



U.S. Department of Justice

Civil Division

REK:AKM:EBruskin  
D.J. No. 154-F17-118

---

Washington, DC 20530  
March 26, 2018

Peter R. Marksteiner  
Office of the Clerk  
United States Court of Appeals for the Federal Circuit  
717 Madison Place, N.W.  
Washington, D.C. 20439

Re: *Fulcher v. Secretary of Veterans Affairs*, No. 2017-1460

Dear Colonel Marksteiner:

Pursuant to Fed. R. App. P. 28(j), Respondent David J. Shulkin, Secretary of Veterans Affairs, herein responds to petitioners' Notice of Supplemental Authority, dated March 19, 2018 (Notice). ECF No. 133. The Notice identifies a recent decision from the United States Court of Appeals for the Sixth Circuit, *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, No. 16-2424 (Mar. 7, 2018).

Petitioners point to the Sixth Circuit's decision "that discrimination on the basis of transgender or transitioning status violates Title VII." Notice at 1. As explained in the Secretary's brief, there are strong arguments to the contrary. *See* ECF No. 112 at 44. More fundamentally, given the ordinary remand rule, this Court should not reach out to decide this contested constitutional question, ECF No. 112 at 31-36, and petitioners do not seriously contend that it would be proper for this Court to do so, *see* ECF No. 123 at 23-24 & n.5. Rather, even if the Court concludes that it has jurisdiction despite the lack of final agency action, *see* ECF No. 112 at 13-23, the only appropriate remedy here would be a remand of the rulemaking petition to the Secretary to permit the agency an opportunity to adequately address the petition for rulemaking in the first instance. ECF No. 112 at 25-27, 31-36.

Very truly yours,

/s/Eric P. Bruskin  
ERIC P. BRUSKIN  
Senior Trial Counsel  
Commercial Litigation Branch

cc: Counsel of Record (via ECF)

**CERTIFICATE OF SERVICE**

I hereby certify under penalty of perjury that on this 26th day of March, 2018, a copy of the foregoing letter was filed electronically. The filing was served electronically to all parties by operation of the Court's electronic filing system.

/s/Eric P. Bruskin