IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DR. RACHEL TUDOR et al.,	§	
	§	
Plaintiff-Appellant/ Cross-Appellee,	§	
	§	
v.	§	
	§	
SOUTHEASTERN OKLAHOMA STATE UNIVERSITY	§	Case No. 18-6102/ 18-6165
	§	
and	§	
	§	
REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA	§	
	§	
Defendants-Appellees/ Cross-Appellants.	§	

DR. TUDOR'S OPPOSED MOTION
TO VACATE ABATEMENT ORDER

Dr. Tudor respectfully requests that the Court vacate its April 22, 2019 abatement order entered *sua sponte* "in light of the United States Supreme Court's decision to grant certiorari in numbers 17-618, *Bostock v. Clayton County, Georgia*, 17-1623, *Altitude Express, Inc. v. Zarda*, and 18-107, *R.G. & G.R. Harris Funeral Homes v. EEOC, et al.*"

Tudor respectfully submits that the Court is mistaken that the issues taken on certiorari are dispositive in her appeal. She otherwise asks that the abeyance be lifted in light of the equities at stake.

Respectfully, Tudor asks that the Court hear oral argument on this motion. Pursuant to 10th Circuit Rule 27.1, Tudor represents that this motion is opposed.

BACKGROUND[1]

Dr. Tudor is female.[2] She also happens to be transgender. Nearly a decade ago Southeastern denied Tudor tenure and blocked her reapplication, terminating her employment, destroying her professional reputation, and effectively ending her career unless she is reinstated.

In November 2017, an Oklahoma jury found as fact that Southeastern's actions were taken because of Tudor's gender *and* retaliation.[3] The jury was narrowly instructed that the fact that Tudor is transgender is irrelevant to her sex discrimination claims.[4] No party has preserved a challenge to that jury instruction let alone raised it on appeal.[5]

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[1] Throughout Tudor references Southeastern Oklahoma State University and the Regional University System of Oklahoma collectively as "Southeastern." Citations to the appendices will take this form: Tudor App. Vol X at XX (Tudor's Appendix). References to the parties' briefs will take this form: 1st Brief (Tudor's Opening Brief), 2d Brief (Southeastern's Opening Brief), and so on.
[2] *See* 5th Brief at 8–9 (collecting unrefuted evidence).
[3] Tudor App. Vol. 2 at 71–72 (Verdict Form).
[4] *Id.* at 47 (Jury Instruction No. 6).
[5] *See* 3d Brief at 67 (arguing same).

In this Court, Tudor appeals three narrow remedies issues.[6] On cross-appeal, Southeastern raises three liability-stage issues, one of which purports to attack the jury's verdict on the premise that Tudor did not prove a *prima facie* case of sex discrimination prior to or at trial.[7] But that issue is a red herring—it is neither properly before this Court nor relevant where a jury decides a Title VII case on the merits.[8]

This Court originally scheduled oral argument for May 7, 2019. However, on April 22, 2019 the Supreme Court granted certiorari in *Bostock*, *Zarda*, and *Harris*, all of which are Title VII cases. That same day, this Court issued a *sua sponte* order cancelling oral argument and holding this case in abeyance "pending the outcome of the Supreme Court proceedings" in the other cases. Those three cases are slated to be heard in the October 2019 Term, likely decided on the merits no sooner than June 2020—14 months from now. It is probable that this Court mistook the fact that *Bostock, Zarda,* and *Harris* have been popularly labeled as

[6] *See* 1st Brief at 2–3 (questions presented).
[7] *See* 2d Brief at 3 (questions presented).
[8] See *infra* note 17 (explaining procedural bars to reviewing this issue); 3d Brief at 70–71 (explaining why if the discrimination claims are reviewed the only question before this court is whether discrimination *vel non* was proved).

LGBT rights cases as an indication that their disposition by the Supreme Court will have some bearing on Tudor's appeal.

ARGUMENT

I. The narrow issues recently granted certiorari are neither properly presented in nor dispositive to Tudor's appeal.

This Court's *sua sponte* abeyance order is premised on the assumption that the issues granted certiorari in *Bostock*, *Zarda*, and *Harris* are dispositive in Tudor's appeal. But the narrow issues granted certiorari are not properly presented in let alone dispositive to these proceedings. Consequently, holding Tudor's appeal in abeyance is unnecessary.

This Court's power to hold its proceedings in abeyance is tempered by "exercise of judgment, which must weigh competing interests and maintain an even balance."[9] It may be prudent for this Court to enter an abeyance in the rare situation where an issue in a case before it, itself dispositive, is taken on certiorari. However, if there is only a fleeting

[9] *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936).

possibility that the Supreme Court's disposition of another matter will affect the outcome, this Court should not abate its own proceedings.[10]

The abeyance entered here is unwarranted. The Supreme Court accepted very narrow issues on certiorari none of which are dispositive to Tudor's appeal. In *Bostock* and *Zarda*, which have been consolidated, the Supreme Court narrowly certified the question of whether discrimination because of sexual orientation is a form of sex discrimination. That issue is not presented in either *Harris* or Tudor's appeal. In *Harris*, the Supreme Court granted certiorari on two questions speaking to legal theories under which a transgender person may prove a *prima facie* case of sex discrimination,[11] an issue not properly presented in let alone dispositive to Tudor's appeal.

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[10] *See, e.g.*, *United States v. Victorio*, 719 Fed.Appx. 857, 858 n.1 (10th Cir. 2018) (Murphy, J.) (unpublished) (explaining that it is proper to abate proceedings where the exact, dispositive issue was taken on certiorari but imprudent to do so where the issue is not the same let alone dispositive).

[11] *Compare R.G. & G.R. Harris Funeral Homes v. EEOC*, 2019 WL 1756679 (Apr. 22, 2019) (granting certiorari on the following questions: "Whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Pricewaterhouse v. Hopkins*, 490 U.S. 228 (1989).") *with Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1220–21 (10th Cir. 2007) (explaining *per se* and sex stereotyping theories are relevant to *prima facie* case showing).

As Tudor explained in her merits briefs, the judgment below can be affirmed on her retaliation claim, an alternative ground that obviates review of her two sex discrimination claims.[12] Indeed, Southeastern admits as much to this Court, querying only whether front pay might be recalibrated as a result.[13] However, the front pay awarded below must already be recalibrated for other reasons making resolution of the sex discrimination claims unnecessary.[14] Critically, neither *Harris* nor the other two certiorari cases touch on Title VII's retaliation protections let alone pose a barrier to affirming the judgment on that alternative ground.

Tudor's appeal is otherwise distinguishable from *Harris*. Because Tudor's case was tried to a jury and the parties do not challenge the jury instructions defining sex discrimination, review is limited to the narrow issue of whether Tudor proved discrimination *vel non*.[15] The Supreme Court's disposition of *Harris* will not reach that issue since that dispute arose at summary judgment, where the *prima facie* case, something

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[12] *See* 3d Brief at 54–60.
[13] See 4th Brief at 26, arguing the remedies like front pay might be affected. Southeastern also argues that reinstatement is not a remedy to retaliation (*id.*) but offers no authorities in support.
[14] *See* 1st Brief at 52–58; 3d Brief at 19–23.
[15] *See* 3d Brief at 67–68; *id.* at 70–71.

different, is at issue.[16] Moreover, there are procedural hurdles that Southeastern would have to (but cannot) overcome to properly raise the *prima facie* case issue to this Court and thus it need not be considered.[17]

Ultimately, this Court may decide Tudor's appeal on the merits without even reaching the issues taken on certiorari. Given this, the Court need not hold these proceedings in abeyance.

II. Sibling Circuits confronted by the same *certiorari* grants have construed them narrowly.

Dr. Tudor respectfully submits that, in considering her request to vacate the abeyance, this Court may benefit from taking into account how

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[16] See *Abuan v. Level 3 Commc'ns Inc.*, 353 F.3d 1158, 1169 (10th Cir. 2003) (*citing U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983), (explaining that discrimination *vel non* and the *prima facie* case are different showings and that to sustain a jury's verdict the worker need only show discrimination *vel non* was proved. *But see also Wells v. Col. Dep't of Transp.*, 325 F.3d 1205, 1228 (10th Cir. 2003) (Hartz, J., concurring) ("It is time for this circuit to devote our attention to 'the ultimate question of discrimination *vel non*'."); *Zamora v. Elite Logistics, Inc.*, 478 F.3d 1160, 1167 (10th Cir. 2007) (Hartz, J., concurring) (observing that application of the *prima facie* case test "adds unnecessary complexity to the analysis, and is too likely to cause us to reach a result contrary to what we would decide if we focused on 'the ultimate question of discrimination *vel non*'.").

[17] See 3d Brief arguing that the interlocutory orders are not reviewable (at 50–52), Southeastern failed to preserve its sufficiency of the evidence challenges because its Rule 50(b) motion was untimely (at 53), Southeastern's precursor Rule 50(a) failed to preserve "specific grounds" (at 53–54), and Southeastern's pretrial stipulation promising to cease challenging the meaning of "sex" in this proceeding forecloses challenges on appeal (at 60–62; *see also* Tudor App. Vol. 6 at 37 ["Your Honor, we do not intend to dispute the definition of sex."]).

sibling circuits have navigated the same grants of certiorari. Research undertaken by the undersigned reflects that, as of this filing, there are only three other cases where appeals were pending and fully briefed that could be impacted by the certiorari grants. The disposition of all three affirms that maintaining an abeyance in Tudor's appeal is simply unnecessary.

Horton v. Midwest Geriatric Management (18-1104) is currently pending in the Eighth Circuit. *Horton* is a Title VII sex discrimination and religious discrimination case brought by a gay man. Merits briefing closed in July 2018 and oral argument was heard on April 17, 2019. *Horton* presents the exact narrow issue taken on certiorari in *Bostock* and *Zarda*. In anticipation of the possibility that certiorari might be granted in those other matters, the *Horton* merits panel sought confirmation from Mr. Nevins[18] that if certiorari were granted in the other cases an abeyance at least as to the sex discrimination claim pending the Supreme Court's disposition would be appropriate. At oral argument, Mr. Nevins confirmed that result would be proper because the

[18] Mr. Nevins is *amicus* counsel for Lambda Legal in this matter and, by happenstance, lead plaintiff-appellant's counsel in *Horton*.

issues presented are the exact same.[19] On April 25, 2019, the Eighth Circuit entered an abeyance order. In light of Mr. Nevin's preemptive representation to the Eighth Circuit that the certiorari issues were dispositive as to at least one claim, holding those proceedings in abeyance is prudent.

Parents for Privacy v. Barr (18-35708) is currently pending in the Ninth Circuit. Merits briefing closed in late March 2019. *Parents for Privacy* involves Title IX and other claims brought in the context of a public school's restroom and locker room policies which provide various accommodations to transgender youths. On April 28, 2019, shortly after the grants of certiorari were announced, the Ninth Circuit set this case for oral argument to be heard on July 11, 2019. *Parents for Privacy* involves questions closely related but nonidentical to those taken up on certiorari. The Ninth Circuit's decision to proceed in this matter is significant because Title IX and Title XI status questions are typically interpreted along the same lines. Given that, it appears the Ninth Circuit has construed the certiorari grants narrowly for now, affording the

[19] *Horton v. Midwest. Geriatric Mgmt.*, 18-1104, Oral Arg. at 23:20 –23:59 (8th Cir. Apr. 17, 2019), http://media-oa.ca8.uscourts.gov/OAaudio/2019/4/181104.MP3

parties the opportunity to make their case directly before the proceedings are unnecessarily stayed.

Adams v. School Board of St. Johns County (18-13592) is currently pending in the Eleventh Circuit. Merits briefing closed in late March 2019. Oral argument has not yet been set in this matter. Among other things, *Adams* involves Title IX questions close to those raised in *Parents for Privacy*. The Eleventh Circuit has not yet elected to hold its proceedings in abeyance and, as of yet, no party has requested that an abeyance be instated. Based on the public docket, it appears that the Eleventh Circuit too is construing the certiorari grants narrowly, choosing to not delay proceedings that may be disposed of without reaching the questions taken up on certiorari.

III. Other equities weigh in favor of lifting the abeyance.

A central thread of Tudor's merits appeal is that withholding reinstatement to the tenured professorship she earned at Southeastern deprives her of the make whole relief mandated by Title VII.[20] In a similar vein, any delay sown by the abeyance prejudices Tudor because it unnecessarily extends her deprivation of the tenured job she earned.

[20] *See, e.g.*, 1st Brief at 38–52.

On balance, equity cannot justify depriving Tudor of her career even one moment longer since this Court is without the power to turn back the clock. As this Court recognized in *Jackson v. City of Albuquerque*, deprivation of a job is an injury money cannot cure.[21]

Tudor is also prejudiced by the abeyance because the lingering effects of Southeastern's Title VII violations metastasize by the day and delay only exacerbates her injuries. More than a year ago Tudor attested that despite diligent efforts she cannot even secure interviews for equivalent jobs, she is unemployed with diminishing savings on which to sustain herself, she was struggling to cover basic living expenses, and her professional reputation is so damaged that other compensated opportunities for work in her field have dried up.[22] Things have only worsened over time and Tudor is prone to continue on that downward spiral unless this Court intervenes. In light of the equities of this situation, undue delay of these proceedings prejudices Tudor and thus warrants lifting the abeyance.

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[21] 890 F.2d 225, 235 (10th Cir. 1989).

[22] Tudor App. Vol. 3 at 20–21 (describing financial hardships); Tudor App. Vol. 4 at 188–93 (describing impediments to reemployment absent reinstatement).

CONCLUSION

For the aforementioned reasons, Dr. Tudor respectfully requests that this Court vacate the April 22, 2019 abatement order and re-schedule oral arguments in this matter with all deliberate speed.

Dated: May 1, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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CERTIFICATE OF SERVICE

I certify that on May 1, 2019, I electronically filed the foregoing Opposed Motion to Vacate Abatement Order with the Clerk of 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.

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