

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

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

**PLAINTIFF UNITED STATES OF AMERICA’S REPLY IN SUPPORT OF ITS  
MOTION TO LIFT THE STAY**

The United States respectfully submits this reply to address and correct Defendants’<sup>1</sup> mischaracterization of the nature and scope of the preliminary injunction (“Injunction”) issued in *Texas v. United States*, No. 7:16-cv-00054 (N.D. Tex.), their conjecture about future proceedings in *Texas* and the effect that such proceedings might have on this distinct and earlier-filed case, and their suggestion that this Court should cede control of its own docket based on this speculation. Contrary to Defendants’ assertions: (1) the order staying this case does not preclude the United States from seeking to lift the stay; (2) the Injunction places no restriction on the United States’

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<sup>1</sup> In this brief, Plaintiff will refer to Southeastern Oklahoma State University as “Southeastern” and the Regional University System of Oklahoma as “RUSO.”

ability to pursue its existing claims in this Court through discovery and trial; and (3) this Court need not await further rulings from the *Texas* court before resuming its proceedings. The Injunction, of course, has no impact on Defendants' ability to mount their defense in this case. The United States is the only party that faces restrictions as a result of the Injunction, and because the United States believes it can effectively litigate its existing claims within the bounds of those restrictions even as it appeals the Injunction, the Court should not delay this case any further and instead should lift the stay.

**I. Defendants Misconstrue the Stay Order, Distort the History of the Injunction, and Mischaracterize the Texas Court's Clarification Order.**

***a. The Stay Order Does Not Preclude the Relief Requested by the United States.***

Defendants begin their opposition to the United States' motion with the argument that this Court's previous Stay Order (ECF No. 123) prevents the United States from seeking any relief other than "additional scheduling relief" because the *Texas* court ruled that this case is covered in part by the Injunction. Defs.' Br. at 1-2. Defendants' argument reflects a misreading of this Court's Stay Order. That Order, sought at the United States' request, is permissive. The Stay Order does not limit the kind of scheduling relief the United States may seek—including relief from a two-month pause in the schedule.

More to the point, the United States requested the Stay Order, out of an abundance of caution, while it sought clarification regarding the extent to which the *Texas* court believed that its order enjoined action in pending litigation, including this case. The

*Texas* court's Clarification Order (ECF No. 125-7)<sup>2</sup> provides the clarification relevant here, with an express discussion about the way in which the Injunction applies in part to the case before this Court. *Id.* at 6 n.2. Having received the clarification sought, the Stay Order contemplates that the United States may return to this Court for further action regarding the schedule. That is precisely what the United States has done.

***b. The Texas Court Specifically Said That the United States' Legal Arguments in This Case are Not Enjoined.***

In a bid to expand the scope of the Injunction even beyond that set by the *Texas* court, Defendants falsely assert that the *Texas* court enjoined the United States "from asserting that Title VII's definition of sex includes gender identity." Defs.' Br. at 5. Defendants offer no citation to the text of the Injunction, overbroad as it was, supporting this assertion. The *Texas* court did not issue such a ban (and could not lawfully have issued such a ban). Indeed, Defendants completely fail to acknowledge the *Texas* court's ruling that the United States' legal arguments in this specific case are not enjoined. *See* Clarification Order at 6 n.2 ("Because litigation in Southeastern was substantially underway before the issuance of this injunction, DOJ's legal arguments in the case fall outside the scope of this injunction."). A plain reading of the *Texas* court's conclusion reveals that Defendants are wrong when they say that the United States is precluded from asserting the legal claims in Counts 1 and 2 of its Complaint (*see* Defs.' Br. at 4-5).

These are the precise claims that were "substantially underway" prior to the issuance of

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<sup>2</sup> To avoid confusion, Plaintiff will refer to pages of this particular document as it is filed with this Court, not the pagination assigned by the *Texas* court's ECF system.

the injunction, they are based (in part) on the argument that discrimination on the basis of sex under Title VII includes discrimination on the basis of gender identity, and the *Texas* court specifically ruled that these arguments fell outside the scope of the Injunction.

Defendants also erroneously rely on language from the Clarification Order regarding limitations on the United States' ability to pursue certain investigations under a statute not asserted here. Defs.' Br. at 4. In its Clarification Order, the *Texas* court stated that it had enjoined the United States from "initiating, continuing, or concluding any investigation based on [the United States'] interpretation that the definition of sex includes gender identity under Title IX." ECF No. 125-7 at 6 n.2 (emphasis added); *see also* ECF No. 112-1 at 37. This restriction in the Injunction is irrelevant to this case. This case against Southeastern and RUSO is not, and never has been, about Title IX. There are no Title IX claims in the United States' Complaint. As a result, any limitation on activity under Title IX does not impact the prosecution or resolution of this case.

***c. The Texas Court Did Not Enjoin the United States from Pursuing Discovery to Support its Legal Arguments.***

Defendants have misstated the scope of the Injunction and Clarification Order by arguing that those Orders prohibit the United States from taking certain types of discovery and presenting certain evidence at trial before this Court. Defs.' Br. at 5, 8-9. In its Injunction, as explained by its Clarification Order, the *Texas* court declined to impose any limitations on what discovery the United States could seek, expert testimony it could proffer, or trial evidence it could present with respect to the claims that the United States has already asserted in this case. ECF No. 112-1 at 37; ECF No. 125-7 at 6

n.2. The *Texas* court knew that the parties had not yet completed discovery in this case when it issued its Clarification Order (ECF No. 125-1 at 2). The *Texas* court was particularly aware that Dr. Tudor's restroom access was a subject of discovery (as Defendants acknowledge on page 5 of their Brief) and still said nothing to indicate that the United States could not seek discovery or present evidence at trial on this topic in support of its existing claims.<sup>3</sup> Thus, Defendants' assertion, Defs.' Br. at 10, that the United States, before proceeding before this Court, should have to go back to the *Texas* court for further clarification about whether and how it may obtain and use such evidence is completely meritless.<sup>4</sup> Any attempt to expand the Injunction to impose evidentiary limitations that Defendants have otherwise failed to obtain in motion practice before this Court amounts to an abuse of the Stay.

## **II. This Court Should Lift the Stay Without Further Rulings From the *Texas* Court.**

Defendants also argue that this Court should not grant the United States' requested relief until the *Texas* court further clarifies the scope of the Injunction and its application to this case. Defs.' Br. at 3, 10. There is no cause for further delay. As discussed above,

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<sup>3</sup> Defendants argue that the United States could only want discovery on the issue of Dr. Tudor's access to women's restrooms for purposes of arguing that Defendants violated Title VII when they denied her access to women's restrooms. Defs.' Br. at 6-7. This is incorrect. As the United States has previously indicated, there is a factual dispute over whether Defendants barred Dr. Tudor from women's restrooms. As such, the issue impacts Dr. Tudor's credibility, as well as the credibility of other witnesses, and witness credibility is obviously relevant to the United States' claims related to Dr. Tudor's attempts to obtain promotion and tenure.

<sup>4</sup> Defendants use their response to attempt to raise, once again, their failed argument that the United States should disclose its requested injunctive relief. The Court has already clearly ruled that the United States is not required to disclose its injunctive relief request until after the close of discovery (ECF No. 105 at 3).

the *Texas* court has already issued an order, naming this case specifically and clarifying how it believes its Injunction impacts this case. Any suggestion that the *Texas* court may purport to further limit the conduct of litigation before this Court is purely speculation. This case should continue since, according to the *Texas* court's Clarification Order, the United States' "legal arguments in [this case] fall outside the scope of" the *Texas* court's Injunction. ECF No. 125-7 at 6 n.2. To be sure, in the Clarification Order, the *Texas* court asked the parties for further briefing on how the Injunction should impact future Title VII enforcement. But the *Texas* court did not indicate that the Injunction's effect on this case might change as a result of that briefing. If the *Texas* court had wanted further briefing before ruling on how its Injunction impacted this case, it would have said as much in the portion of the Clarification Order where it specifically addressed this case.

The United States has filed a notice of appeal in the *Texas* case, but there is no sound basis for this Court to wait for the appellate process in *Texas* to conclude before lifting the stay in this case. The United States understands that the Injunction precludes the United States from amending its complaint to assert a claim that the Defendants violated Dr. Tudor's rights under Title IX or Title VII by depriving her of "access to intimate facilities." Clarification Order at 1, 6 n.2. But the United States can effectively litigate its existing claims in this case, which are not barred by the Injunction, whatever the outcome of the appeal of the *Texas* court's order.

### **III. Clarification of Relief Sought**

Defendants' opposition to the United States' Motion to Lift the Stay reveals that the parties have different views about the scope of the Injunction as it applies to

discovery that the United States intends to seek (and, indeed, has sought in the past). The United States believes that the *Texas* court has clarified the scope of its Injunction with respect to this action, and that in determining that “DOJ’s legal arguments in the case fall outside the scope of this injunction,” ECF No. 125-7 at 6 n.2, the *Texas* court determined that its Injunction did not limit the United States’ pursuit of its existing claims.

Defendants apparently disagree. To be clear, the United States’ motion to lift the stay is based on its understanding of the Injunction and Clarification Order that the *Texas* court has issued, which do not on their face impact discovery or evidentiary proceedings in this Court on the claims the United States has asserted. In the interest of avoiding future motion practice concerning the Injunction’s impact on discovery and the admissibility of evidence, the United States respectfully requests that this Court expressly confirm that understanding in any order lifting the stay.

With respect to Defendants’ request for a judicial settlement conference, the United States does not oppose this request. However, if the stay is lifted, the United States requests that the Court permit the parties to work such a conference into a proposed schedule which would incorporate deadlines for discovery, motions, all remaining pre-trial activities, and a trial date.

### **Conclusion**

For the foregoing reasons and the reasons stated in its motion, the United States requests that the Court lift the stay and enter the United States’ proposed order.

Respectfully submitted,

Date: November 14, 2016

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**CERTIFICATE OF SERVICE**

I certify that I served this document on all counsel of record through the Court's electronic filing system on the date below.

Date: November 14, 2016

/s/ Allan K. Townsend