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

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

DR. RACHEL TUDOR'S OPPOSITION TO THE UNITED STATES' MOTION TO DISMISS THE UNITED STATES' CLAIMS

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Dr. Tudor opposes the United States' motion to dismiss its claims (ECF No. 1) with prejudice, (US Motion, ECF No. 164; US Brief in Support, ECF No. 165) for the limited purpose of requesting that the Court place conditions upon the dismissal to ensure that Dr. Tudor is not prejudiced. In the event that the Court deems it infeasible to impose conditions on the dismissal sufficient to protect Tudor from prejudice, Dr. Tudor respectfully requests that the Court deny or delay making a decision on the United States' motion to dismiss until the final resolution of Dr. Tudor's claims.

I. Introduction and Background

Dr. Tudor finds herself in an unusual and unenviable position. After more than two and a half years of co-litigation, the United States has settled its mirror claims and resolved to dismiss them with prejudice, leaving Tudor to continue her fight onward through summary judgment and an impending jury trial. Making matters worse, Defendants and the United States have refused Tudor concessions she urges are necessary to protect her from prejudice.

Prior to the filing of this case, the United States entered into a Common Interest Agreement with Tudor, covering any litigation against Defendants and settlement discussions related to the case. Under shield of the Common Interest Agreement, Tudor and her counsel and the United

States and its counsel divulged sensitive and privileged facts, strategies, and legal theories undergirding both parties' cases in chief.

The United States initiated this Title VII enforcement case on March 30, 2015 (ECF No. 1). Ten days later, Dr. Tudor timely moved to intervene and join an additional claim (ECF No. 7). Tudor filed her Complaint-in-Intervention (ECF No. 24) on May 5, 2015. The United States' Complaint sets forth facts and two claims—sex discrimination and retaliation arising under Title VII—that fully overlap with facts and claims brought by Tudor. (Tudor's Complaint-in-Intervention also sets forth a Title VII hostile work environment claim, which relies upon commonly pled facts, and also pleads additional facts which further buttress her environmental claim.)

Up through August 29, 2017, the United States and Tudor closely co-litigated this case through, among other things, heavy motion practice, discovery involving dozens of depositions and tens of thousands of pages of responsive documents, pre-trial filings, multiple scheduling orders, made initial joint preparations for a jury trial which is currently scheduled for November 7, 2017, and otherwise shared resources, including expert witnesses Drs. Parker and Brown.

On August 30, 2017, with only a few weeks remaining in discovery and just over two months until trial, the United States and Defendants reached a

Compromise Agreement.[1] By letter on that same day, the United States notified Tudor that the Common Interest Agreement "is no longer in effect." Soon thereafter, the United States released Drs. Parker and Brown—experts timely designated by the United States in August 2016 (ECF No. 107)—from retainers and raised no objection to Tudor privately retaining Drs. Parkers and Brown or her utilizing their previously disclosed expert reports going forward.

On August 31, 2017, the United States and Defendants formally asked Tudor to stipulate to the United States' dismissal pursuant to Fed. R. Civ. P. 41(a)(1)(A)(ii) without prejudice. Tudor asked both parties to give her time to consider her options.

On September 1, 2017 and September 4, 2017 Dr. Tudor's counsel formally retained Dr. Parker and Dr. Brown, respectively. Shortly thereafter, Tudor notified the United States and Defendants that she had retained Drs. Parker and Brown and desired to use them as her own experts going forward relying upon the expert reports that the United States had disclosed more than a year prior. In an attempt to avoid inconvenience to Defendants, Dr. Tudor requested that Defendants agree to keep the previously agreed upon

[1] A copy of the Compromise Agreement was filed *ex parte* and under seal by Tudor as an exhibit to her brief in opposition to Defendants' motion for protective order. *See* ECF No. 173, Exhibit 1.

[2] Pursuant this Court's Order (ECF No. 175), deadlines for matters

September 12, 2017 (Brown) and September 18, 2017 (Parker) deposition dates; Defendants refused.

Moving forward, and in good faith, Dr. Tudor reached out to the United States and Defendants to attempt to reach an agreement on language for stipulations tailored to prevent prejudice to Tudor upon the dismissal of the United States from this action. As to a stipulation under Rule 41(a)(1)(A)(ii), Dr. Tudor requested that in any joint motion for stipulation of dismissal the parties agree to language which makes clear there is no preclusive effect as to Tudor's claims and/or facts underlying her claims and further that the dismissal of the United States not trigger any election of remedies as to Tudor. Dr. Tudor also sought additional conditions. As to Defendants, Dr. Tudor requested that Defendants stipulate that Dr. Tudor is permitted to use Drs. Brown and Parker going forward as experts and stick with deposition dates previously selected by Defendants. Dr. Tudor also requested that the United States refrain from making filings or statements touching on the scope of Title VII's protections in her case and the merits of Tudor's case (and overlapping points in the United States' case) until Tudor's case is finally resolved. Both Defendants and the United States refused Tudor's requested concessions.

On the afternoon of September 7, 2017, the United States and Defendants notified Tudor of their intent to move to dismiss the United

States' claims *with prejudice* pursuant to Rule 41(a)(2). In response, Tudor notified both parties of her intent to oppose the dismissal in order to seek conditions on the dismissal from this Court.

Pursuant to this Court's scheduling order (ECF No. 142 as modified by ECF No. 175), discovery closed and dispositive motions and *Daubert* motions for matters between Tudor and Defendants became due on September 22, 2017.[2] On that same day, Defendants filed a motion for summary judgment as to all of Tudor's claims (Defs. SJ Mot., ECF No. 177).

Defendants' motion leans heavily on arguments and legal theories that would be unviable if Tudor was given the concessions she sought from the parties in exchange for her agreement to stipulate to the dismissal of the United States. For example, Defendants raise factual arguments regarding the nature of "biological sex" that are refuted by Dr. Brown's testimony. *See* Defs. SJ Mot. at 20 ("'[S]ex' means a person's biological status and [*sic.*] male or female. Intervenor has not plead [*sic.*], nor can she show, that she is biologically female. This fact precludes her from proving that she belongs to a protected class of 'female', which precludes her from satisfying the first element under *McDonnell Douglas*."). *But see* **Exhibit 1**, Brown Report at 3

[2] Pursuant this Court's Order (ECF No. 175), deadlines for matters involving the United States save for Defendants' motion for protective order (ECF No. 156) and the United States' motion for dismissal (ECF No. 164), are temporarily stayed.

(opining that "'[b]iological sex' is a broad and complex concept that consists of a number of variables, including gender and gender identity, genital anatomy, sexual orientation, hormonal levels in the brain and body, and chromosomal complement."); *id.* at 8 (explaining there is "evidence in support of a biological basis for gender identity"). (To date, Defendants have not filed any motion seeking to exclude Dr. Brown.)

Defendants' summary judgment motion also raises arguments touching on contested pretext issues concerning the nature of tenure and promotion as well as evaluations of Tudor's and comparators' portfolios which Tudor needs to rebut by pointing to Parker's testimony. *See, e.g.*, Defs. SJ Mot. at 22–24 (arguing the Court must give deference to Southeastern's administrative decision-makers in tenure process that Tudor was unworthy of tenure for non-discriminatory reasons); *id.* at 25–26 (arguing that Tudor was unworthy of tenure and has not made showing of pretext). The value of Parker's testimony is clear. Indeed, the Court recently decided that Parker qualified as an expert and that his testimony is relevant to "questions of pretext." Order, ECF No. 163 at 3 ("[Parker] is qualified to explain to the jury the tenure application process, his consideration of Dr. Tudor's work, and his comparison of that work of other applicants who were offered tenure."); *id.* at 4 (Dr. Parker's testimony is relevant to "questions of pretext" that may arise in a motion for summary judgment).

Additionally, Defendants ostensibly argue in their summary judgment motion that the United States' supposed change in position as to Title VII's coverage of sex discrimination claims brought by transgender persons should disrupt this Court's prior ruling of law. *See* Defs. SJ Mot. at 19 (obliquely suggesting that the United States has changed its position as to the scope of Title VII's reach in sex discrimination cases involving transgender persons as evidenced by excerpted text from an *amicus* brief it filed in *Zarda v. Altitude Express*, 15-3775 (2d Cir.))[3]; *id.* at 20 ("Under the authority and reasoning recently offered by the United States of America, 'sex' means a person's biological status and [*sic.*] male or female."). *But see* Order, ECF No. 34 at 4–5[4].

[3] Defendants correctly quote from part of the United States' brief in *Zarda*, but mistakenly cite and attach as an exhibit a brief filed by other *amici* in that same case to their summary judgment motion.

[4] Therein, this Court held,

> Defendants argue Dr. Tudor fails at the first step because she cannot establish she is a member of a protected class. According to Defendants, in *Etsitty v. Utah Transit Auth.,* 502 F.3d 1215 (10th Cir.2007), the Tenth Circuit held a transsexual individual is not within a protected class. However, the reasoning relied on by the Tenth Circuit in *Etsitty* is inapposite here. The Tenth Circuit's holding was that "transsexuals may not claim protection under Title VII from discrimination based solely on their status as a transsexual." *Id.* at 1222. The Circuit went on to clarify that "like all other employees, such protection extends to transsexual employees only if they are discriminated against because they are male or because they are female." Here, it is clear that

II. Standard for Imposing Conditions on or Withholding Dismissal Pursuant to Rule 41(a)(2)

Dismissal pursuant to Rule 41(a)(2) is wholly within the discretion of the district court. *Clark v. Tansy*, 13 F.3d 1407, 1411 (10th Cir. 1993). The purpose of the rule is "primarily to prevent voluntary dismissals which unfairly affect the other side, and to permit the imposition of curative conditions." *Id.* (cleaned up).

Factors that a district court shall consider on a Rule 41(a)(2) motion include: the opposing party's trial preparation efforts and expenses incurred therein, excessive delay or lack of diligence by the moving party, sufficiency of the explanation for requested dismissal, and the "present stage of the litigation." *Ohlander v. Larson*, 114 F.3d 1531, 1537 (10th Cir. 1997); *Stewart*

Defendants' actions as alleged by Dr. Tudor occurred because she was female, yet Defendants regarded her as male. Thus, the actions Dr. Tudor alleges Defendants took against her were based upon their dislike of her presented gender. The Tenth Circuit recognized this distinction in *Etsitty* at n. 2, when it cited to the Sixth Circuit case of *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 label, 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."). The factual allegations raised by Dr. Tudor bring her claims squarely within the Sixth Circuit's reasoning as adopted by the Tenth Circuit in *Etsitty*. Consequently, the Court finds that the discrimination occurred because of Dr. Tudor's gender, and she falls within a protected class. The first element is adequately pled.

v. KFOR-TV, 2006 WL 1702493 at *2 (W.D.Okla. 2006) (Cauthron, J.) (similar). "The Court should also consider other unique factors, if any, relevant to the instant action [. . .], including curative conditions negating legal prejudice, and may take a broad view of all relevant facts considered." *Stewart*, at *2 (*citing Brown v. Baeke*, 413 F.3d 1121, 1124 (10th Cir. 2005)).

"Not all factors considered need be resolved in one party's favor" *Stewart*, at *2 (*citing Ohlander*, 114 F.3d at 1537). "[T]he important aspect is whether the opposing party will suffer prejudice in the light of the valid interests of the parties." *Clark*, 13 F.3d at 1411. "In reaching its conclusion, 'the district court should endeavor to insure substantial justice is accorded to [all] parties]', and therefore the court 'must consider the equities not only facing the defendant, but also those facing the plaintiff'." *Cty. of Santa Fe, N.M. v. Pub. Serv. Co. of New Mexico*, 311 F.3d 1031, 1048 (10th Cir. 2002) (*quoting Ohlander*, 114 F.3d at 1537).

Prejudice. Courts take an expansive view of what amounts to prejudice in the context of Rule 41(a)(2) dismissals. For example, prejudice may be present where an opposing party loses a substantial right as a result of dismissal. *Durham v. Florida East Coast Ry. Co.*, 385 F.2d 366, 368 (5th Cir. 1967) (explicating basic rule). Similarly, prejudice may exist where other burdens appear to be extreme or unreasonable. *See, e.g.*, *Watson v. Clark*, 716 F.Supp. 1354, 1356 (D.Nev. 1989) (explicating basic rule, but not finding

such conditions exist where party moved for dismissal without prejudice, dismissal filed shortly after answer filed, "extensive discovery" not undertaken, and no inordinate amount of time expended on trial preparation).

Where the moving party seeks to dismiss with prejudice predicate and/or overlapping claims that are maintained by a non-settling intervenor whom opposes the dismissal, the requested dismissal prejudices the intervenor and thus should be denied. *See, e.g.*, *Wilkerson v. Schirmer Eng'g Corp.*, 2009 WL 2766716 at *4 (D.Colo. 2009) (Trustee's claims which overlap with those of real party in interest in Title VII case cannot be voluntarily dismissed because dismissal would prejudice real party in interest); *Romoland Sch. Dist. v. Inland Empire Energy Ctr., LLC*, 548 F.3d 738, 750 (9th Cir. 2008) (where moving party's proposed order seeks to dismiss its own claims with prejudice and apply "law of the case" doctrine to claims which overlap with intervenor's claims, dismissal cannot be granted because it would effectuate dismissal with prejudice of intervenor's mirror claims which sows prejudice against intervenor); *ITV Direct, Inc. v. Healthy Solutions, LLC*, 445 F.3d 66, 70–71 (1st Cir. 2006) (opposing "intervenor's interests should also be considered"; dismissal cannot be granted where it would in effect give priority to plaintiff's resolution of its own claims over intervenor's

resolution of its claims; allowing priority of claims amounts to prejudice against intervenor weighing against dismissal).

Placing conditions on dismissal. Courts routinely place conditions on dismissals under Rule 41(a)(2) to ensure fairness to the non-moving parties. *See, e.g.*, *Snyder v. Francis Tuttle Tech. Ctr. Sch. Dist. No. 21*, 2008 WL 2558002 at *1 (W.D.Okla. 2008) (Cauthron, J.) (conditioning dismissal without prejudice on term that moving plaintiff will pay all or part of costs of present litigation if he refiles his case against some or all of defendants in the future).

Denying or withholding dismissal. In a rare situation—like this one—where a plaintiff moves to dismiss with prejudice but the plaintiff-intervenor opposes claiming prejudice will result, the district court may deny dismissal and leave the moving plaintiff to not prosecute its case until final resolution of the intervenor's claims. *See, e.g.*, *Cty. of Santa Fe, N.M. v. Pub. Serv. Co. of New Mexico*, 311 F.3d 1031, 1048–50 (10th Cir. 2002) (denying dismissal with prejudice where intervenors would be adversely impacted by plaintiff's dismissal); *id.* at 1049 (finding no serious prejudice to settling plaintiff if forced to remain in the case until resolution of intervenors' claims); *id.* at 1050 (finding that if intervenors did not succeed on merits claims "that will end the matter" for both intervenors and plaintiff).

Alternatively, in rare situations—like this one—where dismissal would prejudice remaining parties, a court may exercise its prerogative to manage its own docket and delay making a decision on the dismissal motion until the remaining party's claims, which would be prejudiced by a dismissal, are finally resolved. *Baca v. Berry*, 806 F.3d 1262 (10th Cir. 2015) (*quotations omitted*) (though *Ohlander* places some constraints on court's ability to deny Rule 41(a)(2) motion, district court retains broad discretion to stay proceedings as an incident to its power to control its own docket and thus may stay or delay making decision on dismissal which would otherwise result in prejudice).

III. Arguments

A. Condition dismissal of the United States' claims.

1. No Preclusive Effect on Facts or Claims

Dr. Tudor will be prejudiced if the United States' claims are dismissed with prejudice because such dismissal could be construed as a judgment or ruling which precludes Tudor's continued litigation of her mirror claims as well as commonly pled facts which support Tudor's environmental claim.

Dismissal of claims with prejudice constitutes a judgment on the merits of the dismissed claims. *Crowley v. Jones*, 2007 WL 4788471 at *3 (W.D.Okla. 2007) (*citing Clark v. Hass Grp., Inc.*, 953 F.2d 1235, 1238 (10th Cir. 1992)) (Rule 41(a)(2) voluntary dismissal of action with prejudice constitutes

judgment on the merits of the claims dismissed). If the United States' claims are dismissed with prejudice, Defendants could claim *res judicata*[5] or its cousin doctrine, law of the case,[6] effectively dispose of Tudor's mirror claims and facts supporting those claims that both Tudor and the United States pled. (This could potentially also deprive Tudor of moving forward on her hostile work environment claim which relies in part on commonly pled facts.)

As explained above, dismissing the United States claims with prejudice would rob Tudor of her ability to continue her own case forward. This would be prejudicial to Tudor on its face, and thus the Court should deny the United States' motion. *See, e.g.*, *Wilkerson*, at *4; *Romoland Sch. Dist.*, 548 F.3d at 750; *ITV Direct, Inc.*, 445 F.3d at 70–71. However, the Court could condition dismissal by dismissing the United States' claims without prejudice, and include a statement in its order clarifying that the dismissal has no preclusive effect on Tudor's mirror claims and commonly pled facts.

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[5] *See MACTEC, Inc. v. Gorelick*, 427 F.3d 821, 831 (10th Cir. 2005) (The "doctrine of res judicata, or claim preclusion, . . . prevent[s] a party from relitigating a legal claim that was or could have been the subject of a previously issued final judgment."); *id.* at 831 ("claim preclusion applies when three elements exist: (1) a final judgment on the merits in an earlier action; (2) identity of the parties in the two suits; and (3) identity of the cause of action in both suits")

[6] *See Concrete Works of Colo., Inc. v. City and Cty. of Denver*, 321 F.3d 950, 992 (10th Cir. 2003) (cleaned up) (Under law of the case doctrine, "a legal decision made at one stage of litigation, unchallenged in a subsequent appeal when the opportunity to do so existed, becomes the law of the case for future stages of the same litigation, and the parties are deemed to have waived the right to challenge that decision at a later time.").

2. No Election of Remedies

Dr. Tudor will be prejudiced if the Court does not condition and clarify in its order that the dismissal of the United States' claims does not trigger election of remedies as to Tudor on her mirror claims.

In this case, Tudor and the United States have brought two mirror claims and sought similar injunctive and compensatory relief. Where the federal government brings an enforcement action that the charging party joins as an intervenor, election of remedies is triggered where one of the parties fully resolves overlapping claims and another party proceeds in the litigation, seeking relief on those same claims. *See EEOC v. Joslin Dry Goods Co.*, 240 Fed.Appx. 255, 258 (10th Cir. 2007) (observing [but not ultimately deciding issue because charging party's attempted intervention was denied] that where charging party settles claims but EEOC proceeds litigating same claims, if EEOC were to prevail on same claims there is a potential for "double recovery"). *Cf. Boulware v. Baldwin*, 545 Fed.Appx. 725, 728 (10th Cir. 2013) (where overlapping sets of claims seek to remedy the same wrong, "obtaining relief would right the wrong twice").

However, since Tudor was not a party to the Compromise Agreement, the United States' settlement with Defendants should not be used as a means to shield Defendants from *any* remedies sought by Tudor if she prevails on the merits of her mirror claims. Plainly, it would prejudice Tudor to deprive

her of the ability to seek greater relief than that secured by the United States under the Compromise Agreement. *See Wheeler v. Am. Home Prod. Corp. (Boyle-Midway Div.)*, 582 F.2d 891, 896 (5th Cir. 1997) (a stipulation settlement between some parties but not intervenors should not be used to foreclose intervenors' trial on remedies they timely sought prior to stipulation settlement). Under these circumstances, it is appropriate for the Court to condition dismissal with a holding that the dismissal does not trigger an election of remedies as to Tudor.

3. Tudor May Use Drs. Parker and Brown as Experts

Dr. Tudor will be prejudiced if the Court does not condition dismissal of the United States' claims on allowing Tudor's continued use of experts Drs. Parker and Brown.

Up until the execution of the Compromise Agreement, Tudor and the United States shared resources, including experts Drs. Parker and Brown. Though Drs. Parker and Brown were first retained and designated by the United States, at all times Tudor intended to rely upon and use Parker and Brown to buttress her mirror claims. Up to this point, it has been commonly understood that both experts would be utilized by the United States and/or Tudor.[7]

[7] Indeed, in filings and Orders, the parties and the Court have referenced the designated experts as being collectively the Plaintiffs' experts.

Upon learning that the United States settled its claims, Tudor reached out to and retained both Drs. Parker and Brown and quickly notified all parties. As described *supra* Part I, in their summary judgment motion Defendants are now directly attacking issues and facts Drs. Parker and Brown address in their expert reports and/or are prepared to testify to during the jury trial.

Stripping Tudor of her ability to use Drs. Parker and Brown, so close in time to trial—out of time to designate new experts and with no practical ability to vet new experts in time for depositions let alone trial—would unfairly prejudice Tudor. *Cf. Mannering v. Exxonmobil Oil Corp.*, 2005 WL 2210233 at *2 (W.D.Okla. 2005) (conditioning dismissal of federal action on condition that parties use "the discovery and expert witnesses in this case" in parallel state action). Tudor would also be prejudiced if she is deprived of the ability to use Drs. Parker and Brown's testimony specifically to rebut Defendants' arguments raised in their summary judgment motion which aim to attack Tudor's pretext case and the nature of sex.

Conversely, Defendants do not stand to be harmed if Drs. Parker and Brown are permitted to continue to serve as experts in this case. Defendants

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See, e.g., Defs. First Mot. *in Limine*, ECF No. 98 at 1 ("Plaintiffs offer the testimony of Dr. Robert Dale Parker as a purported expert"); Order, ECF No. 163 at 1 ("[i]n preparation for trial, Plaintiffs have retained Dr. Robert Dale Parker").

have known the identities of Drs. Parker and Brown and had access to their expert reports since June 6, 2016. *See* **Exhibit 2** (cover letter disclosing names of experts and disseminating reports as attachments thereto). Moreover, Defendants are well aware of the scope of these experts' expected testimony—and, in the case of Dr. Parker, there is already a Court order (ECF Doc. 163) explicating the permissibility of Parker's testimony and placing limits upon it with the jury.

Taken as a whole, under these circumstances, it is appropriate to condition the dismissal of the United States' claims on Tudor being permitted to continue to use Drs. Parker and Brown as experts.

4. Limit the United States' Filings in and Statements Regarding this Case

Dr. Tudor will be prejudiced if the Court dismisses the United States' claims without the condition that, *a fortiori*, the United States cannot make filings in or make public statements regarding Tudor's case (or its own overlapping merits case) which cut against the legal theories and factual averments made by Tudor herein.[8] At bottom, placing such conditions on

[8] Dr. Tudor wishes to clarify that she requests this condition so as to protect herself, her case, and the integrity of this process and these proceedings from future conduct taken on the behalf of the United States. Dr. Tudor does not contend that the U.S. Department of Justice attorneys who have appeared in this matter thus far harbor personal ill-will against Tudor or themselves would capitulate in such actions. However, Tudor is deeply

dismissal of the United States' claims protects Tudor from prejudice and preserves both the integrity of this process and these proceedings.

Dr. Tudor's private case ultimately endeavors to reinstate Tudor at Southeastern Oklahoma State University and otherwise compensate her for the hostilities, sex discrimination and retaliation she endured between 2007 and 2011. One of the key obstacles to Tudor securing this relief is establishing that Tudor is protected under Title VII. More than two years ago, this Court correctly held that the fact that Tudor is a transgender woman does not exclude her from the ambit of Title VII's protection (Order, ECF Doc. 34 at 4–5). In any normal case, such a ruling would allow a plaintiff in Tudor's shoes to settle or otherwise resolve her case on the merits. Unfortunately, Tudor's case is no ordinary case.

The fact that Tudor's case involves a transgender person makes it of key import to the broader civil rights movement and of key concern to those who desire deprive transgender Americans of Title VII's protection. [9]

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concerned about what direction those attorneys' client will direct them or others to take in the future.

[9] The current political and cultural climate make this obvious. However, to the extent the Court necessitates further evidence, it need look no further than Defendants' foray into *Texas et. al. v. United States et al.*, 7:16-cv-00054 (N.D.Tex. filed May 25, 2016) and the United States' and Tudor's appeals of the preliminary injunction issued therein styled as *Texas et al. v. United States et al.*, 16-11534 (5th Cir.) (collectively, "the *Texas* Litigation"). As the Court is aware, the State of Oklahoma (of which Defendants are sub-divisions)—among other plaintiff states and state sub-

Unfortunately, given the recent change in federal administration and increasing public scrutiny of civil rights matters involving transgender Americans, Tudor's case is uniquely vulnerable to attacks by the United States if it is dismissed from this case without conditions imposed on it limiting its further participation and speech.

There are two key reasons why the United States is prone to take actions that are prejudicial to Tudor upon its dismissal.

First, upon information and belief,[10] the United States desires to change its litigation position as to Title VII's coverage of transgender

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divisions—attempted to use the *Texas* Litigation as a vehicle to get a nationwide declaratory judgment redefining Title VII and Title IX to exclude transgender persons from protection and thereby prohibit the United States and its agencies from protecting transgender Americans from sex discrimination in schools and workplaces. The *Texas* Litigation plaintiffs also sought to collaterally attack this Court's earlier decision (Order, ECF No. 34) finding Tudor is protected under Title VII under a sex stereotyping theory. Indeed, for many months, Tudor's case in this Court was stayed while Tudor challenged the Northern District of Texas court's power to enjoin *this case*. (Tudor's efforts ultimately helped get the preliminary injunction dissolved and forced the withdrawal of the *Texas* Litigation.) Suffice to say, Tudor's case is not an ordinary case given who she is and what she alleges herein. Moreover, it is not unfathomable that Tudor might face atypical obstacles to prosecuting her merits case going forward.

[10] This is based upon the expertise and observations of Dr. Tudor's counsel on the new administration's attempts to reorient litigation postures across a wide swath of civil rights matters, including matters involving transgender Americans. Neither Dr. Tudor nor her counsel are privy to privileged internal deliberations by the United States and its counsel concerning litigation strategy outside of discussions directly related to the co-litigation of Dr. Tudor's case which were subject to and remain subject to the now defunct Common Interest Agreement.

persons. But, as a party to Tudor's case, the United States is in an awkward bind. Tudor's case is the United States' first enforcement litigation advancing an interpretation of Title VII which reaches sex stereotype discrimination experienced by transgender persons; this Court previously issued a ruling settling the scope of Title VII's coverage which is law of the case (ECF Doc. 34 at 4–5); and Tudor's case is the only Title VII case involving a transgender charging party filed by the prior administration still in the United States' litigation portfolio. While it is still a party to this case, the United States cannot take positions in other matters that are in conflict with its position in this case. *But* the United States can change its litigation position if it exits this case.

Second, Tudor's case is set for a jury trial in November 2017—falling within the first year of the new administration's changed approach to transgender Americans, including its high-profile efforts to kick transgender soldiers out of the military[11]. The quickly approaching jury trial in Tudor's case makes a change in the United States' nationwide position particularly urgent.

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[11] *See* Leo Shane III and Tara Copp, *Trump Says Transgender Troops Can't Service in the Military*, Military Times, July 26, 2017, http://www.militarytimes.com/news/pentagon-congress/2017/07/26/trump-says-transgender-troops-cant-serve-in-the-military/ ("Transgender individuals could be kicked out of the military and banned from enlisting under a policy change announced by President Donald Trump on Twitter Wednesday morning.").

If this Court does not condition dismissal of the United States on a judicially enforceable prohibition barring it from taking actions that undermine Tudor's case until her claims are resolved, Dr. Tudor fears that the United States will, upon its exit, take steps that will prejudice her.

For example, the United States might interfere in these proceedings in ways which undercut Tudor's legal arguments and/or otherwise sabotage her merits case. This possibility is not remote—the United States has recently taken such actions in other high profile civil rights matters, including *Zarda v. Altitude Express*, 15-3775 (2d Cir.). In *Zarda*, the United States filed an uninvited *amicus* brief opposing the charging party's argument that gay persons can seek refuge from sex discrimination under Title VII,[12] used its brief to lash out at the U.S. Equal Employment Opportunity Commission's contrary legal conclusions,[13] and sought and received precious time at oral arguments before the *en banc* Second Circuit to push forward its legally specious arguments[14]. As evidenced by *Zarda*, the United States enjoys a unique prerogative to file briefs and otherwise participate in virtually any federal case unless otherwise limited by a court.

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[12] *Zarda v. Altitude Express*, 15-3775, ECF No. 417 (2d Cir.) (filed July 26, 2017), *reprinted at* http://tinyurl.com/y9r496k4.

[13] *See, e.g.*, *Id.* at 1 (arguing that the EEOC is "not speaking for the United States").

[14] The Second Circuit has made its recording of the *Zarda* oral arguments available online. *Zarda*, Oral Arg. Audio, 15-3775 (2d Cir. Sept. 26, 2017) (*en banc*), http://tinyurl.com/ya744hbq.

As troubling as the United States' actions in *Zarda* are, the kind of prejudice Tudor risks if the United States' dismissal is not conditioned to limit post-dismissal activities in her case is potentially far more devastating. Up until recently, the United States was an active party in this case, co-litigated it along side Tudor, and became privy to otherwise privileged facts, legal strategies, and other issues unique to Tudor's case under the now defunct Common Interest Agreement. The likelihood of prejudice if the United States' dismissal is not conditioned as requested by Tudor is plain to all. Indeed, Defendants gleefully seized on the possibility of the United States turning against Tudor in their recently filed summary judgment motion. *See* Defs. SJ Mot. at 19 [arguing change of United States' position as evidenced by its *Zarda* brief]; *id.* at 20 [citing United States' *Zarda* brief as authority cutting against Tudor's theory of status protection under Title VII]).

If left unrestrained, the United States could land devastating blows to Tudor's case—informed by knowledge and insights gained by virtue of its participation in this case and the Common Interest Agreement. Untoward actions by the United States against Tudor would plainly prejudice her and undermine the integrity of this process and these proceedings. This Court is plainly empowered to condition the United States' dismissal as necessary, informed by the unique circumstances and dynamics at play. *Santa Fe*, 311 F.3d at 1048 (*quoting Ohlander*, 114 F.3d at 1537) ("'the district court should

endeavor to insure substantial justice is accorded to [all] parties]', and therefore the court 'must consider the equities not only facing the defendant, but also those facing the plaintiff'").

Given these unique circumstances, Tudor respectfully requests that the Court condition dismissal of the United States, prohibiting it from submitting filings in or making public statements regarding Tudor's case until Tudor's claims are finally resolved.

B. Alternatively, deny or stay decision on United States' dismissal motion.

In the event that the Court finds it infeasible to place the conditions on the United States' dismissal, the Court has two alternative options, both of which protect Tudor from prejudices identified above and serve the higher purpose of protecting the integrity of process and proceedings.

The first option is to deny the United States' dismissal outright, keeping the United States as a plaintiff but not requiring the United States to affirmatively prosecute its case. This option is expressly approved in *Cty. of Santa Fe, N.M. v. Pub. Serv. Co. of New Mexico*, 311 F.3d at 1048–50 (10th Cir. 2002). Much as in *Santa Fe*, dismissing the United States with prejudice would adversely affect Tudor but leaving the United States as a party until Tudor resolves her claims would not prejudice the United States. In this scenario, the United States need not actively prosecute its mirror claims. In

this situation, if Tudor loses her case, "that will end the matter" for the United States—it would be deemed to have lost its claims because Tudor lost her claims, ending things entirely for both Tudor and the United States. 311 F.3d at 1049–50. If Tudor wins her case (or settles), the United States can then move to dismiss its claims, without prejudicing Tudor. *Id.* Much as in *Santa Fe*, the fact that the United States had settled its own claims does not preclude this option. *Id.* at 1048.

The second option is for this Court to delay a decision on the United States' dismissal until Dr. Tudor's claims are resolved. This option is expressly approved in *Baca v. Berry*, 806 F.3d 1262 (10th Cir. 2015). *Baca* teaches that though *Ohlander* places some constraints on a district court's ability to deny Rule 41(a)(2) motions, the court retains broad discretion to stay proceedings and/or delay decision-making on motions as an incident to its power to control its own docket. 806 F.3d at 1269–70. Thus, this Court could simply delay making a decision on the United States' motion—which would not prejudice the United States and would protect Tudor from prejudice—until Tudor's claims are resolved.

IV. Conclusion

For all the foregoing reasons, Dr. Tudor respectfully requests that the Court place conditions on the dismissal of the United States' claims to ameliorate prejudice to Dr. Tudor. In the alternative, Dr. Tudor requests that

the court deny the United States' motion to dismiss its claims. In the second alternative, Dr. Tudor requests that the Court delay making a decision on the United State's motion until Tudor's claims are finally resolved.

Dated: September 28, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2017, I electronically filed a copy of the foregoing with the Clerk of Court by using the CM/ECF system, which will automatically serve all counsel of record.

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