No. 18-6102

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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

v.

SOUTHEAST OKLAHOMA STATE UNIV., *et al.*
Defendants-Appellees-Cross-Appellants.

On Appeal from the United States District Court
for the Western District of Oklahoma
Case No. 5:15-cv-00324
The Honorable Robin Cauthron, District Judge.

AMICUS CURIAE LAMBDA LEGAL'S MOTION FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT

Pursuant to Fed. R. App. P. 29(a)(8), amicus curiae Lambda Legal respectfully moves this court for leave to participate in oral argument scheduled in this case on May 7, 2019. Amicus requests that the total argument time for each side be augmented by 5 minutes (or 10 minutes if the court prefers that). In the alternative, if the court is unwilling to add time to the argument, it can grant leave

for the undersigned amicus to participate, and allocation of the time allotted for Tudor will be worked out between counsel for Tudor and the undersigned.

Undersigned counsel supervised the production of Lambda Legal's amicus brief in *Etsitty v. Utah Transit Auth*., 502 F.3d 1215 (10th Cir. 2007) and was the primary author of its brief submitted on this appeal. The undersigned has participated in oral argument in appeals involving the legality of sex discrimination against transgender and lesbian, gay, and bisexual persons under federal law. *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (counsel for transgender plaintiff); *Hively v. Ivy Tech Community College*, 853 F.3d 339 (7th Cir. 2017) (en banc) (counsel for lesbian plaintiff); *Zarda v. Altitude Express*, 883 F.3d 100 (2d Cir. 2018) (en banc) (gay male plaintiff; undersigned served as amicus); *Evans v. Georgia Regional Hosp*., 850 F.3d 1248 (11th Cir. 2017) (counsel for lesbian plaintiff), *Horton v. Midwest Geriatric Mgmt.*, 8th Cir. No. 18-1102 (oral argument set for April 17, 2019) (counsel for gay male plaintiff). Each of these appeals squarely presents or presented the question of whether federal sex discrimination protections covered the LGBT plaintiff.

But perhaps of greater relevance to this motion is two appeals for which the undersigned presented oral argument as amicus curiae in the Fifth Circuit in January 2019, after that court's granting of a motion for leave. *Wittmer v. Phillips 66 Co.*, 915 F.3d 328 (5th Cir. 2019) and *O'Daniel v. Industrial Serv. Solutions*, 5th

Cir. No. 18-30136 (argued and submitted January 9, 2019). Each was an appeal by an unsuccessful employee, in which the district court had opined on Title VII coverage.[1] But equally true and even more important given the sweeping effects of a circuit court pronouncement on coverage[2] was that judgment against the plaintiff could be affirmed on narrower, case-specific facts.[3] Undersigned amicus so argued, and the *Wittmer* court agreed; we await a decision in *O'Daniel*. *See Wittmer*, 915 F.3d at 330. In short, Lambda Legal prides itself as an impact

---

[1] *Wittmer v. Phillips 66 Co.*, 304 F. Supp. 3d 627, 634 (S.D. Tex. 2018) ("the court assumes that Wittmer's status as a transgender woman places her under the protections of Title VII" in light of "very recent circuit cases [that] are persuasive") (citing *Hively*, *Zarda*, and *Equal Emp't Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 577 (6th Cir. 2018)), *aff'd on other grounds*, 915 F.3d 328 (5th Cir. 2019); *O'Daniel v. Indus. Serv. Sols*., No. CV 17-190-RLB, 2018 WL 265585, at *7 (M.D. La. Jan. 2, 2018) ("It is unreasonable for Plaintiff to believe that discrimination based on her status as a married, heterosexual female constitutes discrimination on the basis of her sex.")

[2] According to the opinions in *Evans* and *Wittmer*, it is fair to say that the only reason that over 73 million residents of the six states of the former Fifth Circuit cannot invoke Title VII if they endure sexual orientation discrimination is because, in 1979, the court in *Blum v. Gulf Oil Co*., 537 F.2d 936 (5th Cir 1979) was not content with upholding a verdict that Mr. Blum had been fired for "engaging in personal real estate business activities during regular working hours" and not "because he was Jewish, male, white, and homosexual." but instead added the gratuitous, penultimate sentence of the opinion: "Discharge for homosexuality is not prohibited by Title VII." *Id*. at 937, 938.

[33] *Wittmer*, 304 F. Supp. 3d at 637 ("Wittmer neither presents nor points to record evidence to support" that there was "a pretext for discrimination, or that her later-related information about her transgender status was a motivating factor in the decision to rescind the offer."); *O'Daniel* 2018 WL 265585, at *7 (M.D. La. Jan. 2, 2018) ("Plaintiff does not allege, or propose any allegations, indicating that Defendants terminated her because of her sexual orientation").

litigation organization that can explain why seemingly groundbreaking decisions are necessary and proper when issues are squarely presented, like the *Hively* decision issued two years ago today. But we not only recognize and respect the judicial restraint that courts should exercise in hesitating to rule more broadly than necessary, but stand ready to assist them in that process. *See generally See Valley Forge Ins. Co. v. Health Care Mgmt. Partners, Ltd.*, 616 F.3d 1086, 1094 (10th Cir. 2010) ("Judicial restraint, after all, usually means answering only the questions we must, not those we can.") (Gorsuch, J.).

This means that, if this motion is granted, amicus intends to focus on whether the liability judgment can be affirmed on the simple basis of the substantial evidence supporting it under a jury instruction that was both not objected to and that complies with even a conservative reading of *Etsitty*. Amicus will also attempt to parlay a dozen years of experience of courts and litigants citing and misciting *Etsitty* into any helpful thoughts that might guide the court's consideration and preparation of a decision.[4]

---

[4] Perhaps the most prominent mischaracterization of *Etsitty* is to depict the decision as the basis for a circuit split, as if this Court had adjudicated Krystal Etsitty to be a "biological male" (as opposed to her explicitly pursuing the case as a male) whom her employer could appropriately consign forever (as opposed to the Utah Transit Authority's willingness to rehire Etsitty upon completion of her transition when her legal and lived identity would merge) to using only the men's restrooms on the employer's premises (as opposed to the contemporaneously-expressed sole concern about liability from Etsitty's using bathrooms on others' premises). *See e.g., R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Opportunity Employment*

CERTIFICATION OF COMPLIANCE WITH TENTH CIRCUIT RULE 27.1

Undersigned counsel consulted with counsel for Tudor, Ezra Young, who consents to this motion. Undersigned counsel emailed Zach West, counsel for Southeastern, asking "I intend to move for leave to participate in oral argument and have the total argument time for each side augmented by 5 minutes (or 10 minutes if the court prefers that). In the alternative, if the court is unwilling to add time to the argument, it can grant leave for me to participate and allow Ezra Young and me to allocate the time between us." Mr. West responded that "We oppose altering the typical format for oral argument in the Tenth Circuit."

Undersigned counsel does not view the instant request as altering Tenth Circuit rules so much as being akin to the request made in *American Athiests, Inc. v. Duncan*, wherein "the States of Colorado, Kansas, New Mexico, and Oklahoma

---

Com'n, U.S. S. Ct. No. 18-107, Petition for a Writ of Certiorari, 2018 WL 3572625 *25 (July 24, 2018) ("The Tenth Circuit thus affirmed that employers may administer sex-specific policies according to their employees' sex rather than their gender identity."); *Doe v. Boyertown Area School Dist*., U.S. S. Ct. No. 18-658, Brief of Amicus Curiae Women's Liberation Front in Support of Petitioners[' Petition for Writ of Certiorari], 2018 WL 6716868 *6 (December 18, 2018) ("The Tenth Circuit held that Title VII allows employers to require employees to use restrooms consistent with their sex."); *see also Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 515, 517 n3 (3d Cir. 2018) (Jordan, J., dissenting from denial of reh'g en banc) (making the true but selective point that *Etsitty* "stated" that Title VII does not "require a government entity to permit a transsexual person to use the bathroom designated for use by persons of the opposite biological sex.") (quoting *Etsitty*, 502 F.3d at 1224 (10th Cir. 2007).

and The Becket Fund for Religious Liberty ('amici') respectfully move this Court for leave to participate in oral argument." *American Athiests, Inc. v. Duncan*, No. 08-4061, Motion of Amici Curiae, the States of Colorado, Kansas, New Mexico, and Oklahoma and the Becket Fund for Religious Liberty for Leave to Participate in Oral Argument, p. 1 (Dec. 2, 2008). Indeed, the request is procedurally identical ("Amici request five minutes of oral argument time, in addition to the parties' time," *see id.*), except that undersigned counsel proposed a corresponding increase in the argument of the opposing side, whereas in *American Athiests*, it was Chief Judge Henry, in granting the motion, who ruled "On the court's own motion, the Appellants will receive an additional five minutes of time for a total of twenty minutes argument time." *American Athiests, Inc. v. Duncan*, No. 08-4061, Order, Jan. 26, 2009.

CONCLUSION

For the aforementioned reasons, Lambda Legal respectfully requests that this it be allowed to participate in oral argument before this Court as amicus curiae.

DATED: April 4, 2019

Respectfully submitted,

LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.

By: /s/ *Gregory R. Nevins*
Gregory R. Nevins
Attorneys for *Amicus Curiae*
Lambda Legal

CERTIFICATE OF COMPLANCE WITH RULE 32

This motion complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type-style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016, in 14-point Times New Roman font, and contains only 1,509 words.

DATED: April 4, 2019 By: *_/s/ Gregory R. Nevins_*
Gregory R. Nevins

CERTIFICATE OF SERVICE

I, Gregory R. Nevins, hereby certify that on April 4, 2019, I electronically filed a copy of the foregoing with the Clerk of Court using the CM/ECF system, which will automatically serve all counsel of record.

/s/ Gregory R. Nevins

Gregory R. Nevins
Lambda Legal
730 Peachtree Street NE, Suite 640
Atlanta, Georgia 30308
Phone: (404) 897-1880
Fax: (404) 897-1884
gnevins@lambdalegal.org

Attorneys for Amicus Curiae
Lambda Legal Defense & Educ. Fund, Inc.