Case No. 18-6102/ 18-6165

In the United States Court of Appeals for the Tenth Circuit

DR. RACHEL TUDOR,
Plaintiff-Appellant/Cross-Appellee

v.

SOUTHEASTERN OKLAHOMA STATE UNIVERSITY
AND
REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA,
Defendants-Appellees/Cross-Appellants

On Appeal from the United States District Court for the Western District of Oklahoma, Case No. 5:15-cv-324-C, Hon. Robin Cauthron

---

REPLY AND RESPONSE BRIEF OF PLAINTIFF-APPELLANT/CROSS-APPELLEE DR. RACHEL TUDOR (THIRD BRIEF ON CROSS-APPEAL)

EZRA ISHMAEL YOUNG
LAW OFFICE OF EZRA YOUNG
30 Devoe Street, #1A
Brooklyn, NY 11211
(949) 291-3185
ezra@ezrayoung.com

BRITTANY M. NOVOTNY
NATIONAL LITIGATION LAW GROUP PLLC
2401 NW 23rd St., Ste. 42
Oklahoma City, OK 73107
(405) 896-7805
bnovotny@nationlit.com

MARIE EISELA GALINDO
LAW OFFICE OF MARIE E. GALINDO
Wells Fargo Bldg.
1500 Broadway, Ste. 1120
Lubbock, TX 79401
(806) 549-4507
megalindo@thegalindofirm.com

Attorneys for Plaintiff-Appellant/Cross-Appellee

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitutions:

Statutes:

Rules:

Miscellaneous:

GLOSSARY OF TERMS

DOJ	U.S. Department of Justice
FAC	Faculty Appellate Committee
Southeastern	Southeastern Oklahoma State University
RUSO	Regional University System of Oklahoma

Dr. Rachel Tudor respectfully submits this Brief[1] in reply and response to Southeastern's[2] Brief.

SUPPLEMENTAL FACTUAL BACKGROUND

I. ADDITIONAL PROCEDURAL HISTORY[3]

After-acquired evidence stipulation. In pre-trial briefing, Tudor sought to exclude the Collin College record and other materials and testimony to the extent that Southeastern sought to use it as after-acquired. In response, Southeastern stipulated that Tudor's Collin College record would not be used as after-acquired evidence in this case, stating sweepingly:

> Defendants have been consistently candid about the fact that they are not in possession of any after-acquired evidence. Further Defendants have gone so far as to express that fact in writing, as well as provide assurances that should any after-acquired evidence come into Defendants' possession, that Defendants' will produce that evidence immediately[.] No such evidence has been obtained to date, nor do Defendants expect such evidence to be produced prior to trial.[4]

---

[1] Citation to the appendices will take this form: Tudor App. Vol. 1 at XX (Tudor's Appendix) or Okla. App. Vol. 1 at XX (Southeastern and RUSO's Appendix). References to the parties' earlier filed briefs will take this form: 1st Brief (Tudor's Opening Brief) and 2d Brief (Southeastern and RUSO's Opening Brief and Response). Similarly, references to the amicus brief filed by National Women's Law Center et al. will take this form: NWLC Brief at XX.

[2] Throughout Tudor references Southeastern and RUSO collectively as "Southeastern."

[3] Supplementing 1st Brief at 23–35.

[4] ECF No. 213 at 2–3.

Admission of Parker's Expert Report at Trial. Southeastern suggests in its Appendix that Dr. Parker's Report was not admitted as evidence at trial, implying it was shown to the jury for the limited "purpose of allowing witness to point to chart."[5] That is incorrect. The trial transcript reflects that because Southeastern objected to use of the Report as a demonstrative, Tudor sought to admit the whole report into evidence. The District Court asked Southeastern whether it objected to the Report's admission, to which it replied, "We don't have an objection to that admission, Your Honor."[6]

II. FACTS AT TRIAL

Southeastern's Brief presents a lengthy recitation of numerous facts as though the jury accepted its version of the facts when, plainly, it did not.[7] This Court should instead construe the evidence and inferences in the light most favorable to the nonmoving party, here, Dr. Tudor. Two points merit further elucidation.

[5] *See* Okla. App. Vol. 3 at 9 (description of Pl.'s Tr. Ex. 160).
[6] Tudor App. Vol. 7 at 15.
[7] *See* 2d Brief at 7–13.

A. Collin College Record

At trial, the District Court ruled that the Collin College record was totally irrelevant to liability in this case and excluded it. Despite that order, Southeastern attempted to bring it in anyway, which prompted the District Court to directly instruct the jury to not consider it.[8]

B. Sex Stereotype Evidence

Rachel Tudor is female.[9] It is true that neither she nor her counsel hid the fact that she is transgender from the jury. After all, it is simply a fact about who she is and, given the context in which the discrimination and retaliation Tudor grieved erupted, it's an important fact to know.

In the event that a sufficiency of evidence review is necessary, Tudor respectfully draws the Court's attention to a non-exhaustive list of examples of sex stereotype evidence presented at trial.

Stereotyped comments by key actors:

- Scoufos characterized Tudor's gender as being "weird."[10]
- Scoufos told House that, referencing a picture of Tudor, "she was trying to look feminine but that she isn't."[11]

---

[8] *See* Tudor App. Vol. 6 at 202 ("I'm going to instruct the jury that any evidence regarding plaintiff's performance at Collin County College or Collin College is irrelevant, shouldn't be considered by you").
[9] Tudor App. Vol. 6 at 59 ("[I]t's who I am. I'm Rachel Tudor. I'm a woman.").
[10] Tudor App. Vol. 8 at 46.
[11] *Id.* at 46–47.

- Scoufos also told House that Tudor "was trying to dress female but that she's not."[12]

- Scoufos mocked Tudor's voice, telling House "Tudor was trying to have—a like whispering voice to not sound so—like a male, and that it was very raspy."[13]

- Scoufos asked House what she thought Tudor's genitals looked like and whether Tudor had had "the surgery."[14]

- McMillan told House that he saw Tudor's female gender as a "lifestyle" and "he didn't agree with it."[15]

- McMillan told House that he "had never told Dr. Tudor that she could not use the women's restroom, but that he did not believe or feel like she should be allowed to."[16]

- Conway referred to Tudor as "he" and "him" in an email to Stubblefield despite knowing Tudor is female. In that same chain, Stubblefield responded making light of Conway's comment. The context of that exchange is particularly troubling—Conway and Stubblefield were editing an investigation report responding to Tudor's sex discrimination and retaliation grievances.[17]

- During the pertinent period, Scoufos used male pronouns to refer to Tudor.[18]

- At trial, and despite Scoufos testifying to only having ever known Tudor as female, Scoufos repeatedly used male pronouns to reference Tudor.[19]

---

[12] *Id.* at 47.
[13] *Id.* at 47.
[14] *Id.* at 48.
[15] *Id.* at 48.
[16] *Id.* at 48.
[17] Tudor App. Vol. 6 at 34.
[18] *See, e.g.*, *id.* at 118.
[19] *See, e.g.*, Tudor App. Vol. 8 at 103; *id.* at 124.

Stereotypes infecting grievance proceedings:

- Stubblefield admits that Tudor's internal grievances alleged she was discriminated against as a woman. Nonetheless, Stubblefield sought out legal advice to see if she could ignore the complaints on the premise that she is not a woman.[20]

Key actors' penchant to make decisions based on stereotypes:

- McMillan made employment decisions premised on his peculiar faith-based gender stereotypes. On one particular occasion, McMillan told House he would use his influence get Southeastern President's to transfer her rather than eliminate her position because "the Bible says that we take care of widows."[21]

- In 2007, Conway told Tudor that McMillan asked for Tudor to be summarily fired shortly after he learned about her gender transition.[22]

Past special rules, premised on stereotypes, imposed only on Tudor:

From 2007 through Tudor's termination in 2011 she was subjected to special work rules. The work rules are premised on and animated by gender stereotypes:

- Tudor was barred from using all women's restrooms on campus and relegated to using unisex restrooms. Administrators attest that this rule was premised on a variety of gender stereotypes they held both about Tudor and the nontransgender women.[23]

---

[20] *See, e.g.*, Tudor App. Vol. 8 at 232; *id.* at 21–22.
[21] Tudor App. Vol. 6 at 67–68.
[22] Tudor App. Vol. 6 at 66.
[23] *See, e.g.*, Tudor App. Vol. 8 at 165–66 (Conway implying rule was imposed because of unsubstantiated worries about coworker and student complaints);

- Tudor was told that if her make-up was not "right" she would be fired.[24] Conway describe the standard vaguely, but indicated the concern was Tudor would not look right or like a "drag queen."[25] Conway also dubiously told Tudor that she was being held to a special standard because she otherwise risked sexually harassing others on campus simply by being herself.[26]

- Tudor's clothing choices were also specially policed. In particular, Tudor was told that Southeastern would closely watch her skirt length (not specifying what length was appropriate).[27] As with the vague makeup rule, Tudor was told she risked sexually harassing others if she broke the rule.[28]

Tudor Vol. 9 at 86–88 (Weiner attesting that Conway told him other women in Tudor's Department had complained about her restroom use and that was the rationale behind the rule); Tudor App. Vol. 7 at 155–56 (Mischo attesting that there were no faculty complaints about Tudor's restroom use; he claims the rule was imposed without any rationale).

[24] Tudor App. Vol. 6 at 66.

[25] *Id.* at 66.

[26] *Id.* at 186–87.

[27] *Id.* at 47.

[28] *Id.* at 186–87.

ARGUMENT AS APPELLANT

SUMMARY OF REPLY ARGUMENT

Reinstatement is Title VII's preferred, presumptive remedy. The judiciary should not hesitate to cure tenure denials where, as in this case, discrimination is proved.

The District Court's front pay award was fashioned according to the wrong rules and otherwise contravenes this Court's requirement that front pay take into account the individualized circumstances of the worker and erroneously deemed Tudor's inferior, non-equivalent mitigation job to cut off front pay.

The Seventh Amendment insulates the jury's special role in setting uncapped damages from reexamination. This Court should reject Southeastern's invitation to render the jury's special constitutional role a nullity.

REPLY ARGUMENT

I. REINSTATEMENT

A. Reinstatement should have been awarded.

Southeastern acknowledges that reinstatement is the preferred, presumptive remedy under Title VII,[29] but ultimately fails to reconcile that well-established rule with the District Court's denial below. Indeed, Southeastern does not broach the core point raised by Tudor that the District Court's failure to reinstate her with tenure impermissibly withholds make whole relief.[30]

Rather than rebut the presumption head-on, Southeastern invites this Court to create a university carve-out to Title VII on the dubious premises that tenure is an "extreme remedy" and courts cannot become "entangle[d]" with tenure decisions.[31]

But in *Univ. of Penn. v. EEOC*, the Supreme Court recognized that Title VII totally "expose[s] tenure determinations to the same enforcement procedures applicable to other employment decisions."[32] In

[29] 2d Brief at 54.
[30] 1st Brief at 50–52.
[31] 2d Brief at 53.
[32] 493 U.S. 182, 190 (1990).

that vein, the Third Circuit explains in *Kunda v. Muhlenberg Coll.*[33] that the judiciary should not hesitate to cure illicit tenure denial where, as in this case, the discrimination is proved. The reason for that is,

> Congress did not intend that those institutions which employ persons who work primarily with their mental faculties should enjoy a different status under Title VII than those which employ persons who work primarily with their hands[.]
>
> When a case is presented such as this, in which the discrimination has been proven and the required remedy is clear, we cannot shirk the responsibility placed on us by Congress.[34]

At bottom, once Title VII violations are proved, the judiciary has the full arsenal of make whole remedies at its disposal, including the award of reinstatement with tenure.

Southeastern does concede that reinstating a professor with tenure is appropriate in cases of "egregious discrimination."[35] This is such a case, and in fact the very case cited by Southeastern demonstrates this. Southeastern cites *Ford v. Nicks*,[36] which confirmed that tenure should be awarded if it was illicitly deprived by the university and its is unlikely

---

[33] 621 F.2d 532, 550–51 (3d Cir. 1980).
[34] *Id.* at 550–51.
[35] 2d Brief at 53.
[36] 866 F.2d 865, 877 (6th Cir. 1989).

that the professor will receive a fair reevaluation of her application absent court intervention.[37] Although the *Nicks* Court determined that it need not intervene by reinstating Ford to a tenured professorship, it did so because Dr. Ford had not yet come up for tenure and therefore the Court reasoned it had an insufficient basis to find Ford would not receive a fair revaluation by the university upon reinstatement.

Dr. Tudor's plight is wholly distinguishable from Dr. Ford's. As the jury found, Southeastern discriminated against Dr. Tudor on the basis of sex by denying her 2009-10 tenure application. Further, Southeastern discriminated on the basis of sex and retaliated against Dr. Tudor when it denied her the opportunity to reapply for tenure the next cycle and terminated her. This record amply demonstrates that Southeastern not only failed to afford Dr. Tudor fair opportunity to be considered for tenure twice but also punished Tudor for invoking her Title VII rights. This is the exact kind of egregious discrimination that the *Nicks* Court recognized as necessitating reinstatement with tenure.

Southeastern's only argument as to why the discrimination in this case is not egregious is that the jury declined to find a hostile work

[37] *Id.*

environment.[38] But, neither Title VII, *Nicks*, nor any other case creates such a rule. Instead, make whole relief is calibrated to salve injuries flowing from claims actually established. Here, Dr. Tudor seeks a remedy for the sex discrimination and retaliation that the jury found that she endured, not for a hostile work environment. As Tudor previously argued, only reinstatement to a tenure position would make Dr. Tudor whole and deter future discrimination.[39]

Similarly, the insinuation that an award of reinstatement with tenure unjustly interferes with Southeastern's special sphere and thus makes the remedy infeasible totally lacks merit.[40] As the First Circuit held in *Brown v. Trs. of Boston Univ.*, "to deny tenure because of the intrusiveness of the remedy and because of the University's interest in making its own tenure decisions would frustrate Title VII's purpose of making persons whole for injuries suffered through past discrimination."[41] "[O]nce a university has been found to have impermissibly discriminated in making a tenure decision, as here, the

[38] 2d Brief at 53.
[39] 1st Brief at 38–51.
[40] 2d Brief at 52–53.
[41] 891 F.2d 337, 360 (1st Cir. 1989), *cert denied*, 110 S.Ct. 3217 (1990) (cleaned up).

University's prerogative to make tenure decisions must be subordinated to the goals embodied in Title VII."[42]

Lastly, Southeastern fails to reconcile Title VII's make whole purpose with the fact that, in addition to declining Tudor reinstatement with tenure, the District Court also declined to reinstate Tudor to the tenure-track professorship she last held at Southeastern. Indeed, if this Court were to find no egregious discrimination in this case and otherwise follow the *Nicks* Court, as Southeastern urges,[43] then Tudor should be reinstated without tenure.

B. Litigation hostilities are not a ground to withhold reinstatement.

Southeastern argues that the District Court was correct to withhold reinstatement premised on supposed litigation hostilities.[44] But even if the record evidenced such hostilities (it does not), this Court's precedents categorically bar withholding reinstatement on that ground.[45] That rule cannot and should not be set aside because reinstatement would be denied in virtually every case, a result that is irreconcilable with Title

[42] 891 F.2d at 359.
[43] 2d Brief at 53.
[44] *Id.* at 54–56.
[45] *See* 1st Brief at 39–44.

VII's twin purposes of making victims whole and deterring future violations.[46]

Even if there were litigation hostilities, the record overwhelmingly shows that Tudor can feasibly return to Southeastern. Tudor, the victim of discrimination and retaliation, has always sought to be reinstated and cannot think of any reason not to return to Southeastern, which she still considers to be her home.[47]

This Court recognized in *Jackson v. City of Albuquerque*, that the employee's desire to return to work despite past violations is dispositive evidence of the feasibility of reinstatement.[48] The record here is even stronger than that in *Jackson*. Unlike Carl Jackson, Tudor had the opportunity to return to the worksite and interact with her immediate colleagues prior to reinstatement, a critical test not only of Tudor's willingness and capacity to return to work and her colleagues' likely neutral if not positive reception of reinstatement. Tudor credibly testified that her March 2018 presentation on the Southeastern campus was well-received and that her colleagues—including several members of the

[46] *See* NWLC Brief at 8–9 (discussion and authorities).
[47] Tudor App. Vol. 6 at 57–58.
[48] 890 F.2d 225, 235 (10th Cir. 1989).

English Department and persons who testified on both sides at trial—universally made her feel welcomed, respected, and safe.[49]

Southeastern has not disputed that "all culpable actors have left Southeastern" aside from simply stating that this is not true, without a single citation in support.[50] It ignores the trial record, which shows that the three lead administrators who illegally denied Tudor tenure—Minks, McMillan, and Scoufos—have departed. In addition, Babb, Stubblefield, and Conway—the former general counsel, affirmative action officer, and human resources director respectively—have also left. That group's departure marks the end of all persons who were responsible for investigating Tudor's internal complaints and who failed to enforce EEO rules during her employment. Both Tudor and Cotter-Lynch credibly attest that those persons are the only ones who bore direct responsibility for the Title VII violations Tudor grieved.[51] As this Court recognized in *Jackson*, the departure of all persons directly responsible for past Title

[49] Tudor App. Vol. 4 at 230–35.
[50] 2d Brief at 62.
[51] Tudor App. Vol. 2 at 195–207.

VII violations is yet another factor demonstrating that reinstatement is feasible.[52]

Glaringly, Southeastern also fails to grapple with record evidence showing the climate has substantially improved since Tudor's departure. For instance, they do not take account of how the significant reforms they made to their employment practices and DOJ's ongoing supervision of the university pursuant to the Compromise Agreement have improved workplace conditions generally let alone for Tudor specifically. They also argue that reinstatement will fail due to tensions in the workplace. There is no evidence that current Southeastern employees hold unusual disdain for Tudor let alone that they will poison the environment upon her return.

Southeastern's remaining arguments are meritless. For instance, Southeastern never substantiates its contention that "half the faculty" oppose reinstatement.[53] In fact, every single current Southeastern worker to testify on the issue, aside from Prus, supports or does not oppose Tudor's reinstatement. As to Prus, his bare speculation that some

[52] *Jackson*, 890 F.2d at 232.
[53] 2d Brief at 57.

of his colleagues might harbor concerns about reinstatement is of no consequences as it is inadmissible heresay,[54] is contradicted by his colleagues' trial testimony,[55] and Prus appears to have refused to collect his colleagues' views on the issue, as Cotter-Lynch testified[56].

Nor is there any support for Southeastern's argument that friends of McMillan, who have never been identified, will oppose Tudor's reinstatement.[57] Again, this is contradicted by other faculty members' testimony, but also, more troubling, Southeastern appears to be justifying the denial of Tudor's make whole remedy based on anticipated, future illegal retaliation against her that would itself violate Title VII and the Compromise Agreement with the DOJ.

Lastly, Southeastern's contention that Tudor has somehow "betrayed trust" by prosecuting this Title VII litigation fails on its face.[58] Southeastern did not raise this point below and thus it is waived. Moreover, there is no evidence in the record from current Southeastern

---

[54] *See, e.g.*, *Thomas v. Int'l Bus. Machs.*, 48 F.3d 478, 485 (10th Cir. 1995) ("courts should disregard inadmissible heresay statements contained in affidavits as those statements could not be presented at trial in any form").
[55] 1st Brief at 17–18 (discussion and evidence).
[56] *Id.*
[57] 2d Brief at 55–56.
[58] *Id.* at 56–57.

administrators reflecting a betrayal of trust or anything of the sort. Cotter-Lynch, the highest ranking current Southeastern administrator to testify in this case, attests not only that a reunion would be positive for Southeastern but that it is necessary for Southeastern itself to heal.[59]

C. Media coverage does not make reinstatement infeasible.

For the first time on appeal, Southeastern argues that because this case has garnered national media attention that reinstatement is infeasible.[60] That argument is waived and otherwise unsupported and inconsistent with Title VII. Indeed it would be antithetical to Title VII's make whole purpose to hold that the worse the discrimination, the more unlikely the victim will be made whole. If anything, increased scrutiny means that Southeastern should be more easily held accountable and deterred from discriminating in the future.

This situation is neither unprecedented nor doomed to fail. As one example, the District of Columbia Circuit reinstated Ann Hopkins of *PriceWaterhouse v. Hopkins* as a partner,[61] a position often deemed

[59] Tudor App. Vol. 7 at 124.
[60] 2d Brief at 61.
[61] 920 F.2d 967 (D.C. Cir. 1990).

comparable to a tenured professorship in the Title VII context[62]. Hopkins' book chronicling her experience evidences workers and employers caught up in even the highest-profile of suits can still make things work.[63]

D. Claimed concerns about Tudor's teaching and scholarship are meritless.

Southeastern's supposed concerns about Tudor's teaching and scholarship are unsupported by the record and otherwise not a reason to withhold reinstatement.

At the threshold, the jury found that Tudor's true qualifications were not now or ever a real problem. That finding is in harmony with record testimony from Tudor's Southeastern colleagues, including Prus who remains steadfast that Tudor qualified for tenure in the 2010-11 cycle.[64] It is also supported by Parker's expert conclusion that against similarly situated comparators Tudor was not just qualified for tenure, but that objectively weighed, Tudor was more qualified than several of her tenured colleagues.[65]

---

[62] *See* Note, *Tenure and Partnership as Title VII Remedies*, 94 HARV. L. REV. 457 (1980).
[63] *See generally* ANN BRANIGAR HOPKINS, SO ORDERED: MAKING PARTNER THE HARD WAY (1996).
[64] Tudor App. Vol. 8 at 12.
[65] Tudor App. Vol. 6 at 5 (Parker's comparative qualifications rankings chart).

Southeastern's arguments concerning the Collin County job are premised on facts not within the record and are wholly irrelevant given the considerable differences in the two jobs and workplaces.[66] There is no evidence that Southeastern administrators or faculty evaluated Tudor's mitigation job record let alone concluded it is disqualifying. Even if they had, Southeastern's argument would fail because to withhold reinstatement on that ground Southeastern must show that it strips similarly situated professors of tenure in analogous situations. Yet Southeastern did not proffer evidence showing that it routinely terminates tenured professors who are the targets of a handful of student complaints.[67]

II. FRONT PAY

A. District Court applied the wrong standard.

Southeastern ignores the fact that the District Court applied the wrong standard when it crafted the front pay award. As Tudor previously explained,[68] the District Court applied the rule set forth in *Carter II* [69]

---

[66] 2d Brief at 58–59.
[67] *See Zisumbo v. Ogden Reg'l Med. Ctr.*, 801 F.3d 1185, 1205–07 (10th Cir. 2015) (setting parameters for limiting make whole relief where the employer proffers post-termination *after-acquired* evidence).
[68] 1st Brief at 52–52.
[69] *Carter v. Sedgwick Cnty., Kan.* (*Carter II*), 929 F.2d 1501 (10th Cir. 1991).

rather than the clarified rule set forth in *Carter III* [70]. That error was significant here.

As this Court held in *Carter III*, it is not enough for a district court's front pay calculation to "simply attempt to compensate for future loss during which the plaintiff will find commensurate employment."[71] In other words, front pay is not automatically cut off when the worker finds another job. As with reinstatement, the front pay award must be calibrated to make the victim whole.[72] Front pay must take into account the amount of time it will take Tudor to find a comparable tenured position to what Tudor would have held today but for Southeastern's illegal conduct, not the time it might take her to find a lesser position.[73] Thus, because the District Court's front pay award calculation was premised on an estimate of how long it would take Tudor to find any other job, instead of an equivalent tenured professorship, the front pay award does not make Tudor whole.[74]

---

[70] *Carter v. Sedgwick Cnty., Kan.* (*Carter III*), 36 F.3d 952 (10th Cir. 1994).
[71] *Id.* at 957.
[72] *Id.*
[73] *Abuan v. Level 3 Commc'ns, Inc.*, 353 F.3d 1158, 1180–81 (10th Cir. 2003).
[74] *Id.*

B. *Whittington* factors not satisfied.

Southeastern does not even attempt to address the District Court's failure to abide by this Court's decision in *Whittington v. Nordam Grp., Inc.*[75] As Tudor previously argued, *Whittington* directs district courts to consider evidence of the individualized circumstances of both the employee and employer when fashioning front pay awards.[76]

The District Court failed to take into account Tudor's circumstances. For instance, the District Court did not consider the relative unavailability of jobs with comparable status, responsibilities, working conditions, and promotional opportunities in Tudor's geographic area. The District Court also did not look at the particular challenges that Tudor faces in obtaining an equivalent job elsewhere due to her age, Native American heritage, and the fact that she is a woman who is transgender. Lastly, the District Court did not take into account record evidence reflecting that Tudor had already faced considerable difficulty in obtaining equivalent employment elsewhere.

[75] 429 F.3d 986, 1001 (10th Cir. 2005).
[76] 1st Brief at 58.

In ignoring such evidence, the District Court cannot be said to have satisfied the standard set forth in *Whittington*, which expressly calls for consideration of not only the evidence presented at trial but also the individualized circumstances of the parties.

C. Front pay not cut off by inferior, non-tenured Collin County job.

Southeastern effectively seeks to penalize Tudor for mitigating her damages by taking a vastly inferior job at Collin County Community College, a non-tenure track position teaching English composition, that can hardly be compared to the tenured professorship Tudor earned at Southeastern let alone the tenure-track position she last held there. The Collin County position should by no means have cut off Tudor's front pay.

The record unequivocally reflects that the Collin College instructorship and the tenured professorship Tudor earned at Southeastern are not equivalents. Among other things, the Collin College job was not tenured and had no possibility of tenure, had different job duties and performance expectations, and was at a two-year community college as opposed to a four-year university. The record also reflects that the Collin College job not only paid Tudor less than what she was due as

a tenured professor at Southeastern[77] but also impaired her ability to pursue work opportunities outside of the university setting because she was deprived of the title of tenured professor which opens doors to things like outside consulting work and publishing opportunities.[78]

As *amici* National Women's Law Center et al. point out, sister courts and district courts within this Circuit, including a case affirmed by this Court, have recognized that in order for a mitigation job to cut off front pay it must be substantially equivalent. Substantial equivalence is met where the jobs afford virtually identical promotional opportunities, compensation, job responsibilities, working conditions, and status. Pay is not the sole criterion.[79]

III. STATUTORY CAP

Southeastern correctly points out that the parties stipulated to the fact that 42 U.S.C. §1981a(b)(3)(D) applies.[80] However, it misapprehends

---

[77] In her highest earning year at Collin College Tudor made only $58,022 (Okla. App. Vol. 2 at 406) whereas the lowest she would have made in a comparable year at Southeastern as a tenured professor is ~$74,000, with that amount increasing over time due to seniority and likely rising even higher as Tudor took on additional responsibilities as is common at Southeastern (see Tudor App. Vol. 4 at 217–21 [projected earnings at Southeastern through retirement]).

[78] 1st Brief at 29–30 (discussion and evidence).

[79] NWLC Brief at 16–18.

[80] 2d Brief at 70 (*citing* Okla. App. Vol. 2 at 335).

how Title VII's damages are codified and as a result errors in construing the parameters of the stipulation and Tudor's representation to the District Court.

Section §1981(a)(b)(3)(D) imposes a cap on a discrete subset of damages available where the employer has 500+ employees. However, pursuant to §1981a(a)(1) the damages available under §706(g) of Title VII (codified at 42 U.S.C. §2000e-5(g)) are also available and are uncapped.[81]

Before trial Tudor stipulated that §1981(a)(b)(3)(D)—which sets a cap of $300,000 on a discrete subset of damages—applies.[82] At trial, Tudor's counsel did not waive the availability of *uncapped damages*, he only affirmed that there were damages available under all of Tudor's claims that were "subject to the same cap." Mere agreement that §1981a applies to all of Tudor claims, does not mean that there are no uncapped damages available.[83]

---

[81] *See generally Pollard v. E.I. du Pont*, 532 U.S. 843, 847–48 (2001) (explaining structure of Title VII damages scheme).
[82] Okla. App. Vol. 2 at 335.
[83] *Contra* 2d Brief at 70.

Moreover, Southeastern ignores that the District Court charged the jury that it may award damages to Tudor for a universe of discrete injuries, some of which are capped and others uncapped.[84] The jury's charge on damages is set forth in Jury Instructions 13, 14, 15, and 16. Among other things, the jury was charged that if it found sufficient evidence of Tudor's injuries—identifying a universe of discrete injuries, some of which are subject to the cap and others that are not—then the jury may award damages to Tudor based on *its calibration* of what is necessary to compensate her.[85]

In this situation, the Seventh Amendment's Reexamination Clause prohibits disturbing the jury's calibration of the damages necessary to compensate Tudor for injuries not subject to the cap. Tudor does not dispute the general proposition that statutory caps are constitutional—Congress simply excepted damages available subject to a cap from the the Reexamination Clauses' strictures.[86] But damages awarded by a jury to compensate injuries not subject to a cap cannot be reexamined by

[84] In Title VII cases juries are charged as to the universe of injuries for which damages are available, but 42 U.S.C. § 1981a(c)(2) bars courts from telling the jury that damages for some of those injuries are capped.
[85] Tudor Vol. 2 at 59–64 (Jury Instructions); *id.* 71–72 (Verdict Form).
[86] 1st Brief at 61–63.

courts. Under the Reexamination Clause, uncapped damages are available, the jury's "measure of actual damages" is a "fact" "tried" by the jury.[87] As explained in *Gasperini v. Ctr. for Humanities, Inc.*, the Reexamination Clause "quite plainly bar[s] reviewing courts from entertaining claims that the jury's verdict was contrary to evidence."[88]

As previously explained, the fact that the jury issued an omnibus award—a mixed bag of capped and uncapped damages—should not insulate the award from the Reexamination Clause's strictures.[89]

In direct reply, *Pals v. Schepel Buick & GMC Truck, Inc.* is this exact situation.[90] As happened here, the jury was charged on damages that were statutorily capped and uncapped, the parties in *Pals* agreed that §1981a applied to the universe of statutorily capped injuries, but the verdict form only allowed the jury to return an omnibus award there was no way to discern how the *jury* calibrated let alone allocated damages between injuries that are capped and uncapped.[91]

---

[87] *See Cooper Indust., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 437 (2001) (stating basic principle).
[88] 518 U.S. 415, 452 (1996).
[89] 1st Brief at 62–63.
[90] 2d Brief at 71 (*discussing Pals*, 220 F.3d 495 (7th Cir. 2000)).
[91] *Pals*, 330 F.3d at 499–500.

Even if construed as simply a matter of statutory interpretation, it cannot be said the District Court committed no error in applying §1981a's cap to a mixed bag of damages awarded pursuant to both §1981a and §2000e-5(g). The terms of the former expressly state the cap does not apply to the latter.

As a matter of allocating burdens in civil rights cases, it would be exceedingly strange to decide that it is the victim worker who bears responsibility for taking all affirmative steps necessary to preserve the employer's right to invoke the statutory cap against her.

Procedurally, it would also be curious that where there are no challenges to the jury's damages instructions or the verdict form that the prevailing plaintiff's damages may be disturbed *sua sponte* by the district court simply because the defendant argues there is insufficient evidence supporting the award but makes no proffer in support. That rule would also create perverse incentives for employers to sit on their rights rather than proactively take steps to ensure the cap is applied as Congress intended.

ARGUMENT AS CROSS-APPELLANT

SUMMARY OF ARGUMENT

The District Court was empowered to strike Southeastern's Rule 50(b) motion as untimely. District courts retain inherent powers to set and modify motion deadlines and, at Southeastern's own invitation, a special deadline was set. Southeastern was not entitled to simply ignore the District Court's oral order. It most certainly was not an abuse to strike a 206-day late motion.

The District Court did not abdicate its gatekeeper role. *Daubert v. Merrell Dow Pharm., Inc.*[92] affords trial courts flexibility to sensibly tailor review to the circumstances of the case and challenges raised. The District Court did all that *Daubert* required. It took briefing and ruled on the merits in a succinct but precise formal order that surmises the parties' positions and explains pointedly why Southeastern's motion was denied distinguishing the key case Southeastern tells this Court to follow. On the merits, the District Court's admission of Parker's testimony was proper and even if not there's no prejudice meriting a new trial.

[92] 509 U.S. 579 (1993).

Rachel Tudor is a different kind of woman. This Court's decision in *Etsitty v. Utah Transit Authority*[93] recognizes that Title VII affords Tudor the same scope of protections as everyone—no more, and definitely no less. The District Court and the jury faithfully abided by *Etsitty*'s equitable command. Tudor proved her case on the merits. The legal arguments Southeastern raises are dubious and the motions it lost long ago are variously unreviewable and waived. Moreover, there are good, prudential reasons to affirm the jury's verdict on other grounds. But if revisiting *Etsitty* proves necessary, this case presents an opportunity to sharpen its clarion call.

[93] 502 F.3d 1215 (10th Cir. 2007).

RESPONSE ARGUMENT

I. DISTRICT COURT HAD AUTHORITY TO STRIKE UNTIMELY MOTION.

Southeastern's counsel invited the District Court to set a deadline for Rule 50(b) motions. It obliged and set one for December 11, 2017. Southeastern filed its motion on July 5, 2018—206 days late. The District Court acted within the scope of its inherent authority by striking that motion as untimely.

A. District Courts have inherent authority to modify default deadlines.

Southeastern argues, without legal support, that the District Court lacked the authority to modify the default deadline set by Federal Rule of Civil Procedure 50(b).

Southeastern overlooks Federal Rule of Civil Procedure 6(c)(1)(c) which expressly states that a court may, via order "set[] a different time" for motions. Though Rule 6(b)(2) prohibits *extensions* of time for Rule 50(b) motions, there is no similar express bar on *shortening* time. A faithful construction leads to the conclusion that shortening the deadline is not forbidden.

This Court could otherwise resolve this dispute on the alternative ground that the District Court acted properly within the scope of its inherent authority. As Justice Harlan observed in *Link v. Wabash R. Co.*, district courts' inherent powers are "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."[94] That is precisely why this Court held in *Hartsel Springs Ranch of Col. Inc. v. Bluegreen Corp.* that district courts possess inherent authority to manage their dockets in ways that promote judicial efficiency and the "comprehensive disposition of cases."[95]

The cases that Southeastern claims forbid district courts from modifying Rule 50(b) motions do no such thing. For example, the proposition cited from *Eberhart v. U.S.* speaks to a minute point of criminal procedure in a situation where default deadlines were not modified.[96] *In re A.G. Fin. Serv. Ctr.*, a Seventh Circuit opinion, holds that Article I bankruptcy courts lack the power to alter substantive state

[94] 370 U.S. 626, 630–31 (1962).
[95] 296 F.3d 982, 985 (10th Cir. 2002).
[96] 546 U.S. 12, 17 (2005).

law and the federal Bankruptcy Code,[97] a point that has no bearing on whether an Article III district court may modify default motion deadlines. *SEC v. All. Leasing Corp.* is also distinguishable.[98] There, the Ninth Circuit held that the district court had the inherent authority to disregard a local rule and consider an otherwise *timely* filed summary judgment motion.[99] But the question presented in this case is not whether a district could hear an untimely motion, but rather, whether it abused its discretion in declining to hear it.

Southeastern also argues its failure to follow the District Court's order should be excused because its counsel believed they could ignore it.[100] There is no support for that proposition. Quite the opposite, as this Court held in *Ehrenhaus v. Reynolds*, parties cannot ignore court orders "without suffering the consequences" because to allow otherwise imperils courts' ability to "administer orderly justice, and the result would be chaos."[101]

---

[97] 395 F.3d 410, 413–14 (7th Cir. 2005).
[98] 28 Fed.Appx. 648 (9th Cir. 2002).
[99] *Id.* at 651.
[100] 2d Brief at 43.
[101] 965 F.2d 916, 921–22 (10th Cir. 1992).

Even if Southeastern was mistaken as to which deadline to follow—the default deadline or the special deadline set by the District Court—Southeastern was still obliged to follow the special deadline. Southeastern asked the District Court to set a deadline for its motion and the court granted that request via a valid oral order. As this Court held in *Yapp v. Excel Corp.*, "a party who simply misunderstands or fails to predict the legal consequences of his deliberate acts cannot later, once the lesson is learned, turn back the clock to undo those mistakes."[102]

B. Oral scheduling orders are valid and cannot be modified by non-judicial officers.

Southeastern's contention that the District Court's oral order is invalid because it was issued at a hearing immediately after trial and "Defendants did not verbally respond" to it is absurd.[103] As the Ninth Circuit aptly explains in *Dreith v. Nu Image, Inc.*, "an oral order of a district court, though perhaps imposed quickly at the conclusion of a hearing, is nonetheless binding on the parties."[104]

---

[102] 186 F.3d 1222, 1231 (10th Cir. 1999).
[103] 2d Brief at 43.
[104] 648 F.3d 779, 787 (9th Cir. 2011).

Southeastern's contention that it justifiably ignored the oral order because it was modified by Deputy Clerk Goode in an *ex parte* and off record communication is without legal support. Though court personnel do vital and important work, they are not empowered to give legal advice let alone to make or modify orders. It is for that exact reason that this Court held in *Midwestern Dev., Inv. v. City of Tulsa* that an order purportedly entered by a deputy clerk "is a nullity."[105]

II. DR. PARKER'S TESTIMONY

A. Challenge should not be reviewed.

Though Southeastern challenged Parker's testimony via a motion *in limine*, it failed to renew objections at trial and thus waived its challenge. It is held in *McEwen v. City of Norman, Okla.*, that once the motion *in limine* is denied, a party that seeks to preserve the issue for appeal must renew the objection at trial or else it is waived.[106] This Court's decision in *U.S. v. Mejia-Alacron* is inapposite.[107] Under *Mejia*, a party's failure to preserve error at trial is excused if three factors are met, one of which is that there is a "definitive ruling" by the District Court on

[105] 319 F.2d 53, 53 (10th Cir. 1963).
[106] 926 F.2d 1539, 1544 (10th Cir. 1991).
[107] 995 F.2d 982 (10th Cir. 1993).

the issue raised on appeal.[108] Southeastern's challenge cannot come in under *Mejia* because it represents that the District Court did not make a definitive ruling on "Parker's reasoning or methodology" and that issue was "punted" to the jury.[109]

Alternatively, this Court may decline to consider Southeastern's challenge because it failed to supply an appropriate appendix of the record below. The record Southeastern supplies in support of this issue is totally one-sided, including only Southeastern's motion *in limine*, Parker's report, and the District Court's order.[110] Southeastern neglects to supply DOJ's 26-page response brief and its 11 accompanying exhibits which the District Court credits in its order as informing its decision.[111] The omission of Parker's 19-page *curriculum vitae* is particularly glaring given Southeastern's attacks on Parker's professional experience. Pursuant to 10th Circuit Rule 10.3(B) this Court may decline to consider this challenge or take other appropriate action as surmised at length in *Lincoln v. BNSF Ry. Co.*[112]

---

[108] *Id.* at 987.
[109] 2d Brief at 29.
[110] *See* Okla. Vol. 1 at 73–128.
[111] These appear in the docket below at Doc. No. 147.
[112] 900 F.3d 1166, 1189–92 (10th Cir. 2018).

B. Alternatively, challenge is meritless.

1. District Court acted as a gatekeeper.

The crux of Southeastern challenge appears to be that the District Court's order denying the motion *in limine* was, as were all orders below, succinct.[113] But that does not mean that the District Court failed to act as a gatekeeper. As this Court held in *Storagecraft Tech. Corp. v. Kirby*, district courts need only focus their attention on the *Daubert* factors implicated by the unique circumstances of the case and in light of the specific challenges raised.[114] Here, the *Daubert* order reveals that the District Court took considerable care to summarize Southeastern's objections as well as DOJ's rebuttals, the latter of which it found to warrant allowing Parker to testify at trial.[115] This is all that *Daubert* requires.

Southeastern's reliance on this Court's decision in *Adamscheck v. Am. Family Mut. Ins. Co.* is misplaced.[116] The district court in *Adamscheck* refused to allow the parties to file *Daubert* motions and later

---

[113] *Id.* at 28–29.
[114] 744 F.3d 1183, 1190 (10th Cir. 2014) (*citing Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137 (1999)).
[115] *See generally* Okla. App. Vol. 1 at 125–28 (Order).
[116] 818 F.3d 576 (10th Cir. 2016).

at a hearing summarily denied oral *Daubert* motions without giving a rationale for its decision on the record.[117] The proceedings below bear no resemblance.

Nor does the prudent advice the District Court gave Southeastern to cross-examine Parker on his methodology at trial evince of abdication of the gatekeeper role. *Daubert* establishes a minimum bar for admitting expert testimony. Once met, the Supreme Court itself advised unsuccessful challengers that they may utilize "traditional and appropriate means of attacking shaky but admissible evidence" and, just as the District Court did, pointed out that "[v]igorous cross-examination" is a tool in their arsenal.[118] Indeed, that is why in *Valley View Angus Ranch, Inc. v. Duke Energy Field Servs., LP* this Court recognized that a district court giving similar advice about cross-examination did not abdicate its gatekeeper role.[119]

---

[117] *Id.* at 587–88.
[118] *Daubert*, 509 U.S. at 596.
[119] 410 Fed.Appx. 89, 93 (10th Cir. 2010).

2. Relevance

Under *Daubert*'s relevance prong, the pertinent inquiry is whether the proposed testimony logically advances a material aspect of the case. Put bluntly, whether it is sufficiently "relevant to the task at hand."[120]

Southeastern narrowly contends that Parker's testimony is irrelevant on a faulty premise. Limiting Parker's testimony to only the comparator analysis, Southeastern argues evidence going to Tudor's relative qualifications is irrelevant because it is possible Southeastern simply made a bad mistake in denying her tenure and was not motivated by bias.[121] But that angle only shows that Parker's testimony doesn't speak to one theory of the case, not that its totally irrelevant to the task at hand.

Southeastern's narrow attack misses the bigger picture. Among other reasons, Parker's testimony is relevant because it speaks to the overarching question of whether Southeastern's stated reasons for denying Tudor tenure were a pretext for discrimination. Parker's opinion that Tudor was as qualified as or more qualified than candidates who

[120] *Daubert*, 509 U.S. at 597.
[121] 2d Brief at 36–37.

received tenure is particularly probative of pretext given Southeastern's hyperbolic assertions about Tudor's lack of qualifications. To wit, McMillan's statement that Tudor's portfolio was the "poorest" he had seen in twenty years is exposed as baseless, which in turn casts doubt on the veracity of McMillan's other statements, his overall rationale for recommending against tenure, and whether he and other administrators actually believed Tudor was not qualified. Indeed, it is reasonable that if the jury found that McMillan lied about Tudor's portfolio being the poorest, they could infer that he lied about other things as well. By Southeastern's own admission—whether McMillan and others lied about the reasons why they denied Tudor tenure—is the focus of a pretext inquiry.[122]

3. Qualifications

Dr. Parker is a nationally renowned scholar with extensive experience evaluating tenure applications and appeals at his home university, the University of Illinois at Urbana-Champaign— flagship public university—and regularly advises on tenure cases at other

[122] 2d Brief at 36.

universities.[123] It is thus not reasonably disputed that Parker possesses extensive experience with academic tenure decisions in the field of English. Southeastern claims that he was unqualified to serve as an expert because he is not an expert in each and every sub-field of English.[124] That position strains credulity. The pertinent expertise needed is exactly what Parker possesses—an intimate understanding and experience in evaluating English tenure applications in the public university context.

Moreover, it is disingenuous for Southeastern to claim Parker must be a master of all subfields to proffer an opinion in this matter given that they simultaneously assert that Southeastern administrators—chiefly, Minks, McMillan, and Scoufos—none of whom even share the same general discipline of English, are qualified to opine on the quality of work in entirely different fields.

By a similar token, there is no credence to Southeastern's critique that Parker's expertise is deficient "because he has no prior experience in Oklahoma public universities."[125] First, Southeastern never asked

[123] Tudor App. Vol. 6 at 1–2 (Parker Rep't).
[124] 2d Brief at 30.
[125] *Id.*

Parker about his experience evaluating tenure candidates in Oklahoma universities, so there is no foundation for this critique. Second, at trial, Southeastern's own witnesses testified that the best means of flushing out discrimination or other misconduct in the tenure review process is to have outside academics who specialize in the general field to evaluate applications.[126]

4. Foundation

Southeastern argues that Parker lacked sufficient foundation to attest to Tudor's relative qualifications on the assumption that he did not possess local knowledge about tenure at Southeastern.[127] But Parker's testimony and report make clear that he was provided with the same written tenure rules Southeastern claims guided its decision-making and that these rules played a critical role in guiding his analysis.

Southeastern's reliance on *Conroy v. Vilsack*[128] is misplaced. In *Conroy* this Court held that a district court was right to exclude an expert's testimony because that expert's report revealed he was mistaken about undisputed facts in the record and on that basis found the

[126] *See, e.g.*, Tudor App. Vol. 9 at 59–60 (Snowden Test.).
[127] 2d Brief at 31.
[128] *Id.* at 30 (*citing Conroy*, 707 F.3d 1163 (10th Cir. 2013)).

testimony lacked foundation.[129] *Conroy* is distinguishable because Southeastern did not show Parker's report is premised upon mistakes concerning undisputed facts.

Southeastern's specious contention that Parker was ignorant of "strict formatting requirements" for tenure applications and insinuation that Tudor was denied tenure on that ground falls flat. At trial, Dr. Scoufos testified that she had formatting preferences but Tudor was not denied tenure on that basis.[130] Given Scoufos' admission, it cannot be said that Parker was ignorant of a "key local factor."

Southeastern's claim that Parker lacked appropriate foundation to testify about Tudor's 2009-10 portfolio is similarly infirm and otherwise premised on a misapprehension of the evidence Parker evaluated and the conclusions he made as a result. It is true that Parker (and the jury, for that matter) only reviewed a reconstructed version of Tudor's 2009-10 tenure portfolio. However, that does not mean that Parker did not have foundation to assess Tudor's relative qualifications based upon the evidence given to him.

---

[129] 707 F.3d 1163, 1170 (10th Cir. 2013).
[130] Tudor App. Vol. 8 at 125 (Scoufos Test.) ("there were no rules").

Indeed, the record shows that Parker considered a wide array of documents that, taken together, gave him a solid foundation upon which to base his opinion. For instance, Parker's report reveals that he reviewed thousands of pages of documents related to Tudor's 2009-10 application including her reconstructed portfolio and her original *curriculum vita* which Parker and others testified is a critical component of the tenure application.[131] Parker also reviewed memoranda written by McMillan and Scoufos, portfolios of English Department comparators, Southeastern's tenure rules, and the English Department's supplemental tenure rules.[132] In sum, Parker's careful analysis, premised on more than forty discrete documents as informed by his professional expertise does not bespeak a lack of foundation.

5. Premised on expertise.

Southeastern tautologically argues that Parker's comparative evaluations of Tudor's 2009-10 and 2010-11 portfolio against those of successful English Department applicants are impermissibly subjective because all tenure decisions are subjective.[133] Not so.

---

[131] Tudor App. Vol. 6 at 27–30 (collecting materials reviewed).
[132] *Id.*
[133] 2d Brief at 32–34.

The District Court was correct to reject this same argument at the motion *in limine* stage. At that juncture, DOJ pointed to considerable evidence showing that tenure decisions at Southeastern were not supposed to be subjective. For instance, evidence revealed that there were clear expectations about the number and type of publications that a successful tenure candidate needed and what types of service to the University were considered sufficient. In light of that proffer, the District Court distinguished *Goswami v. DePaul Univ.*,[134] recognizing that in situations like this one—where it is alleged that university procedures were not followed—expert testimony regarding the tenure process is appropriate.[135]

Dr. Parker's testimony regarding partially subjective decisions was also sufficiently objective and reliable. While it is possible that some may find discrete aspects of tenure review to be subjective, that does not mean it is impossible to provide objective testimony on tenure decisions. Moreover, as this Court highlighted in *Smith v. Ingersoll-Rand Co.*, the point of *Daubert* gatekeeping is to ensure the testimony is ultimately

[134] 8 F.Supp.3d 1019, 1035 (N.D. Ill. 2014).
[135] Okla. App. Vol. 1 at 128 (Order).

premised on "the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."[136] Parker's report evidences exactly that. Parker recognized and abided by standards that guide and limit analysis. For instance, Parker reviewed standards for judging scholarship before looking at the scholarly records of the individual candidates as well as provided five different markers of scholarly accomplishment.[137] By a similar token, for the criterion of peer-reviewed publications, Parker presented and evaluated characteristics of publications by which experts in his field would determine prestige.[138]

6. Methodology

Parker's expertise is rooted in his experience rather than scientific proof or clear professional standard. Thus, the District Court was correct to focus its reliability inquiry on assessing whether Parker's experience leads to the conclusions that he reached and how that experience is reliably applied to the facts.[139]

---

[136] 214 F.3d 1235, 1244 (10th Cir. 2000) (*quoting Kumho*, 526 U.S. at 152).
[137] Tudor App. Vol. 6 at 2–4 (Parker Rep't).
[138] *Id.* at 10–24.
[139] *U.S. v. Fredette*, 315 F.3d 1235, 1240 (10th Cir. 2003).

Southeastern charges that there is no role or need for tenure experts.[140] But Parker's comparative analysis of Tudor's qualifications and other successful Southeastern tenure candidates is a reliable method of demonstrating Tudor's objective qualifications which is one means by which she may establish a *prima facie* case of discrimination. As the Seventh Circuit recognized in *Namenwirth v. Bd. of Regents of Univ. of Wisc. Sys.*, in a tenure denial case such as this one evidence of the professor's objective qualifications is important. There the Seventh Circuit recognized that "evidence of a comparative sort is appropriate" and "may be essential to a determination of discrimination" because it can help show that the employer's nondiscriminatory rationale is not worthy of credence.[141]

Southeastern contends that Dr. Parker's methodology is flawed because he did not look at applicants who were denied tenure rings hollow. No other English Department professor since at least the 2006-07 term was recommended for tenure by their Department and Chair

[140] 2d Brief at 34.
[141] 769 F.2d 1235, 1240 (7th Cir. 1985).

only to be denied tenure by the Administration. Thus, Tudor was treated differently than every other comparator in her discipline.

Southeastern's criticism of Parker's sample pool—Tudor's 2009-10 and 2010-11 applications and those of four other successful applicants in the English Department two years immediately before and after her tenure bids—is meritless. Parker's sample pool is appropriate given the facts of this case. As Parker explained, those comparators set the bar for what Southeastern considered to merit tenure in the English Department during the pertinent period.[142] While the sample size is small, this is to be expected—Southeastern is a small, rural university and the English Department is modestly sized.

C. Alternatively, the error is harmless.

Southeastern claims that is presumptively entitled to a new trial if either the District Court abdicated its gatekeeper role or erred in admitting the testimony.[143] Not so. New trials are only warranted where there is a finding of prejudice. There is no presumption of prejudice here.

[142] Tudor App. Vol. 7 at 7–9 (Parker Test.).
[143] 2d Brief at 28.

The correct rule is stated in *Kinser v. Gehl Co.* which observes that erroneous admission of expert testimony is typically deemed harmless error and thus no new trial is warranted[144] In *Sanjuan v. IBP, Inc.*, this Court explains that it is rare for improper admission of expert testimony to sow prejudice because prejudice only results where "it can be reasonably concluded that with or without such evidence, there would have been a contrary result."[145] Thus, as was the situation in *Goebel v. Denver & Rio Grande W.R.R. Co.*, "if other competent evidence is 'sufficiently strong' to permit the conclusion that the improper evidence had no effect on the decision" then the error is harmless.[146]

Southeastern is not entitled to a new trial since it has not argued let alone shown that admission of Parker's testimony sowed prejudice. Though Parker's testimony was important, the jury could have returned a verdict in Tudor's favor based on other evidence at trial. For example, Tudor, Cotter-Lynch, Weiner, Mischo, and Spencer variously testified to tenure rules and standards at Southeastern, the particular rules in the English Department, and tenure processes. Moreover, Parker's

[144] 184 F.3d 1259, 1271 (10th Cir. 1999).
[145] 160 F.3d 1291, 1296 (10th Cir. 1998).
[146] 215 F.3d 1083, 1089 (10th Cir. 2000).

testimony did not foreclose the jury from considering Southeastern's alternative theories or evidence. Given the foregoing, even if erroneous, admission was at most harmless error and no new trial is warranted.

III. *ETSITTY* CHALLENGES

Southeastern challenges the denials of its motions to dismiss and for summary judgment, claiming both orders erred in finding Tudor protected by Title VII. But those orders are not properly before this Court.

To the extent Southeastern seeks to challenge the District Court's final judgment order, that too fails. That order is independently supported by the jury's verdict on Tudor's retaliation claim and can be sustained on that basis, obviating review of the two discrimination claims.

Even if this Court were to review the discrimination claims, Southeastern's challenge fails because the jury was properly charged in line with governing law and there was sufficient evidence. Alternatively, the discrimination claims can be affirmed on the ground that they are in line with Title VII's broad, remedial scope on a legal theory reserved in *Etsitty* but now substantiated. Lastly, the constitutional avoidance canon

urges rejecting Southeastern's proposed construction of Title VII because it is unmoored from the statute's text, contrary to *Etsitty*, and otherwise leads to absurd and unconstitutional ends.

A. Orders not reviewable.

Southeastern's challenge to the denials of its motions to dismiss and for summary judgment cannot be heard because Southeastern failed to designate those orders in its notice of appeal[147] in derogation of Federal Rule of Appellate Procedure 3(C)(1)(B). That failure deprives this Court of jurisdiction.[148]

The challenge is also infirm because orders denying motions to dismiss and summary judgment are interlocutory. Because there was a jury trial on the merits those orders are thus not directly reviewable.[149] The narrow exception articulated in *Apodaca v. Raemich*[150] does not apply because Southeastern claims its challenge necessarily presents mixed issues of law and fact rather than an issue of pure law.[151] As one example, Southeastern admits that this Court would have to make a

---

[147] Okla. App. Vol. 2 at 560.
[148] *See, e.g.*, *Williams v. Akers*, 837 F.3d 1075, 1078 (10th Cir. 2016).
[149] *Ortiz v. U.S.*, 562 U.S. 180, 184 (2011).
[150] 864 F.3d 1071, 1075–76 (10th Cir. 2017).
[151] *See generally* 2d Brief at 37–41.

finding of fact as to what Tudor's sex is (female, as she claims, or something else altogether),[152] a material issue disputed by the parties at summary judgment[153].

On this posture, to redress errors raised at summary judgment, Southeastern was obliged to present evidence in support of its position at trial and otherwise preserve its argument via a Rule 50(a) motion before the case was sent to the jury.[154] Southeastern fails at that step.

Southeastern's oral 50(a) motion (no written motion was filed) stated only: "We believe the facts in evidence support a motion for directed verdict on each of plaintiff's claims."[155] On its face, the 50(a) motion did not preserve any legal issues for a subsequent 50(b) motion. This is fatal. As this Court held in *Wolfgang v. Mid-Am. Motorsports*, a deficient 50(a) motion cannot preserve legal arguments not specified therein, even those previously raised in a summary judgment motion.[156]

---

[152] *Id.* at 38–39.
[153] *See* Okla. App. Vol. 1 at 138, *id.* at 155 (Okla. SJ Mot. claiming as fact that Tudor is male); Okla. App. Vol. 2 at 297 (Tudor SJ Resp. arguing Tudor is female).
[154] *See, e.g.*, *ClearOne Commc'ns, Inc. v. Biamp Sys.*, 653 F.3d 1163, 1171–72 (10th Cir. 2011); *Whalen v. Unit Rig, Inc.*, 974 F.3d 1248, 1251 (10th Cir. 1992).
[155] Tudor App. Vol. 9 at 4.
[156] 111 F.3d 1515, 1521–22 (10th Cir. 1997).

Even if Southeastern had preserved its legal argument in a 50(a) motion, it still faces an additional hurdle. Southeastern was obliged to re-raise its legal argument post-trial in a timely 50(b) motion which, if denied on the merits, could then be appealed to this Court.[157] Southeastern fails at this step. As argued above, Southeastern's 50(b) motion was properly struck as untimely.[158]

Lastly, this Court should decline to review the summary judgment order because the portions of Southeastern's appendix in support of this issue is deficient and one-sided. It glaringly omits all 68 of the exhibits Tudor proffered in opposition below, 2 of which were filed under seal and thus cannot be accessed from the public docket. On this record it is impossible for this Court to review all the materials considered below by the District Court as is required by Federal Rule of Appellate Procedure 30(a)(1) and 10th Circuit Rule 10.3(A). As with the appendix deficiencies that taint Southeastern's challenge to Parker's testimony, this Court may decline to consider this issue or take other appropriate action.

---

[157] *Ortiz*, 562 U.S. at 189.
[158] *Lyons v. Jefferson Bank & Tr.*, 994 F.2d 716, 722 (10th Cir. 1993).

B. Sufficiency of evidence challenges not preserved.

Southeastern's Rule 50(b) motion was properly struck by the District Court and is thus not reviewable on the merits. But even if it hadn't been struck the District Court would have had to deny it before reviewing the merits because the sufficiency of the evidence issues it raised were not preserved in a precursor 50(a) motion and thus are waived. Because the District Court could not have granted the 50(b) motion, this Court cannot rule on its merits.

A Rule 50(a) motion must specify the"specific the judgment sought and the law and facts on which the moving party is entitled to judgment."[159] Southeastern's oral 50(a) motion (no written motion was filed) stated only: "We believe the facts in evidence support a motion for directed verdict on each of plaintiff's claims."[160] This motion did not identify any, and thus failed to preserve, legal issues for a subsequent 50(b) motion. As this Court explained in *United Inter. Holdings, Inc. v. Wharf (Holdings) Ltd.*, "merely moving for directed verdict is not

[159] Fed. R. Civ. P. 50(a).
[160] Tudor App. Vol. 9 at 4.

sufficient to preserve any and all issues that could have been, but were not raised in the directed verdict motion."[161]

C. Judgment can be affirmed on the retaliation verdict.

There is yet another reason why this Court should not review Tudor's discrimination claims—review is unnecessary because the judgment can be affirmed on the jury's retaliation verdict alone.

This Court routinely declines to review piecemeal challenges to final judgment where the underlying verdict and remedies can be sustained on alternative grounds.[162] This is such a case. The judgment can be affirmed solely on Tudor's retaliation claim since the discrimination claims afford Tudor the same damages and remedies. Thus, if Tudor's retaliation claim is cognizable and it is otherwise sustained by sufficient evidence the judgment stands, reviewing Tudor's sex discrimination claims is unnecessary.

---

[161] 210 F.3d 1207, 1228 (10th Cir. 2000).

[162] *See, e.g.*, *Starkey ex rel. A.B. v. Boulder Cnty. Soc. Servs.*, 569 F.3d 1244, 1252–53 (10th Cir. 2009); *Bones v. Honeywell Int'l, Inc.*, 366 F.3d 869, 877 (10th Cir. 2004).

1. Cognizable

Tudor's retaliation claim is cognizable. Southeastern implicitly concedes that its core *Etsitty* challenge—that Tudor is not a member of a protected status—does not apply to her retaliation claim because membership in a protected status is not an element of a Title VII retaliation claim.[163] Thus, even if Tudor were barred from bringing her sex discrimination claims, her retaliation claim survives.

Precedent supports the same conclusion. Title VII's anti-retaliation protections are construed broadly so as to ensure that the statute's remedial purposes are achieved.[164] In that vein, this Court held in *Vaughn v. Epworth Villa* that courts may not impose extra-statutory requirements on workers who seek anti-retaliation protection.[165] Thus, if a worker complains of conduct prohibited by the plain text of Title VII they have stated a viable retaliation claim.

Title VII's retaliation protections are set forth in two clauses, neither one of which expressly requires a worker prove she is a member

---

[163] 2d Brief at 51.
[164] *See Knitter v. Corvias Military Living, LLC*, 758 F.3d 1214, 1232 (10th Cir. 2014).
[165] 537 F.3d 1147, 1152 (10th Cir. 2008).

of a protected status and, as a result, status is not a necessary element of a retaliation claim under either clause.

The participation clause prohibits retaliation against "any employee" who "participated in *any manner* [in an] investigation, proceeding, or hearing."[166] Construing that text, this Court held in *Kelley v. City of Albuquerque* that the participation clause "is expansive and seemingly contains no limitations,"[167] and on that basis concluded that "all participants" in Title VII proceedings are protected from retaliation, even if she did not herself file a charge[168].

The opposition clause expressly prohibits retaliation against an employee "because [s]he has opposed any practice made an unlawful employment practice."[169] Critically, in cases like *Crumpacker v. Kan. Dep't of Human Res.*, this Court recognizes that a worker need only show she engaged in protected opposition (activities including but not limited to filing formal charges or voicing complaints to superiors[170]) and that

---

[166] 42 U.S.C. §2000e-(3)(a).
[167] 542 F.3d 802, 813 (10th Cir. 2008) (*quoting Deravin v. Kerik*, 335 F.3d 195, 203 (2d Cir. 2003)) (cleaned up).
[168] *Kelley*, 542 F.3d at 815.
[169] 42 U.S.C. §2000e-3(a).
[170] *Hertz v. Luzenac American, Inc.*, 370 F.3d 1014, 1015 (10th Cir. 2004).

she suffered an adverse action as a result.[171] The worker need not *prove* she was actually discriminated against—simply that she had a reasonable good-faith belief that the opposed behavior was discriminatory.[172]

2. Sufficient Evidence

On this posture, Southeastern must show that the District Court's refusal to grant its Rule 50(b) motion constitutes error because "the evidence points but one way and is susceptible to no reasonable inferences supporting the party opposing the motion."[173] Southeastern's challenge fails two times over.

Participation Clause. In its Rule 50(b) motion[174] and now on appeal[175] Southeastern attacks the jury's retaliation verdict solely under an opposition clause theory. To wit, Southeastern argues only that Tudor did not prove she was barred from reapplying for tenure due to her *complaining* about the 2009-10 tenure denial.[176]

---

[171] 338 F.3d 1163, 1172 (10th Cir. 2003).
[172] *Id.*; *Love v. RE/MAX of Am., Inc.*, 738 F.2d 383, 385 (10th Cir. 1984).
[173] *Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545, 549 (10th Cir. 1999).
[174] Okla. App. Vol. 2 at 542–43.
[175] 2d Brief at 51.
[176] 2d Brief at 51.

But the District Court correctly instructed the jury that Tudor may prove her retaliation under either the participation or the opposition clause, charging the jury under either (or both) theories.[177] Given that charge, Southeastern's failure to challenge the retaliation verdict under both the participation and opposition clause proves fatal.[178] Because Southeastern's challenge could not rule out the possibility that the verdict was alternatively sustained under the participation clause the District Court did not error by leaving the retaliation verdict intact.[179]

Opposition Clause. This Court need not review Southeastern's opposition clause challenge. Even if reviewed Southeastern's challenge fails. Southeastern raises a very narrow attack, arguing simply that there was is no "causal connection" between Tudor's opposition activities and the adverse action.[180] This is not true.

---

[177] Tudor App. Vol. 2 at 57–21 (Jury Instruction No. 12).
[178] *See Crawford v. Met. Gov't of Nashville and Davidson Cnty., Tenn.*, 555 U.S. 271, 280 (2009).
[179] *See In re Robinson*, 921 F.2d 252, 253 (10th Cir. 1990) ("An appellee may defend the judgment on any ground supported by the record."); *U.S. v. Sandoval*, 29 F.3d 537, 542 n.6 (10th Cir. 1994) (appellate court may "affirm a district court decision on any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied upon by the district court.") (cleaned up).
[180] 2d Brief at 52.

Tudor proffered evidence that there was a causal connection between her opposition and the adverse action because the adverse action "closely followed" Tudor's opposition. On this record, a reasonable jury could conclude that McMillan's October 2010 decision to bar Tudor's tenure reapplication was retaliatory because McMillan imposed it a mere 36 days after Tudor filed the August 2010 internal grievances at Southeastern which challenged the 2009-10 tenure denial.[181]

Southeastern contends that the decision to bar reapplication was not retaliatory, and thus no evidence supports the existence of a "causal connection" because "all the evidence" shows that Southeastern's tenure rules barred tenure reapplication it acted in reliance on those rules.[182] In support, Southeastern claims that Scoufos' April 2010 demand that Tudor withdraw her 2009-10 application and reapply another cycle proves the later decision to bar reapplication was not retaliatory because Tudor did not complain about that "offer" contemporaneously.[183]

---

[181] *Ramirez v. Okla. Dep't of Mental Health*, 41 F.3d 584, 596 (10th Cir. 1994) (temporal period of 1 and 1/2 months sufficient). Evidence: Tudor App. Vol. 6 at 99–101; Okla. App. Vol. 3 at 44 (Stubblefield-McMillan email titled "Tudor Retaliation").

[182] 2d Brief at 52.

[183] *Id.* (incorporating by reference argument at 50–51).

Southeastern curiously argues that the April 2010 "offer" absolves it. Not so. By Southeastern's own framing, the central premise of the "offer" was that if Tudor did not withdraw her 2009-10 application she could not reapply under the tenure rules. But McMillan admitted in the October 2010 memorandum that the tenure rules do not bar reapplication.[184] Thus, Southeastern's claimed nondiscriminatory premise for the offer itself—withdraw now, so we can *let* you reapply later—is unmasked as false. As to Southeastern's last point—Tudor did complain about the "offer" being illusory *in writing* to Scoufos the same day it was made and even she noted that she feared retaliation.[185]

D. Alternatively, sex issue is waived.

On the eve of trial, Southeastern stipulated that it would cease raising challenges to the meaning of the term "sex" in this case. Though Southeastern now claims that it secretly intended its stipulation to only govern at trial,[186] the transcript below reveals no such limit[187].

[184] Tudor App. Vol. 5 at 229–30 (McMillan Ltr.).
[185] Tudor App. Vol. 5 at 226 (Tudor Ltr.).
[186] 2d Brief at 39 n.2.
[187] Tudor App. Vol. 6 at 37.

Southeastern's pretrial stipulation should be construed to totally bar it from injecting a challenge to the meaning of "sex" on appeal. This Court has long held that litigants that freely enter into stipulations that narrow the scope of a dispute at trial cannot later set that stipulation aside on appeal. There are two good reasons for that rule both of which ring true here.

First, given the stipulation, the District Court did not error in denying Southeastern's 50(b) motion challenging the court's earlier construction of Title VII.[188] Southeastern admits that it entered into the stipulation with the intent of according its litigation strategy with the District Court's summary judgment order.[189] In this situation, as this Court held in *Lyles v. Am. Hoist & Derrick Co.*, it would not be error for the District Court to premise its denial of Southeasterns' Rule 50(b) motion insofar as the "sex" dispute had been stipulated away.[190] Where parties represent to the district court that a discrete fact or legal issue is no longer disputed, it is reasonable for the trial court to rely on that

[188] The District Court would also have been correct to deny that motion on the alternative ground that Southeastern failed to file a Rule 50(a) motion preserving that issue.
[189] 2d Brief at 39 n.2.
[190] 614 F.2d 691, 694 (10th Cir. 1980).

representation and make rulings accordingly. This is so because, as clarified in *F.T.C. v. Accusearch, Inc.*, stipulations narrow the scope of the dispute properly before the district court.[191] That is exactly why this Court has held that under invited-error doctrine, a litigant cannot argue "that a district court erred in adopting a proposition that the party had urged the district court to adopt."[192] There is thus no error below for this Court to review.

Second, this Court should not permit Southeastern to set aside the stipulation on appeal because doing so would work an injustice and irreparably prejudice Tudor. Southeastern's challenge invites this Court to resolve the exact issue they stipulated away. But reopening that issue on appeal would be fundamentally prejudicial to Tudor since, as Southeastern admits, the stipulation induced Tudor to not present evidence she had developed at trial concerning the nature of "sex" thereby depriving her of a record she would have otherwise created for appeal to rebut Southeastern's challenge.

---

[191] 570 F.3d 1187, 1203–04 (10th Cir. 2009).
[192] *Accusearch*, 570 F.3d at 1204 (*citing U.S. v. Deberry*, 430 F.3d 1294, 1302 (10th Cir. 2005)).

E. Judgement not otherwise erroneous under *Etsitty*.

If this Court does review Tudor's sex discrimination claims, the review is exceedingly limited to two questions. The first is whether the District Court properly instructed the jury on the scope of Title VII's protection at trial. The second is whether, against the correct legal standard, the District Court erred in denying Southeastern's sufficiency of the evidence challenges preserved below.[193]

Only one jury instruction is implicated by Southeastern's appeal—Instruction No. 6, which defines an "unlawful employment practice." Southeastern did not object to Instruction No. 6 below and does not challenge it on appeal, implicitly conceding it accurately reflects governing law. Nonetheless, reviewing the instruction against the governing law confirms that the jury was properly instructed.

1. *Etsitty*'s key holdings.

Faithful statutory interpretation begins with the text itself. Title VII proscribes discrimination "because of . . . sex" in employment.[194] No

[193] *Rocky Mountain Christian Church v. Bd. of Cnty. Com'rs*, 613 F.3d 1229, 1235–36 (10th Cir. 2010).
[194] 42 U.S.C. §2000e-2(a)(1).

provision defines what constitutes sex discrimination or expressly withholds protection from transgender persons.

In *Etsitty v. Utah Transit Authority* this Court held that transgender people can bring Title VII sex discrimination claims.[195] *Etsitty*'s core holdings are faithful to Title VII's text. For instance, *Etsitty* recognizes that statutory construction does not permit imposing extra-statutory bars to coverage. Thus, *Etsitty* deems that superimposing labels like transsexual (the more apt term now being transgender) on a worker cannot bar her from coverage.[196] *Etsitty* also recognizes that, as with all claimants, a transgender worker must do more than simply allege the bare fact of her gender to sustain her claim—i.e., she must show that her gender or gender stereotypes played some role in the adverse action.[197] Following *Etsitty*, every district court presented with the question of whether transgender persons can bring sex

---

[195] 502 F.3d 1215 (10th Cir. 2007).

[196] *Id.* at 1222 n.2 (*quoting Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004) ("Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a level such as 'transsexual', is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.")).

[197] *Id.* at 1225–27.

discrimination claims in this Circuit, including the District Court below, has answered in the affirmative.[198]

While *Etsitty* holds that Title VII does not confer transgender people heightened protection (e.g., rejecting invitation to create stand-alone protected status[199]), it affirms that transgender and nontransgender workers are protected from sex discrimination on equal terms (e.g., holding sex stereotype protection is available[200]).

Given the posture of the issues raised in *Etsitty* and the unique facts that colored that dispute some readers have reached odd, curious, and down-right wrong conclusions about its holdings. Southeastern's Brief is rife with many. Three in particular warrant discussion.

Etsitty's declination to find transgender persons occupy their own protected class does not mean transgender people can't experience sex

---

[198] *See, e.g.*, *Michaels v. Akal Sec., Inc.*, 2010 WL 2573988 (D. Colo. 2010) (federal courthouse employee demonstrated that employer's proffered reason for restricting her usage of certain bathrooms was pretextual and thus stated a Title VII claim on the basis of gender-based stereotyping); *Smith v. Avanti*, 249 F.Supp.3d 1194, 1200 (D. Colo. 2017) (recognizing that *Etsitty* allows the Smiths' sex discrimination claim to proceed under a gender stereotyping theory); *EEOC v. A&E Tire, Inc.*, 325 F.Supp.3d 1129, 1133 (D. Colo. 2018) ("Title VII protects all persons, including transgender persons, from discrimination based on gender nonconformity.").

[199] *Etsitty*, 1221–22.

[200] *Id.* at 1222 n.2.

discrimination let alone redress it under Title VII. That's precisely why this Court fully examined the merits all the way up through the point at which it found Etsitty's *prima case* failed at pretext.

By a similar token, *Etsitty* does not set forth a definitive rule for how a worker's sex is defined—that is, whether they are female, male, or something else entirely.[201] That makes perfect sense given Title VII's expansive remedial reach. Even if the parties dispute whether a transgender woman is a woman or a man a man, taking an adverse action against someone because of their sex takes sex into account and is thus discriminatory.

Lastly, *Etsitty* does not make restrooms a third rail for transgender claimants. Nor does *Etsitty* prescribe the metes and bounds of permissible sex-based restroom segregation let alone bar transgender claimants (or anyone else) from challenging discriminatory workplace rules in that arena. The District of Colorado's analysis in *Michaels v. Akal Security, Inc.* explains this well—if the worker is proceeding under

[201] *Id.* at 1223 at n.3 (indicating the capaciousness of coverage in part by highlighting alternative pleadings available).

a sex stereotype theory, she must both claim that there is a restroom restriction placed on her and she must show pretext.[202]

2. Jury Instruction No. 6 is proper.

Southeastern does not appeal the jury instructions below. Nor does it argue that the jury was improperly instructed, thus the issue is waived.[203] Even so, in light of Title VII's plain text as informed by this Court's key holdings in *Etsitty* the District Court did not erroneously instruct the jury on Tudor's sex discrimination claims.

In pertinent part, Instruction No. 6 states,

> Title VII does not protect people because they are transgender. Thus, for Plaintiff to prevail, you must find any wrongful action occurred because of her gender or because of a perception that that person does not conform to a typical gender stereotype.[204]

There is no legal error in this instruction.

In *Lederman v. Frontier Fire Prot., Inc.*, this Court holds that jury instructions should "fairly, adequately and correctly state the governing law and provide the jury with an ample understanding of the applicable

---

[202] 2010 WL 2573988 at *4.
[203] *Davis v. Garcia*, 355 F.3d 1263, 1266 (10th Cir. 2004) ("Issues not raised in the opening brief are deemed abandoned or waived.").
[204] Tudor App. Vol. 2 at 47 (emphasis added).

principles of law and factual issues confronting them."[205] Instructions need not be "flawless." But, as held in *Brodie v. Gen. Chem. Corp.*, instructions should ensure the jury has an "understanding of the issues and its duty to decide those issues."[206] On its face, Instruction No. 6 abides by those limits.

Instruction No. 6 clearly incorporates and is otherwise informed by *Etsitty*'s key holdings. The instruction advises the jury that Tudor is not specially protected simply because she is transgender, as *Etsitty* requires. It also conveys to the jury that Tudor can prevail if either her gender or her failure to conform to typical gender stereotypes was the true reason motivating the adverse actions, also aligned with *Etsitty*.

3. Sufficient Evidence

At the threshold, Southeastern has omitted essential evidence from its Appendix in derogation of 10th Circuit Rule 10.3(B). On that basis this Court may choose to not hear this issue. Southeastern omitted the tenure portfolios from comparators Parrish and Barker,[207] two of the four comparators evaluated by Parker both of whom he ranked lowest in his

[205] 685 F.3d 1151 (10th Cir. 2012)
[206] 112 F.3d 440, 442 (10th Cir. 1997) (cleaned up).
[207] Omission noted at Okla. App. Vol. 3 at 9.

comparative qualification assessment.[208] Their absence is conspicuous, because, as Parker explained, seeing the applications of the full constellation of comparators "defines the level of qualifications that Southeastern, by its own standards, has decided merits promotion and tenure."[209]

"Southeastern's arguments simply reflect their view of how the evidence was presented or their view as to what the jury should have decided based on the evidence presented at trial."[210] That line of attack misses the mark.

Sufficient evidence can be "something less than the weight of evidence" but that consists of "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, even if different conclusions also might be supported by evidence."[211]

Southeastern bears an exceedingly hefty burden to disturb the jury's verdict. Piecemeal attacks on do not suffice. As the Supreme Court explains in *Bourjaily v. U.S.*, "individual pieces of evidence, insufficient

---

[208] *See* Tudor App. Vol. at 5.
[209] Tudor App. Vol. 6 at 1.
[210] Tudor App. Vol. 5 at 156 (Order).
[211] *Webco Indus., Inc. v. Thermatool Corp.*, 278 F.3d 1120, 1128 (10th Cir. 2002) (cleaned up).

in themselves to prove a point, may in cumulation prove it. The sum of evidentiary presentation may well be greater than its constituent parts."[212]

Nor can Southeastern place the burden on Tudor to disprove Southeastern's theory of the case. Instead, Southeastern must attack *Tudor's* theory of the case head-on recognizing that Tudor was free to present evidence in support of her claims that conflicted with Southeastern's evidence or even prove essential facts, like pretext, by alternative means.[213]

Stereotyping. Southeastern argues that the jury's verdict on both discrimination claims must be reversed because Tudor "failed to make a *prima facie* case of sex stereotyping at trial."[214] Southeastern expends considerable energy banging that drum but it ultimately rings hollow. In *U.S. Postal Serv. Bd. of Govs. v. Aikens* the Supreme Court clarified that the jury's role is narrowly focused on finding whether discrimination actually occurred or "discrimination *vel non*."[215] Thus, as explained in

[212] 483 U.S. 171, 179–80 (1987).
[213] *Denison v. Swaco Geolograph Co.*, 941 F.2d 1416, 1422 (10th Cir. 1991).
[214] 2d Brief at 44.
[215] 460 U.S. 711, 715 (1983).

Abuan v. Level 3 Comm'ns, Inc., even if this Court found Tudor "cannot make a *prima facie case* of discrimination," it is "not bound to reverse the jury's finding that discrimination occurred" because Southeastern still bears the burden of convincing the Court that Tudor "failed to prove the ultimate issue of discrimination *vel non*."[216]

Southeastern also implies that the jury, rather than following the instructions provided by the District Court on Tudor's two sex discrimination claims, found for Tudor on some other basis.[217] However, there is a strong presumption that the jury followed the instructions and otherwise performed its factfinding duty as charged.[218] That presumption endures even if, as Southeastern baselessly accuses, counsel made misleading arguments in front of the jury.[219]

Southeastern also argues that Tudor cannot prove pretext for either discrimination claim on the premise that Minks was the true decision maker and no direct evidence of his sex bias was presented at trial.[220] That argument proves too much. It is also contrary to *Thomas v. Berry*

---

[216] 353 F.3d 1158, 1169 (10th Cir. 2003).
[217] *See* 2d Brief at 44.
[218] *See, e.g.*, *Cavanaugh v. Woods Cross City*, 718 F.3d 1244, 1250 (10th Cir. 2013).
[219] *Bland v. Sirmons*, 459 F.3d 999, 1015 (10th Cir. 1998).
[220] 2d Brief at 45–46.

Plastics Corp., which recognizes that Tudor can prove pretext under the cat's paw theory by proffering "evidence that a biased subordinate who lacked decisionmaking power used the formal decisionmaker as a dupe in a deliberate scheme to bring about an adverse employment action."[221]

On this record it would be reasonable for a jury to infer that Minks was the dupe in McMillan's deliberate scheme to discriminate against Tudor. Minks repeatedly rubberstamped McMillan's decisions and even went so far as to delegate his authority as the president to McMillan to proffer the administration's official rationale for tenure denial in 2009-10 and the official decision to bar tenure reapplication in 2010-11.[222] Indeed, Knapp, the professor who sat on all 3 of the FACs that heard Tudor's grievances, testified to as much—it all went back to McMillan.[223] As noted *infra*, there's is also plenty of evidence of McMillan's bias and that of others he involved in his scheme.

Qualification. Southeastern also urges that Tudor failed to proffer evidence sustaining "a *prima facie* case showing qualification for a

[221] 803 F.3d 510, 514–15 (10th Cir. 2015).
[222] Tudor App. Vol. 6 at 31 (Minks Ltr.); Tudor App. Vol. 5 at 215–16 (Weiner Ltr.); Tudor App. Vol. 5 at 229–30 (Oct. 5, 2010 McMillan Ltr.).
[223] Tudor App. Vol. 8 at 29–30 (Knapp Test.).

tenured professorship."[224] To the extent Southeastern argues Tudor must have proved some kind of *prima facie* case at trial, that is wrong under *Aikens* as explained in *Abuan*.

Southeastern also argues that there is insufficient evidence of Tudor's qualification because she proffered a reconstructed copy of her 2009–10 tenure portfolio at trial.[225] It further claims "Scoufos gave unrebutted testimony that the original documents were missing" from the portfolio thus it would be impossible for the jury to conclude Tudor possessed the minimal qualifications.[226] That argument fails on its own terms because Dr. Mischo testified that he reviewed the original 2009-10 portfolio and attests that it was not missing essential documents at the time of his review.[227] That conflicting evidence alone ends things since this Court may not reweigh evidence.

To the extent Southeastern contends that Tudor produced no evidence that she was qualified for tenure, that is simply not true. Tudor testified about her qualifications at the time of the 2009–10 tenure

[224] 2d Brief at 47.
[225] *Id.* at 47.
[226] *Id.*
[227] Tudor App. Vol. 7 at 160 (Mischo Test.)

cycle[228] and a copy of the reconstructed portfolio came into evidence[229]. Mischo and Spencer, both of whom voted in favor of Tudor's tenure in the 2009–10 cycle also testified about her qualifications. Lastly, Parker's comparative analysis of Tudor's qualifications as against successful Southeastern tenure candidates is probative.[230]

Pretext. Southeastern claims there is insufficient evidence of pretext on the premise that Tudor "relies heavily on Parker's expert report," contending support for that odd proposition comes from *Babbar v. Ebadi*.[231] This argument lacks merit. *Babbar* is distinguishable on the facts because Tudor does not *solely* rely on Parker's report (it's one piece of evidence in her constellation) and her tenure bid was not opposed by every single faculty and administrative reviewer on the same grounds.[232]

Southeastern otherwise argues that there was insufficient evidence of pretext on the premise that the 2009-10 tenure denial is nothing more than a "disagreement between the faculty and administration," implying

---

[228] *See, e.g.*, Tudor App. Vol. 6 at 74–77.
[229] Okla. Vol. 3 at 561–87 (Reconstructed 2009-10 Application).
[230] *Namenwirth v. Bd. of Regents of Univ. of Wisc. Sys.*, 769 F.2d 1235, 1240 (7th Cir. 1985) (evidence of a comparative sort is appropriate" and "may be essential to a determination of discrimination").
[231] 2d Brief at 48 (*citing Babbar*, 36 F.Supp. 2d 1269, 1279) (D.Kan. 1998)).
[232] *Babbar*, 36 F.Supp.2d at 1281.

tenure denials cannot be proved discriminatory by any means.[233] The authorities Southeastern cites do not support that position. Southeastern's position is also directly in conflict with *Univ. of Penn. v. EEOC* 's core holding that Title VII totally "expose[s] tenure determinations to the same enforcement procedures applicable to other employment decisions."[234]

Southeastern also overlooks that, on this record, the jury easily could have rejected their theory of the case given other red flags. As one example, *Garrett v. Hewlett-Packard Co.* recognizes that disturbing procedural irregularities (including but not limited to falsification or manipulation of criteria), and evidence that subjective criteria were applied only to Tudor could together and separately raise a strong inference of pretext.[235] Among other things, there was evidence that showed Scoufos concocted *post hoc* rationales for denial which she incorporated into a backdated letter she planted in Tudor's tenure portfolio after-the-fact.[236] There was also the suspicious fact that Mink's

---

[233] 2d Brief at 48.
[234] 493 U.S. at 190.
[235] 305 F.3d 1210, 1217 (10th Cir. 2002).
[236] *Compare* Okla. App. Vol. 3 at 671 (Original Scoufos Ltr.) *with* Okla. App. Vol. 3 at 681 (Backdated Scoufos Ltr.). *See also* Tudor App. Vol. 6 at 105–06

delegated the responsibility for giving Tudor rationales for denial to McMillan,[237] a pretense to refuse to comply with the FAC's order,[238] and that the letter McMillan eventually sent, though dated April 2010, was postmarked and arrived to Tudor in June 2010.[239]

Discrimination 2010-11. Southeastern speciously contends Tudor failed to proffer evidence giving rise to inferences of discrimination on two counts.

As to the first, there was plenty of evidence at trial from which the jury could conclude Tudor had unmasked as false Southeastern's claim that its rules and practices barred tenure reapplication. The April 2010 email between Weiner and Minks, McMillan, Scoufos and Babb evidences none of the decisionmakers thought a bar existed.[240] Other evidence reveals that no other professors had been barred from reapplying.[241] That

(Tudor Test.); Okla. App. Vol. 3 at 714; Tudor App. Vol. 8 at 143–46 (Scoufos Test.).

[237] Tudor App. Vol. 6 at 31 (Minks Ltr.).

[238] Tudor App. Vol. 5 at 215–16 (Weiner Ltr.).

[239] *Id.* at 227–28 (McMillan Ltr.).

[240] *Id.* at 234–35 (Weiner April 1, 2010 email); Tudor App. Vol. 9 at 89–91 (Weiner Test.).

[241] *See, e.g.*, Tudor App. Vol. 7 at 89 (Cotter-Lynch); *id.* at 157 (Mischo).

evidence is sufficient under *Johnson v. Weld Cnty., Colo.* to give rise to an inference that Southeastern was pursuing a discriminatory agenda.[242]

As to the second, again claims that the April 2010 "offer" absolves it. Once again, Southeastern's claimed nondiscriminatory premise—withdraw now, so we can *let* you reapply later—is unmasked as false by McMillan's admission in the October 2010 memorandum that the tenure rules do not bar reapplication.[243]

Alternatively, in line with *Jones v. Barnhart*, pretext could also be shown because there are "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in [Southeastern's] proffered legitimate reasons for its actions" that a reasonable jury could find them unworthy of credence.[244] (Southeastern oddly claims Tudor didn't complain about illusory "the offer"[245] contemporaneously. But she did, in writing, that same day in a letter to Scoufos.[246])

---

[242] 594 F.3d 1202, 1211 (10th Cir. 2011).
[243] Tudor App. Vol. 5 at 229–30 (Oct. 5, 2010 McMillan Ltr.).
[244] 349 F.3d 1260, 1266 (10th Cir. 2003).
[245] *See* Tudor App. Vol. 6 at 86–88 (Tudor Test.); Tudor App. Vol. 8 at 132–33 (Scoufos Test.); Tudor App. Vol. 7 at 172–73 (Mischo Test.).
[246] Tudor App. Vol. 5 at 226 (Tudor Ltr.).

F. *Per se* theory need not be decided.

Southeastern repeatedly insinuates that Tudor is asking this Court to rule on whether transgender persons are *per se* protected by Title VII. Though there is merit to the *per se* theory, that question is not properly before this Court.

Some background is necessary. There are numerous legal theories supporting the notion that sex discrimination claims brought by transgender persons are cognizable under Title VII. The sex stereotype theory, which this Court affirmed in *Etsitty*, is the oldest and most widely recognized one. Another theory is that of *per se* protection. As the Seventh Circuit recently explained in *Whitaker v. Kenosha Sch. Dist.*, the *per se* theory holds that because "[b]y definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth" discrimination against a transgender person because they are transgender is *per se* sex discrimination.[247] The

[247] 858 F.3d 1034, 1048 (8th Cir. 2017).

Sixth Circuit and the Eleventh Circuit have separately reached the same conclusion as have numerous district courts.[248]

In *Etsitty*, this Court declined to rule on the *per se* theory. The question was reserved because this Court believed that it needed scientific evidence, not in the record, speaking to the nature of sex and how the scientific community classifies a transgender persons' sex.[249] If presented with such evidence, the Court concluded that it could find that intervening scientific advances expanded the "plain meaning" of sex and the *per se* theory would be viable.[250]

In the intervening decade, just as the *Etsitty* Court predicted, scientific advances have shed significant light on what sex is and the appropriate, science-based explanations of how to classify a transgender women's sex. These advances expand the meaning of "sex" to encompass transgender persons' sex and thus support construing Title VII to forbid discrimination against transgender persons because they are transgender.

---

[248] *See, e.g.*, *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011); *Chavez v. Credit Nation Auto Sales, LLC*, 641 Fed.Appx. 883, 884 (11th Cir. 2016); *EEOC v. R.G. & G.R. Harris Funeral Homes*, 884 F.3d 560, 574–75 (6th Cir. 2018).
[249] *Etsitty*, 502 F.3d at 1221–22.
[250] *Id.* at 1222.

At summary judgment, Tudor proffered an expert report authored by Dr. George Brown,[251] a world-renowned medical expert on the clinical treatment of transgender persons and the nature of sex. Brown's Report reflects that the scientific community has gained a greater understanding of the nature of sex since *Etsitty*. For instance, it is now known that both transgender and nontransgender persons' sex is anchored in the brain, and numerous studies conclude that the "brain sex" of a transgender woman like Tudor matches the anatomical traits consistent with that of a nontransgender woman.[252] Other studies reveal that it is impossible to change the brain sex of both transgender and nontransgender persons, meaning their sex is similarly immutable.[253] As a consequence of these and other scientific advances, there is now a scientific consensus that a transgender woman's "biological sex" is female.[254]

If the issue were properly before this Court, the Brown Report is unrebutted evidence that sustains the *per se* theory. Brown helps fill an

[251] Tudor App. Vol. 1 at 196–213.
[252] *Id.* at 203.
[253] *Id.* at 203–04.
[254] *Id.* at 207–08.

important gap and otherwise corrects' the *Etsitty* Court's stale-dated characterization of the nature of sex. Without the aid of scientific expertise, the *Etsitty* Court rationalized that the *per se* theory had not yet been proved because the "plain meaning of sex" in the scientific community did not encompass the sex of transgender persons.[255] Today it is now scientifically settled that a transgender woman's sex fits within the "traditional binary conception of sex" because she is properly categorized as female.[256] Given that conclusion, it is tenable to find that the "plain meaning" of "sex" encompasses a transgender person's sex since, even if Title VII only protects persons "because they are male or female" as Southeastern insists, Tudor and women like her are protected because they are in fact female.

Even though the jury was not charged under the *per se* theory, it is permissible for this Court to affirm the judgment on that basis because it is an alternative theory that sustains the verdict below.[257] However, if the judgment can be affirmed without resorting to the *per se* theory that

---

[255] *Etsitty*, 502 F.3d at 1222.

[256] *Contra Etsitty*, 502 F.3d at 1221–22 (suggesting that scientifically a transgender person's sex is categorized as something other than male or female).

[257] *See, e.g.*, *Harris*, 884 F.3d at 574–75 (similar in summary judgment context).

would be more prudentially sound because in the ordinary course this Court does not "consider an issue not passed upon below."[258]

G. Constitutional Avoidance Canon

Southeastern urges this Court to construe Title VII to subject transgender claimants to disparate treatment. That invitation should be rejected forthwith.

Where there are multiple permissible constructions of a statute, the canon of constitutional avoidance urges adopting a construction that does not force this Court to decide whether Congress acted constitutionally.[259] In this case, the constitutional avoidance canon points in the direction of construing Title VII to afford transgender Americans full protection from sex discrimination.

In Southeastern's imagination, Congress enacted Title VII with the intent to limit the kinds of sex discrimination claims transgender persons may bring but imposed no similar limits on any other group.[260] For

---

[258] *Fogle v. Pierson*, 435 F.3d 1252, 1262 (10th Cir. 2006) (*quoting Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1186 (10th Cir. 2003)).

[259] *See, e.g.*, *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const.*, 485 U.S. 568, 575 (1988).

[260] *But see generally* Katie R. Eyer, *Statutory Originalism and LGBT Rights*, WAKE FOREST L. REV. (forthcoming 2019), tinyurl.com/y7yrrzzv (arguing original public meaning is merely the discredited congressional expectations canon).

instance, Southeastern contends that Title VII should be construed to bar a transgender claimant from relying on their gender presentation (whatever it may be) and/or stereotypes about their gender (whatever it is) to make out a *prima facie* case.

Southeastern also urges this Court to rule that the trier of fact is required to completely ignore a transgender worker's gender presentation and even her gender but claims no such bars apply to nontransgender workers. Absurdly, Southeastern's construction leaves transgender persons as the only individuals in the country who cannot not, as a matter of law, bring gender stereotype claims under Title VII.[261]

In addition to being textually unmoored, Southeastern's proposed construction is patently unconstitutional. Congress cannot by statute single out transgender people for disparate treatment. As the Supreme Court recently reiterated in *U.S. v. Windsor*, "[t]he Constitution's guarantee of equality must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot justify disparate treatment of that group."[262] Nor can Congress create a

[261] *But see Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001) (elephant-in-mousehole doctrine).
[262] 570 U.S. 744, 770 (2013) (cleaned up).

statutory scheme that confers benefits unequally as between transgender and nontransgender persons premised on stereotyped understandings of what it means to be a man or a woman.[263]

Rather than wrestle with the thorny question of whether Congress could constitutionally limit Title VII coverage in the manner Southeastern urges, this Court should adopt an alternative construction of the statute.

CONCLUSION

Tudor respectfully renews her request for relief set forth in her Opening Brief.[264]

[263] *See e.g., Miss. Univ. for Women v. Hogan*, 440 U.S. 268 (1979); *Orr v. Orr*, 440 U.S. 268 (1979); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).
[264] 1st Brief at 63–64.

Respectfully submitted this 11th day of February, 2019.

By:

/s/ Ezra Young
EZRA ISHMAEL YOUNG
LAW OFFICE OF EZRA YOUNG
30 Devoe Street, #1A
Brooklyn, NY 11211
(949) 291-3185
ezra@ezrayoung.com

/s/ Brittany M. Novotny
BRITTANY M. NOVOTNY
NATIONAL LITIGATION LAW GROUP, PLLC
2401 NW 23rd St., Ste. 42
Oklahoma City, OK 73107
(405) 896-7805
bnovotny@nationlit.com

/s/ Marie E. Galindo
MARIE EISELA GALINDO
LAW OFFICE OF MARIE E. GALINDO
Wells Fargo Building
1500 Broadway, Ste. 1120
Lubbock, TX 79401
(806) 549-4507
megalindo@thegalindofirm.com

Attorneys for Dr. Rachel Tudor,
Plaintiff-Appellant/Cross-Appellee

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms with the word limit of 16,200 words as granted by the Court on January 2, 2019 because, excluding the parts of the document exempted by requires of Fed. R. App. P. 32(f), this document contains 15,849 words.

I additionally certify pursuant to 10th Cir. R. 25.5 all required privacy redactions have been made.

I further certify that pursuant to 10th Cir. CM/ECF User Manual, Sec. II, Part I(c), that this ECF submission has been scanned for viruses with the most recent version of a commercial virus scanning program and, according to the program, is free of viruses.

/s/ Ezra Young
EZRA ISHMAEL YOUNG

Attorney for Dr. Rachel Tudor,
Plaintiff-Appellant/Cross-Appellee

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of February, 2019, I electronically filed the Plaintiff-Appellant's/Cross-Appellee's Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

I further certify that pursuant to 10th Cir. R. 31.5 and 10th Cir. CM/ECF User Manual, Sec. III, Part 5, that 7 hard copies of the foregoing Brief will be dispatched via commercial carrier to the Clerk's office within 2 business days of the above date. Those hard copies are exact copies of the ECF filing.

/s/ Ezra Young
EZRA ISHMAEL YOUNG

Attorney for Dr. Rachel Tudor,
Plaintiff-Appellant/Cross-Appellee