southeastern policy.

Dr. Tudor's Discrimination Complaint

114. In August 2010—at the same time she was seeking to re-apply for promotion and tenure—Dr. Tudor also filed a written discrimination complaint with Southeastern's Affirmative Action Officer, Dr. Claire Stubblefield. In that complaint, she alleged, among other things, that Southeastern had discriminated against her on the basis of her sex when it denied her 2009-10 application for promotion and tenure.

115. Dr. Tudor filed a similar discrimination complaint with DOE, and DOE informed Southeastern of the complaint in a letter dated September 15, 2010. This complaint specifically referenced “odious bullying” “hostile attitude arising from discrimination” and “adversarial and hostile demeanor toward a Native American woman.”

116. In October 2010, Dr. Tudor supplemented the discrimination complaint that she had filed with Dr. Stubblefield. She alleged that Southeastern had retaliated against her because of her discrimination complaints when it refused to permit her to re-apply for promotion and tenure during the 2010-11 academic year.

117. Dr. Stubblefield issued a report ostensibly addressing Dr. Tudor's discrimination and retaliation complaints in January 2011. Dr. Stubblefield found that Southeastern had not discriminated against or retaliated against Dr. Tudor.

118. Dr. Stubblefield's report did not address all of Dr. Tudor's allegations of discrimination and retaliation. For example, the report did not mention Southeastern's

decision not to permit Dr. Tudor to re-apply for promotion and tenure during the 2010-11 academic year, even though Dr. Tudor had expressly complained that this decision to not let her re-apply was retaliatory. Similarly, Dr. Stubblefield's report did not address Dr. Tudor's allegation that Vice President McMillan had treated her differently from one of her peers by meeting with a nontransgender English professor to discuss his portfolio before the President rendered a decision on his application for promotion and tenure, while denying Dr. Tudor the opportunity to have such a meeting.

Dr. Tudor's Employment with Southeastern is Terminated

119. Since Dr. Tudor failed to attain tenure before the end of her seventh year as an Assistant Professor, Southeastern terminated her employment on May 31, 2011.

120. Before Dr. Tudor's employment ended, Southeastern's Faculty Senate awarded her with the Faculty Senate Recognition Award for Excellence in Scholarship for the 2010-11 academic year.

121. Since her employment was terminated by Southeastern, Dr. Tudor has attempted to but been unable to secure a tenure-track professorship that is comparable to the one she held at Southeastern.

Dr. Tudor's Desire To Return to Southeastern

122. One of the remedies Dr. Tudor and the United States have requested is reinstatement as Assistant Professor, with tenure. This relief is particularly important given Dr. Tudor's connection to Oklahoma.

123. In the 1830s the Chickasaw were removed from their ancestral lands east of the Mississippi River and moved, at gunpoint, to lands in present-day Oklahoma.

124. Nearly three thousand Chickasaw traveled along the Trail of Tears; an estimated five hundred Chickasaw perished along the way.

125. Today, members of the Chickasaw Nation believe that the lands sold to the Chickasaw in Oklahoma by the federal government in the 1830s have been made sacred by the tears, sweat, blood, and bones of their ancestors.

126. Dr. Tudor believes that the land Southeastern lies upon has been made sacred by the tears, sweat, blood, and bones of her ancestors.

127. Southeastern's campus lies in the historic boundary of the lands sold to the Chickasaw and Choctaw Nations by the federal government in the 1830s. In 2004 Dr. Tudor was offered a lucrative tenure-track professorship at Northern Michigan University. Dr. Tudor was also offered a tenure-track professorship at Southeastern.

128. Dr. Tudor accepted the tenure-track professorship at Southeastern over the offer from Northern Michigan University because she wanted to spend the rest of her career teaching, working, and living on lands lying within the historic boundary of the relocated Chickasaw Nation.

129. Since her employment was terminated by Southeastern, Dr. Tudor has been unable to secure a tenure-track professorship at an institution that lies within the historic boundaries of the removed Chickasaw Nation.

COUNT ONE
Title VII, 42 U.S.C. § 2000e, et seq.
Hostile Work Environment Based on Sex
(Gender, Gender Expression, and Gender Identity)

130. Plaintiff/Intervenor re-alleges each and every allegation contained in paragraphs 1–129.

131. After Dr. Tudor disclosed her intent to transition to female during the 2007-08 school term, Southeastern’s administrators instituted a campaign of harassment and bullying on the basis of sex and sex stereotyping, including gender, gender expression, and gender identity, and adopted an attitude of adversarial and hostile demeanor. This harassment continued through Tudor’s termination from Southeastern in May 2011.

132. Dr. Tudor was targeted for harassment by administrators because of her sex, including gender, gender expression, and gender identity.

133. Dr. Tudor was nonetheless able to maintain cordial and productive relationships with the members of her department.

134. The discriminatory acts involved the same type of employment actions, occurred relatively frequently, were perpetuated and/or directed by the same core group of administrators, were egregious, numerous and concentrated, and formed part of the same hostile work environment, as detailed herein.

135. The work environment was permeated with discriminatory intimidation, ridicule, and insult, sufficiently severe or pervasive to alter the conditions of Dr. Tudor’s employment and to create an abusive working environment, as detailed herein.

136. Dr. McMillan made statements that were repeated to Dr. Tudor that her

gender expression and gender identity were offensive to him, as detailed above.

137. Southeastern administrators, including but not limited to Dr. McMillan, openly denied the legitimacy of Dr. Tudor's feminine gender expression and female gender identity and encouraged others under their direction to do the same. This conduct includes but is not limited to: administrators directing human resources to counsel Tudor against using the multi-stall women's restroom closest to her office and against wearing skirts and other traditionally female articles of clothing in Fall 2007; administrators, including Dean Scoufos, failing to notify the Affirmative Action Office of discrimination reported by Dr. Tudor in 2009; administrators, including Dean Scoufos and Vice President McMillan, publicly and privately misgendering or otherwise expressing their distaste for persons with nontraditional gender identity and expression generally and Dr. Tudor specifically.

138. Dean Scoufos had the power to impose or participate in discipline of Dr. Tudor and to interfere with or stop her tenure and promotion.

139. Vice President McMillan had the power to impose or participate in discipline of Dr. Tudor and to interfere with or stop her tenure and promotion.

140. Dean Scoufos was acting as the Defendants' agent in taking the actions regarding Dr. Tudor detailed herein.

141. Dean Scoufos was acting within the scope of his employment in taking the actions regarding Dr. Tudor detailed herein.

142. Vice President McMillan was acting as the Defendants' agent in taking the actions regarding Dr. Tudor detailed herein.

143. Vice President McMillan was acting within the scope of his employment in taking the actions regarding Dr. Tudor detailed herein.

144. Southeastern administrators, including upon information and belief Dr. McMillan, repeatedly attempted to craft formal and informal policies with the intended effect of forcing Dr. Tudor to suppress her feminine gender expression and female gender identity. This conduct includes but is not limited to: administrators directing Southeastern's human resources office to counsel Dr. Tudor to use a different restroom than that used by other female faculty, causing Dr. Tudor daily humiliation for four years; administrators directing Southeastern's human resources office to counsel Dr. Tudor to not wear traditionally female or feminine articles of clothing; and administrators repeatedly interfering with the tenure review process over the course of two years.

145. The requirement that Dr. Tudor not use female restrooms, and use only a specific single-stall restroom exposed her to disadvantageous terms as detailed herein.

146. The Defendants provided and maintained a health insurance plan for all faculty, including Dr. Tudor, that had an explicit exclusion for transgender health care, as detailed herein. The health insurance policy explicitly excluded all transition-related care for transgender persons. As a result of this exclusion, the plan denied care to transgender persons, solely on the basis of sex and regardless of medical necessity. As a result of this discriminatory exclusion, Dr. Tudor was unable to receive coverage for medically necessary care, she was forced to bear out-of-pocket costs, and was subjected to humiliation which contributed to the hostile work environment.

147. This hostile environment unreasonably interfered with Dr. Tudor's ability

to perform her job duties, by the disruption of her relationship to the University Administration and her Department colleagues, by the unreasonable public criticism and questioning of her abilities as a professor, by her inability to use restrooms appropriate to her gender, by the need to spend many hours on otherwise unnecessary grievance and review processes and other means of seeking relief, and by the necessity of having to create a new tenure application, a time-intensive task involving reviewing and assembling hundreds of pages and requesting and following up on recommendation letters, and other factors.

148. Many events contributing to this hostile work environment occurred within the 300 day period prior to Dr. Tudor's first charge dated September 9, 2010, including but not limited to the daily humiliations caused by the restroom restrictions and misgendering, the maintenance of the discriminatory insurance policy exclusion, dress restrictions, administrators repeatedly interfering with the tenure review process and the constant threat of termination.

149. Dr. Tudor perceived the working environment to be abusive or hostile.

150. A reasonable person in Dr. Tudor's circumstances would consider the working environment to be abusive or hostile.

151. The actions of Defendants' agents, including but not limited to Dean Scofous and Vice President McMillan, in creating the hostile work environment resulted in tangible job consequences to Dr. Tudor, including but not limited to her termination, her denial of promotion and tenure, her inability to reapply for promotion and tenure, her restriction in regard to using restrooms and her inability to obtain health care coverage

for medically necessary treatments.

152. The Defendants did not have any policy prohibiting discrimination based on gender expression or gender identity, and there were therefore no preventive and corrective opportunities available to Dr. Tudor for discrimination based on her gender expression or gender identity.

153. In fact, the Faculty Senate unanimously approved resolutions to prevent discrimination based on gender expression and gender identity on January 19, 2011, and they were sent to Vice President McMillian, who in turn presented the resolutions to Southeastern's President. Both resolutions were rejected.

154. Dr. Tudor took advantage of the preventive and corrective opportunities available to her to the extent they existed, by complaining to Defendants of discrimination based on her sex.

155. The Defendants were on notice of the hostile work environment, including actual notice by means of complaints made by Dr. Tudor to the University detailed herein, and vicariously and constructively by means of the acts perpetrated by her direct supervisors detailed herein.

156. The Defendants should have known of the hostile work environment because of Dr. Tudor's complaints and the acts perpetrated by the administrators, as detailed herein.

157. The Defendants made no efforts to stop the hostile environment detailed herein.

158. In the alternative, the Defendants did not undertake prompt and reasonable

efforts sufficient to stop the hostile environment detailed herein.

159. As a direct and proximate result of Defendants' unlawful discrimination, Dr. Tudor incurred damages including, but not limited to humiliation, loss of enjoyment of life, damage to her professional reputation, and other pecuniary and non-pecuniary losses.

COUNT TWO
Title VII, 42 U.S.C. § 2000e, *et seq.*
Unlawful Discrimination Based on Sex
(Gender, Gender Expression, and Gender Identity)

160. Plaintiff/Intervenor re-alleges each and every allegation contained in paragraphs 1–129.

161. Defendants engaged in adverse employment actions against Dr. Tudor because of her sex and sex stereotyping, including gender, gender expression, and gender identity, as defined and detailed below.

162. Defendants denied Dr. Tudor's application for promotion and tenure during the 2009-10 academic year.

163. Defendants refused to permit her to re-apply during the 2010-11 academic year because of Dr. Tudor's gender, gender expression and gender identity, which constitutes unlawful sex discrimination in violation of Title VII.

164. Had Dr. Tudor been permitted to re-apply during the 2010-11 academic year, she would have obtained tenure and promotion, absent further sex discrimination by Defendants.

165. Defendants created policies and practices that had a disparate impact on

persons based on gender expression and gender identity, and had a disparate impact on Dr. Tudor.

166. Defendants created a policy and practice that required certain female persons, based on their gender identity, including Dr. Tudor, not to use any women's restrooms on campus, but to use only all genders single-stall restrooms for persons with disabilities.

167. This policy and practice had a disparate impact on certain female persons based on their gender identity, including Dr. Tudor.

168. The creation and maintenance of this policy and practice was an adverse employment action.

169. These restroom restrictions also subjected Dr. Tudor to disparate treatment.

170. These restroom restrictions subjected certain persons, based on their gender identity, including Dr. Tudor, to disadvantageous terms based on sex, as detailed herein, and constituted unlawful sex discrimination in violation of Title VII.

171. Defendants terminated Dr. Tudor because of her gender, gender expression and gender identity, which constitutes unlawful sex discrimination in violation of Title VII.

172. Defendants' purported reasons for denying Dr. Tudor's application for promotion and tenure during the 2009-10 academic year and for refusing to allow her to re-apply in the 2010-11 academic year are a pretext for sex discrimination.

173. As a direct and proximate result of Defendants' unlawful sex discrimination, Dr. Tudor incurred damages including, but not limited to, lost income,

humiliation, loss of enjoyment of life, damage to her professional reputation and other pecuniary and non-pecuniary losses.

COUNT THREE
Title VII, 42 U.S.C. § 2000e, et seq.
Retaliation

174. Plaintiff/Intervenor re-alleges each and every allegation contained in paragraphs 1–129.

175. By refusing to permit Dr. Tudor to re-apply for promotion and tenure during the 2010-11 academic year, Defendants retaliated against Dr. Tudor in violation of Title VII because she (a) opposed their discrimination against her that she reasonably believed violated Title VII; and (b) participated in a Title VII proceeding by filing a complaint with DOE.

176. Defendants’ purported reasons for not allowing Dr. Tudor to re-apply for promotion and tenure in the 2010-11 academic year are a pretext for unlawful retaliation.

177. But for Defendants’ unlawful retaliation, Dr. Tudor would have obtained tenure and promotion, and thereby incurred damages including, but not limited to, lost income, loss of enjoyment of life, damage to her professional reputation, and other pecuniary and non-pecuniary losses.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff/Intervenor requests that the court grant the following relief:

- a) Enjoin Defendants from subjecting employees to unlawful sex discrimination (including on the basis of gender, gender identity, gender

- expression, and sex stereotypes) and retaliation that violates Title VII;
- b) Order Defendants to institute and carry out new policies, practices, and programs to prevent unlawful sex discrimination (including on the basis of gender, gender identity, gender expression, and sex stereotypes) and retaliation that violates Title VII;
 - c) Order Defendants to institute and carry out policies, practices, and programs to report, investigate, and effectively address complaints about unlawful sex discrimination (including on the basis of gender, gender identity, gender expression, and sex stereotypes) and/or retaliation that violates Title VII;
 - d) Order Defendants to train their employees on Title VII's prohibitions against unlawful sex discrimination (including on the basis of gender, gender identity, gender expression, and sex stereotypes) and retaliation;
 - e) Order Defendants to train their employees who investigate complaints of Title VII violations on how to conduct effective investigations;
 - f) Order Defendants and their managers and supervisory employees to refrain from engaging in retaliation against any individual for giving testimony in this matter or participating in this matter in any way;
 - g) Order Defendants to compensate Dr. Tudor with monetary relief for the damages she suffered including, but not limited to, lost income, loss of fringe benefits, humiliation, loss of enjoyment of life, and damage to her professional reputation.
 - h) Order Defendants to award Dr. Tudor the position of Associate Professor

with tenure;

- i) Order any further relief necessary to make Dr. Tudor whole;
- j) Award such additional relief as justice may require, together with the Plaintiff/Intervenor's costs, disbursements, and attorneys' fees in this action.

Dated: May 5, 2015

Respectfully Submitted,

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