

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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
and	)	
	)	
DR. RACHEL TUDOR,	)	
	)	
Plaintiff/Intervenor,	)	
	)	
v.	)	CASE NO. 5:15-CV-00324-C
	)	
SOUTHEASTERN OKLAHOMA	)	
STATE UNIVERSITY,	)	
	)	
and	)	
	)	
THE REGIONAL UNIVERSITY	)	
SYSTEM OF OKLAHOMA,	)	
	)	
	)	
Defendants.	)	

**DR. TUDOR'S  
NOTICE OF RELATED APPEAL**

Plaintiff-Intervenor Dr. Tudor hereby notices this Court and all counsel that on November 3, 2016 Dr. Tudor filed a Protective Notice of Appeal, appealing to the Fifth Circuit a preliminary injunction (ECF No. 112-1) and a clarification order (ECF No. 125-7) issued in the case styled as *Texas et al. v. United States et al.*, No. 7:16-cv-00054 (N.D. Tex.). Dr. Tudor's Protective Notice of Appeal is appended hereto as Exhibit 1.

To date, the Northern District of Texas has declined to rule on Dr. Tudor's motion to intervene, filed with that court on September 12, 2016. *See* ECF No. 124-1. Briefing

on Dr. Tudor's motion to intervene closed on October 17, 2016. *See* Exhibit 2 [Tudor Response to Plaintiffs' Objections to Intervention]; Exhibit 3 [Tudor Response to Defendants' Objections to Intervention]. On October 27, 2016 Dr. Tudor moved the Northern District of Texas to rule on Tudor's motion to intervene, noting, among other things, that under binding Fifth Circuit precedent, the Northern District of Texas lacks jurisdiction to enjoin any part of this litigation. *See* Exhibit 4 at 2–3.

Dated: November 4, 2016

Respectfully Submitted,

/s/ Ezra Young

Ezra Young (NY Bar No. 5283114)

Admitted *Pro Hac Vice*

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**ATTORNEY FOR PLAINTIFF/INTERVENOR**

**CERTIFICATE OF SERVICE**

I hereby certify that on November 4, 2016, I electronically filed a copy of the foregoing with the Clerk of Court by using the CM/ECF system, which will automatically serve all counsel of record.

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



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**ATTORNEYS FOR DR. RACHEL TUDOR**

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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 conducted 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.<sup>1</sup> 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.*, CIV.A. 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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<sup>1</sup> *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,<sup>2</sup> 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. Peninsula 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

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<sup>2</sup> 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

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Tudor’s claim directly overlaps with the preliminary and final declaratory relief sought by Plaintiffs in the instant litigation since Plaintiffs seek relief which requires that this Court construe the scope of Title VII’s sex discrimination proscription as applied to transgender persons.

The overlap between Dr. Tudor’s claim and Plaintiffs’ claims is plain. Plaintiffs make clear that the instant litigation seeks to redress Defendants’ efforts to interpret Title VII and Title IX to reach sex discrimination alleged by transgender persons in, *inter alia*, all litigations pending before all federal districts courts where Defendants are a party, including the Oklahoma Litigation. *See, e.g.*, Transcript of Hearing at 18–19, *Texas et al. v. United States et al.*, 7:16-cv-00054-O (N.D.Tex. Sept. 30, 2016) (asserting that Plaintiffs were standing by arguments elevated in ECF Doc. 64); ECF Doc. 64 at 3 (arguing that the Preliminary Injunction enjoins DOJ’s ability “to continue” the Oklahoma Litigation).

While Plaintiffs’ claims arise under the Administrative Procedures Act and the U.S. Constitution, all claims turn on the same threshold issue—does statutorily prescribed “sex” discrimination reach sex discrimination against transgender persons. If the term “sex” reasonably encompasses sex discrimination against transgender persons, then all of Plaintiffs claims fail since the “Guidelines” at issue would not, in that case, present a new rule but rather an interpretation of existing statutory obligations. This overlap between the threshold issue in Plaintiffs’ claims for relief and Dr. Tudor’s claim is sufficient to create a common issue of law. *See, e.g., New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 690 F.2d 1203, 1209 (5th Cir. 1982), *on reh’g en banc*, 732 F.2d 452 (5th Cir. 1984) (parties seeking to intervene presenting similar questions as to the interpretation of a contract raise same question of law). *See also Stallworth v. Monsanto Co.*, 558 F.2d 257, 269 (5th Cir. 1977) (observing that Fed. R. Civ.

P. 24(b)(2)'s common interest of law element should be liberally construed; declining to give deference to district court on commonality of issue of law determination).

Defendants' opposition to Dr. Tudor's intervention turns in part on the notion that this Court should shut the courthouse doors on Dr. Tudor before ever deciding whether Dr. Tudor's Complaint in Intervention raises a viable claim. ECF Doc. 81 at 5 ("Dr. Tudor's motion should be denied because her proposed claim would not survive a motion to dismiss."). Defendants' position begs the question. This Court cannot determine whether Dr. Tudor's claim is legally viable unless it assesses whether preclusive effect should be given to the July 2015 Order. Absent a clarification from this Court that the preliminary injunction does not reach the Oklahoma Litigation, this Court should hear from Dr. Tudor so that it may make a sound decision on this issue for the purposes of appeal. Declining to let Tudor intervene before adjudicating this issue makes no sense; indeed, it is an approach that is highly disfavored by the Fifth Circuit. *See, e.g., Atlantis Dev. Corp. v. United States*, 379 F.2d 818, 827 (5th Cir. 1967) ("The Government would avoid all of these problems by urging us to rule as a matter of law on the face of the moving papers that the intervenors could not possibly win on the trial of the intervention and consequently intervention should be denied. . . . But it hardly comports with good administration, if not due process, to determine the merits of a claim asserted in a pleading seeking an adjudication through an adversary hearing by denying access to the court at all.").

**B. Defendants misapprehend the preclusive effect of a denial of a motion to dismiss premised upon an issue of law.**

Dr. Tudor respectfully disagrees with Defendants' construal of the preclusive effect of a denial of a motion to dismiss premised upon an issue of law. The Fifth Circuit has never decided whether such a decision should enjoy preclusive effect for collateral estoppel purposes. Indeed,

none of the authorities Defendants cite support this proposition.<sup>1</sup> However, key principles animating related precedents and respected treatises support giving such a decision preclusive effect.

Collateral estoppel bars re-litigation of issues of law or fact actually litigated and necessary to the holding of a prior order in another litigation. Whereas “[r]es judicata operates only when there has been a prior ‘judgment *on the merits*’,” collateral estoppel has “more limited preclusive effect,” barring only re-litigation of issues actually litigated and necessary to holdings in the prior litigation. *Keene Corp. v. United States*, 591 F.Supp. 1340, 1346 (D.D.C. 1984), *aff’d sub nom.*, *GAF Corp. v. United States*, 818 F.2d 901 (D.C. Cir. 1987) (giving preclusive effect to deficiencies in complaint scrutinized in prior litigations).

There is no principled reason not to afford preclusive effect to an order settling an issue of law on a motion to dismiss for failure to state a claim. As the Restatement (Second) of Judgments § 27 cmt. d teaches, “[a]n 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.” *See also B&B Hardware, Inc. v.*

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<sup>1</sup> *RecoverEdge L.P. v. Pentecost*, 44 F.2d 1284, 1290 (5th Cir. 1995) approvingly cites Restatement (Second) of Judgments § 27, which supports granting preclusive effect to a denial of a motion to dismiss. *See* Restatement (Second) of Judgments § 27 cmt. d. *Ashe v. Swenson*, 397 U.S. 436 (1970) is inapposite; *Ashe* discusses collateral estoppel in criminal cases and concerns itself with re-litigation of facts. *Avondale Shipyards, Inc. v. Insured Lloyd’s*, 786 F.2d 1265, 1269 (5th Cir. 1986) is concerned with the preclusive effect given to a grant of partial summary judgment involving an issue of fact that was not “a critical and necessary part of a judgment.” *Id.* at 1269 (quotations omitted). *In re Pickle*, 1998 WL 413023 (5th Cir. June 12, 1998) (unpublished), merely states that an order denying a motion to dismiss is generally considered a nonappealable interlocutory order. *But see Champagne v. Jefferson Parish Sheriff’s Office*, 188 F.3d 312 (5th Cir. 1999) (holding denial of motion to dismiss on Eleventh Amendment or qualified immunity grounds are appealable collateral orders when based on issues of law). *Save the Bay, Inc. v. United States Army*, 639 F.2d 1100, 1103 (5th Cir. 1981), is concerned the effect granted to partial summary judgments, not the preclusive effect afforded to an order settling an issue of law on a motion to dismiss for failure to state a claim.

*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) of Judgments § 27 for guidance). Where a party, as Dr. Tudor did in the Oklahoma Litigation, sustains her burden of proof at the motion to dismiss stage on a threshold issue of law, the issue was finally decided. *Cf. Champagne v. Jefferson Parish Sheriff’s Office*, 188 F.3d 312 (5th Cir. 1999) (holding denial of motion to dismiss on Eleventh Amendment or qualified immunity grounds are appealable collateral orders when based on issues of law).

Moreover, where a party seeks to invoke collateral estoppel to preclude re-litigation of a threshold issue of law already decided in another litigation that is still pending, equities and principles of judicial economy weigh heavily in favor of giving it preclusive effect. While such an order may not be final in the sense that parties to the original litigation may seek reconsideration from the first court or appeal it later, such an order should not be open to collateral attack in other fora. To decide otherwise would invite nonprevailing parties to bring successive, parallel litigations in other fora seeking declaratory judgments on issues of law with the express purpose of enjoining earlier filed but still live litigations. Such a result would cut against the values undergirding collateral estoppel. *See, e.g., SIL-FLO, Inc. v. SFHC, Inc.*, 917 F.2d 1507, 1521 (10th Cir.1990) (citing *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 334 (1971) (“The requirement that the party against whom the prior judgment is asserted had a full and fair opportunity to be heard centers on the fundamental fairness of preventing the party from relitigating an issue [she] has lost in a prior proceeding.”)).

Additionally, where there is mutuality of parties, it is incumbent upon courts to give prior adjudications settling an issue of statutory interpretation at the motion to dismiss stage preclusive effect. “In such a case, it is unfair to the winning party and an unnecessary burden on the courts

to allow repeated litigation of the same issue in what is essentially the same controversy, even if the issue is regarded one of ‘law’.” *United States v. Stauffer Chemical Co.*, 464 U.S. 165, 171 (1984) (*quoting* Restatement (Second) of Judgments § 28, cmt. b (1982)). Collateral estoppel’s threshold requirement that the parties had “one opportunity to litigate an issue fully and fairly” is enough to ensure fairness. *Continental Can Co. v. Marshall*, 603 F.2d 590, 594 (7th Cir. 1979). Thus, even if not deemed “final” in most circumstances, in a unique situation like this where the same parties are disputing the same issue of law in quick, successive and overlapping litigations, a denial of a motion to dismiss deciding an issue of law should be granted preclusive effect. *Cf. Golman v. Tesoro Drilling Corp.*, 700 F.2d 249, 253 (5th Cir. 1983) (*citing In re Falstaff Brewing Co. Antitrust Litigation*, 441 F.Supp. 62, 66 (E.D.Mo.1977) (holding that an order granting partial summary judgment based upon pleadings and affidavits in a still-pending case “is, in the sense requisite for raising an estoppel, a final judgment on the merits.”). While virtually every party would prefer a second bite at relitigating an issue, and “there will always [be] a lingering question whether the party might have succeeded in proving his point if he had only been given a second chance . . . [w]ithout more, this is not sufficient to outweigh the extremely important policy underlying the doctrine of collateral estoppel—that litigation of issues at some point must come to an end.” *James Talcott v. Allahabad Bank, Ltd.*, 444 F.2d 451, 463 (5th Cir. 1971), *cert. denied*, 404 U.S. 940 (1971).

**C. However, Dr. Tudor’s motion to intervene and ancillary motions should be denied as moot if this Court determines that the injunction does not enjoin the Oklahoma Litigation.**

As noted in her motion to intervention (ECF doc. 67 at 1–3), all of Dr. Tudor’s pending motions should be denied as moot if this Court determines that the Preliminary Injunction (ECF Doc. 58) does not enjoin any part of the Oklahoma Litigation.

## 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.

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### Request for Ruling

Given Defendants' recently filed Notice of Appeal, it is in all parties interests to expeditiously resolve Dr. Tudor's motion so that the Fifth Circuit may address all interrelated issues on appeal, including Dr. Tudor's Motion to intervene if it is denied.<sup>1</sup>

Further, constitutional guarantees weigh heavily in favor of a prompt disposition of Dr. Tudor's motion. While district courts are generally afforded latitude in managing cases, due process imposes some limits. Indeed, the Fifth Circuit recognizes that where a party moves to intervene and merits motions are pending, intervention should be granted *before* briefing is completed on the merits motions so that the putative intervener has a meaningful opportunity to participate in the proceedings. *White v. Texas American Bank/Galleria, N.A.*, 958 F.2d 80 (5th Cir. 1992).

Additionally, judicial resources can be readily conserved if the Court reviews the facts and legal arguments presented in Dr. Tudor's motion and determines that it lacks jurisdiction over the parties to and issues in the Oklahoma Litigation and adjusts the Preliminary Injunction accordingly. Such a disposition would moot out Dr. Tudor's motion and thus conserve resources. Clear and binding Fifth Circuit precedent weighs heavily in favor of this approach. *See, e.g., Gregory-Portland Indep. Sch. Dist. v. Texas Ed. Agency*, 576 F.2d 81, 82–83 (5th Cir. 1978) (directing second district court to dissolve injunction and transfer case back to first district court which still had jurisdiction over the parties); *West Gulf Maritime Ass'n v. ILA Deep Sea Local 24, S. Atlantic and Gulf Distr. of ILA, AFL-CIO*, 751 F.2d 721, 731 (5th Cir. 1985) (holding that second district court's issuance of preliminary injunction in a purported effort to "preserve the

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<sup>1</sup> See September 30, 2016 Hearing Transcript at 41 (The Court: "So even if it is appealed in the next week or two, why not finish the case and while that is already up there I work hard to get the case finish[ed] so that however I rule the whole thing gets up there are the same time").

status quo” intruded on decisional authority of first district court which still had jurisdiction over the parties and issues); *id.* at 732 (vacating preliminary injunction and remanding for entry of stay, transfer, or dismissal). *See also Ceres Gulf v. Cooper*, 957 F.2d 1199 (5th Cir. 1992) (reversing district court’s denial of intervention motion and directing the court to dismiss case for lack of jurisdiction).

### **Conclusion**

For all the foregoing reasons, Dr. Tudor respectfully requests that this Court immediately rule on her pending Motion to Intervene and Join Claim.

Dated: October 27, 2016

Respectfully submitted,

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**ATTORNEYS FOR DR. RACHEL TUDOR**

**CERTIFICATE OF SERVICE**

I hereby certify that on October 27, 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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