IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON DIVISION

CHRISTOPHER FAIN, *et al.*, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

WILLIAM CROUCH, *et al.*,

Defendants.

CIVIL ACTION NO. 3:20-cv-00740

HON. ROBERT C. CHAMBERS, JUDGE

PLAINTIFFS' OPPOSITION TO DEFENDANT JASON HAUGHT'S MOTION FOR ABSTENTION

Defendant Jason Haught asks this Court to abstain from exercising jurisdiction over this case under the *Colorado River* doctrine. ECF No. 163 at 3. *Colorado River* abstention, however, is an "extraordinary and narrow exception to the duty of a court to adjudicate a controversy properly before it and that abdication of the obligation to decide cases can be justified under abstention only in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest." *Chase Brexton Health Servs., Inc. v. Maryland*, 411 F.3d 457, 463 (4th Cir. 2005) (cleaned up). Even Defendant Haught seems conflicted about whether the elements necessary to request that this Court abstain from exercising jurisdiction are present. They are not. No more than a glance is required to see that Defendant Haught's request is unfounded. For all the reasons below, Defendant Haught's motion for abstention should be denied.

BACKGROUND

On November 12, 2020, Plaintiffs Zachary Martell and Brian McNemar filed this class action against the Director of the West Virginia Public Employees Insurance Agency ("PEIA")

in his official capacity as an *Ex Parte Young* defendant under the Equal Protection Clause. ECF No. 1. Plaintiff Leanne James was subsequently added to the suit through amendment. ECF Nos. 106, 139, 140 (noting that this Court, in granting plaintiffs' motion for leave to file a first amended complaint, stated that the addition of Ms. James "will not prejudice Defendant [Haught]".).

As Interim Director of PEIA, Defendant Haught is the Chief Administrative Officer of PEIA and is responsible for the "administration and management of the Public Employees Insurance Agency." ECF No. 140 at 7 (quoting W. Va. Code § 5-16-3(c)). Through PEIA, qualifying state employees can choose from among several health insurance plans. *Id*. at 17. While the different PEIA health insurance plans offered to state employees are primarily distinguished by coverage ratios, deductible amounts, and general costs to the insured employee, they have at least one feature in common—all health plans offered to state employees contain categorical exclusions of coverage for gender-confirming care (references herein to the "Exclusion(s)" refer collectively to all such Exclusions for gender-confirming care). *Id*. In contrast, gender-confirming care is covered for non-transgender people. *Id*.

Plaintiff Leanne James is a public employee who works for the Kanawha County Board of Education. ECF No. 140 at 24.[1] As part of the terms, conditions, privileges, and status of her employment with the Kanawha County Board of Education, Ms. James is enrolled in a health plan through PEIA and relies on that plan for health care coverage. *Id*.

Ms. James is a woman and she is also transgender. *Id*. In January 2019, Ms. James was diagnosed with gender dysphoria. *Id*. Shortly thereafter, Ms. James began hormone therapy to

[1] Mr. Martell and Mr. McNemar have reached a settlement in principle that is likely to resolve their claims, and this brief accordingly focuses on Ms. James' claims.

alleviate her gender dysphoria. *Id*. As part of her treatment plan, Ms. James requires routine appointments for bloodwork. *Id*. at 25. However, Ms. James continues to be denied coverage for her appointments pursuant to the Exclusion. *Id*. In addition to this, Ms. James is forced to pay out-of-pocket for routine visits with her OB-GYN because of the Exclusion. *Id*. Ms. James requires surgical treatment. *Id*. Although the surgical procedures are medically necessary care to treat her gender dysphoria and are widely accepted and effective treatments for gender dysphoria, the Exclusions in her public employee plan bar her from receiving this medically necessary care. *Id*.

Ms. James has timely submitted a charge to the U.S. Equal Employment Opportunity Commission ("EEOC") for sex discrimination in violation of Title VII. *Id*. at 26; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. Ms. James will seek leave to amend her complaint to add a claim under Title VII after exhausting administrative remedies with the EEOC and receiving notice of her right to sue. ECF No. 140 at 26.

ARGUMENT

I. COLORADO RIVER ABSTENTION DOES NOT APPLY HERE.

Defendant Haught's motion for abstention has no basis in law or fact. "Abstention from the exercise of federal jurisdiction is the exception, not the rule." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976). And "[a]bsent *exceptional* circumstances, the 'district court has a duty to adjudicate a controversy properly before it.'" *Giles v. ICG, Inc.*, 789 F. Supp. 2d 706, 712 (S.D.W. Va. 2011) (italicized for emphasis). In deciding whether *Colorado River* abstention is appropriate, the court must first, as a threshold question, "determine whether there are parallel federal and state suits." *Chase Brexton Health Servs., Inc.*, 411 F.3d at 463. If, and only if, parallel suits exist, will the court then carefully

balance several factors, "with the balance heavily weighted in favor of the exercise of jurisdiction." *Id*. Ultimately, the extraordinary, narrow, and discretionary abstention doctrine recognized in *Colorado River* is limited to only those circumstances in which the federal court "will have nothing further to do in resolving any substantive part of the case." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 28 (1983). This simply is not the case here.

First and foremost, the prerequisite for this form of abstention does not exist because *there is no parallel state suit*. Defendant Haught instead asks this Court to create a new exception out of whole cloth by "extending" the doctrine to an EEOC charge before a federal agency. ECF No. 163 at 4. The court should decline this invitation. Moreover, even if this Court were to take Defendant Haught up on his request to extend *Colorado River* past all recognized limits, Defendant Haught is still unable to meet any of the elements needed to invoke the abstention.

A. *Colorado River* Does Not Apply Here Because There is No Parallel State Proceeding.

In applying *Colorado River* abstention, the Court must first determine "whether the federal and state actions are parallel." *vonRosenberg v. Lawrence*, 849 F.3d 163, 168 (4th Cir. 2017). The answer to this threshold question is "no." Thus, this Court need not even consider the abstention elements under *Colorado River*. There is no parallel state-court action—only administrative charges before a federal agency. Defendant Haught cites no authority suggesting a federal administrative charge is akin to a state court proceeding. Instead, Haught argues that *Colorado River* "is not limited to state suits but extends to administrative actions," relying on *Martin Marietta Corp. v. Maryland Commission on Human Relations*. 38 F.3d 1392 (4th Cir. 1994). The case is inapposite. *Martin Marietta Corp.* dealt with *Younger*—not *Colorado River*—abstention where state administrative proceedings, if they are judicial in nature, are within the

purview of *Younger*. *Id*. at 1396. Defendant cites no such authority under *Colorado River*, and there is no state administrative proceeding here.

To be clear, the requirement of parallel federal and state suits is strict and does not waver in the face of arguable technicalities. *See Colorado River Water Conservation Dist.*, 424 U.S. at 817 (noting federal court's "virtually unflagging obligation" to hear actual cases and controversies before it); *see generally McLaughlin v. United Virginia Bank*, 955 F.2d 930, 936 (4th Cir. 1992) (finding that there was no parallel state proceeding that was duplicative of the federal suit but instead "a complex, heatedly litigated series of complaints, involving various combinations of parties").[2] Moreover, even state and federal claims arising out of the same factual circumstances do not qualify as parallel if they differ in scope or involve different remedies. *See generally, Chase Brexton Health Servs., Inc.*, 411 F.3d at 465 (concluding that the district court erred in determining that "the commonality of a legal issue outweighed the differences between the pending state administrative proceedings and [the federal action]."); *New Beckley Min. Corp. v. Int'l Union, United Mine Workers of Am.*, 946 F.2d 1072, 1074 (4th Cir. 1991) (reversing the district court's decision because although the parties in both actions were virtually identical, "the issues raised and remedies sought [were] not" and "[a] difference in remedies is a factor counseling denial of a motion to abstain."). Put simply, it is not enough that the state action—which again, *does not exist here*—might have a *res judicata* effect upon some of the claims in the federal action but instead, "the decision to invoke *Colorado River* necessarily contemplates that the federal court will have nothing further to do in resolving any substantive part of the case, whether it stays or dismisses." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 28.

[2] Defendant Haught conveniently fails to note that he is not a named respondent in Ms. James's EEOC charge, PEIA is.

Defendant Haught's arguments suffer from at least three major fallacies. First, Defendant Haught erroneously assumes that Ms. James' exhaustion of her administrative remedies with the EEOC is comparable to her Equal Protection claim against Defendant Haught. *See* ECF No. 163 at 6 (arguing that "it is possible that the relief [Ms. James'] seeks could be had in the administrative action" and "[h]aving this EEOC action running concurrently with this action regarding the same transactions and occurrences is not wise"). That is wholly incorrect. While a charge is pending with the EEOC in the administrative forum (i.e., when the plaintiff is going through the exhaustion process), the agency has the power to—at most—encourage the parties to conciliate and mediate, provide a finding of probable cause, and eventually issue a right to sue letter.[3] Nothing about the exhaustion process described above affords Ms. James the ability to secure a binding judgment within the EEOC administrative scheme.

Second, Defendant Haught incorrectly describes the EEOC administrative charge and this case a "parallel." They are not. The parties are different, and in this federal suit, Ms. James brings her Equal Protection claim on behalf of herself, and members of the proposed class, for the purpose of seeking declaratory and injunctive relief and challenging Defendant Haught's enforcement of the discriminatory Exclusion against herself and the proposed class. ECF No. 140 at 33. In contrast, Ms. James' charges of discrimination on the basis of sex in violation of Title VII—an employment statute—are currently being exhausted before the EEOC and are against PEIA and the Kanawha County Board of Education as joint employers. The requirement of strictly parallel actions is not met.

[3] *See* https://www.eeoc.gov/employers/what-you-can-expect-after-charge-filed and https://www.eeoc.gov/after-you-have-filed-charge. (Both last accessed Dec. 1, 2021).

Third, Defendant Haught fails to acknowledge that the remedies Ms. James seeks in bringing her Title VII claim are different and is a factor counseling denial of a motion to abstain. "Title VII was not intended to displace a state employee's remedy under [Section] 1983." *Keller*, 827 F.2d at 958. Such remedies may include, but are not limited to, injunctive relief, compensatory damages, and punitive damages. *See generally*, 42 U.S.C. § 2000e-5(g), (k); 42 U.S.C. § 1981a.

Ultimately, Ms. James' federal administrative action before the EEOC is not an adequate vehicle for the *complete* and *prompt* resolution of her Equal Protection claim against Defendant Haught, which is at issue before this court and of which this court will have to decide a substantive part.

B. Defendant Haught's Request for Abstention Fails to Meet the Elements Required for an Abstention under *Colorado River*.

Even if this Court were to stretch *Colorado River* beyond the limits of its doctrine and decide that the two actions are parallel, Defendant Haught is still unable to meet any of the elements needed to invoke the extraordinary measure of abstention. *Colorado River* requires a court to carefully balance several other factors before abstaining:

> (1) whether the subject matter of the litigation involves property where the first court may assume in rem jurisdiction to the exclusion of others; (2) whether the federal forum is an inconvenient one; (3) the desirability of avoiding piecemeal litigation; (4) the relevant order in which the courts obtained jurisdiction and the progress achieved in each action; (5) whether state law or federal law provides the rule of decision on the merits; and (6) the adequacy of the state proceeding to protect the parties' rights.

Chase Brexton Health Servs., Inc., 411 F.3d at 463–64. When looking at these factors, a court must view them "holistically, 'with the balance heavily weighted in favor of the exercise of jurisdiction." *vonRosenberg*, 849 F.3d at 168 (quoting *Moses H. Cone*, 460 U.S. at 16); *see also Chase Brexton Health Servs., Inc.*, 411 F.3d at 463 (noting that it is not the duty of the court to

"find some substantial reason for the exercise of jurisdiction by the [] court; rather, [the court's] task is to ascertain whether there exist 'exceptional' circumstances, the 'clearest of justifications,' ... to justify the surrender of that jurisdiction.").

There are no extraordinary circumstances justifying abstention here. As Defendant Haught has stated, as "there is no *res* in this matter, the factor does contribute to the court's analysis and weighs against abstention." ECF No. 163 at 6. The second factor, the convenience of the federal forum, does not provide any support for abstention either. Defendant asserts that because Ms. James chose to exhaust her administrative remedies before she was added to the suit through amendment, the federal forum is not convenient. This is simply untrue. Defendant Haught demonstrates no inconvenience in terms of the availability of witnesses, for example, let alone how deferring to the EEOC exhaustion process enhances convenience. Contrary to Defendant Haught's argument, the third factor—avoiding piecemeal litigation—weighs against abstention. Piecemeal litigation occurs when different courts "consider the same issue, thereby duplicating efforts and possibly reaching different results." *Gannett Co. v. Clark Const. Grp.*, Inc., 286 F.3d 737, 744 (4th Cir. 2002). No such concern exists here. Any inconvenience to Defendant Haught arising from the concurrent federal administrative action against PEIA and the matter before this Court is neither unusual nor extraordinary. The fourth factor—the order in which jurisdiction was obtained by the courts—counsels against abstention. The Director of PEIA has had an Equal Protection claim pending against him since November 12, 2020, long before Ms. James began exhausting her administrative remedies, and Ms. James' addition to the complaint did not enlarge or change the scope of that claim in any way. ECF No. 1. Defendant Haught concedes that the fifth factor, source of law governing the decision, weighs against abstention. ECF No. 163 at 6. Finally, the EEOC's determination regarding Ms. James' charges

of discrimination on the basis of sex in violation of Title VII cannot adequately protect the exercise of Ms. James' constitutional rights in this matter—the sixth factor. Ultimately, the *Colorado River* abstention cannot bar this Court's consideration of Plaintiff James' claim.

CONCLUSION

For the foregoing reasons, this Court should deny Defendant Jason Haught's Motion for Abstention.

Dated: December 2, 2021

Respectfully submitted,

/s/ Walt Auvil
Walt Auvil, WVSB No. 190
THE EMPLOYMENT LAW CENTER, PLLC
1208 Market Street
Parkersburg, WV 26101
Phone: 304-485-3058 | Fax: 304-485-6344
auvil@theemploymentlawcenter.com

Anna P. Prakash, MN Bar No. 0351362*
Nicole J. Schladt, MN Bar No. 0400234*
NICHOLS KASTER, PLLP
IDS Center, 80 South 8th Street
Suite 4600
Minneapolis, MN 55402
Phone: 612-256-3200 | Fax: 612-338-4878
aprakash@nka.com
nschladt@nka.com

Sasha Buchert, OR Bar No. 070686*
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
1776 K Street, N.W., 8th Floor
Washington, DC 20006-2304
Phone: 202-804-6245 | Fax: 202-429-9574
sbuchert@lambdalegal.org

Avatara Smith-Carrington, MD Bar*
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
3500 Oak Lawn Avenue, Suite 500
Dallas, TX 75219
Phone: 214-219-8585 | Fax: 214-219-4455
asmithcarrington@lambdalegal.org

Tara L. Borelli, GA Bar No. 265084*
Carl Charles, NY Bar No. 5427026*
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
1 West Court Square, Ste. 105
Decatur, GA 30030
Phone: 470-225-5341
Facsimile: 404-506-9320
tborelli@lambdalegal.org
ccharles@lambdalegal.org

Nora Huppert, CA Bar No. 330552*
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
4221 Wilshire Boulevard, Suite 280
Los Angeles, CA 90010
Phone: 213-382-7600 | Fax: 213-351-6050
nhuppert@lambdalegal.org

Attorneys for Plaintiffs

* Admitted Pro Hac Vice