EXHIBIT A

No. 19-40016

In the

United States Court of Appeals

for the

Fifth Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

– v. –

NORMAN VARNER,

Defendant-Appellant.

On Appeal from the United States
District Court for the Eastern District of Texas
No. 4:11-CR-14-1

BRIEF OF 83 LEGAL ETHICS PROFESSORS AS AMICI CURIAE IN SUPPORT OF REHEARING EN BANC

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SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons as described in the fourth sentence of Circuit Rule 28.2.1, in addition to those disclosed in the parties' certificates of interested persons, have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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Dated: March 20, 2020 *<u>/s/ Geoffrey M. Pipoly</u>*

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INTRODUCTION AND INTEREST OF AMICI[1]

Amici are 83 legal scholars whose scholarship, teaching, and professional service has focused on legal ethics and professional responsibility, including the professional norms governing lawyers and judges. In particular, amici have authored abundant legal academic and professional literature regarding judicial ethics, including on issues of judicial courtesy towards litigants. Amici are uniquely well-qualified to comment on the issues engendered by the panel majority's decision not to extend to Petitioner the courtesy of using Petitioner's requested name and pronoun.

The attached Appendix contains a complete list of amici.

ARGUMENT

This case is about courtesy and the panel majority's decision not to extend it to Petitioner. Petitioner did not, as the panel majority posited, ask the Court to ***require*** anyone to do anything. Instead, Petitioner made a simple two-sentence request that this Court, as a matter of

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1 No party or counsel for any party authored this brief in whole or in part or otherwise contributed monetarily towards its preparation or submission. No person other than the amici and their counsel contributed monetarily towards the preparation or submission of this brief. All parties have consented to the filing of this brief.

courtesy, refer to Petitioner by the name and pronoun with which Petitioner identifies.

The way in which a court refers to a litigant is a simple matter of courtesy. Judges should be courteous to litigants, and abiding by litigants' requests to be addressed in a particular way consistent with their identities is a critical component of courtesy. Judges should be courteous to ***all*** litigants, including transgender litigants like petitioner, or litigants with less consequential requests regarding their identity (for example, litigants who present themselves to the world using a maiden name or nickname). A litigant whose request is not respected in this regard would feel disrespected. Worse, the litigant could reasonably perceive that the judge is biased.

The panel majority should have extended Petitioner the courtesy of addressing Petitioner by the name and pronouns with which Petitioner identifies. Alternatively, the panel majority should have eschewed personal pronouns and names altogether. This Court should grant rehearing to correct the panel majority's ill-advised treatment of Petitioner's request.

A. Courts Should Treat Litigants With Courtesy, Which Includes Using Parties' Requested Names And Pronouns.

To be "courteous" is to show "gracious consideration towards others." American Heritage Dictionary (4th ed. 2009). "All persons involved in the judicial process," including judges, "owe a duty of courtesy to all other participants." *In re Snyder*, 472 U.S. 634, 647 (1985).

To that end, state courts and federal courts alike have model codes of judicial conduct counseling that judges should treat litigants with courtesy and respect. For example, Canon 2 of the ABA's Model Code of Judicial Conduct states that "[a] judge shall perform the duties of judicial office impartially, competently, and diligently." Rule 2.8(B) states that a judge should be "patient, dignified, and courteous" to those "with whom the judge deals in an official capacity." Similarly, Canon 3 of the Code of Conduct for United States Judges counsels that judges "should be patient, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity." These standards of courtesy "address[] the general need to maintain public confidence in the judiciary by avoiding all impropriety

and the appearance of impropriety." Leslie W. Abramson, *Canon 2 of the Code of Judicial Conduct*, 79 MARQ. L. REV. 949, 958 (1996).

Consistent with the values embodied in these judicial codes and model rules, judges in federal and state courts around the country have for decades referred to transgender litigants by those litigants' requested pronouns. *See, e.g., Farmer v. Haas,* 900 F.2d 319, 320 (7th Cir. 1993) (Posner, J.); *United States v. McGrath*, 80 F. App'x 207, 207 n.1 (3d Cir. 2007); *Smith v. Palmer*, 24 F. Supp. 2d 955, 957 n.1 (N.D. Iowa 1998); *Phillips v. Michigan Dep't of Corr.*, 731 F. Supp. 792, 793 n.2 (W.D. Mich. 1990) (using the plaintiff's requested pronoun "out of respect for plaintiff" notwithstanding that "whether plaintiff is indeed a transsexual" was a contested issue in the case); *Littleton v. Prange*, 9 S.W.3d 223, 224 (Tex. App. 1999) ("Throughout this opinion Christie will be referred to as 'She.' This is for grammatical simplicity's sake, and out of respect for the litigant, who wishes to be called 'Christie' and referred to as 'she.' It has no legal implications.").

Just three years ago, when the Supreme Court granted certiorari in a case involving a transgender litigant, it used the litigant's requested pronoun in the case caption. *See Gloucester Cty. Sch. Bd. v.*

*G.G. By **His** Next Friend and Mother, Dierdre Grimm*, 137 S. Ct. 369 (Mem) (Oct. 28, 2016) (emphasis added). The Supreme Court Clerk even instructed an amicus who had used the litigant's incorrect pronoun in the caption to revise the caption to reflect the litigant's requested pronoun. Letter from Scott S. Harris, Clerk, United States Supreme Court, to Mr. Matthew D. Staver, Liberty Counsel (Feb. 24, 2017), *available at* https://bit.ly/2Q0egJP.

A court refusing to extend basic courtesy by employing a transgender litigant's requested name and pronoun is especially hurtful in light of the fact that Courts often defer to litigants' preferences on far less serious issues of identity, like maiden names and nicknames.[2] Courts often have deferred to litigants who wish to be referred to by a maiden name. *See, e.g., Herwig v. United States*, 105 F. Supp. 384, 385 (Ct. Cl. 1952) (because the plaintiff "designated herself by her maiden name … hereinafter she will be referred to by said maiden name"); *Trust Co. Bank of Northwest Georgia, N.A. v. Manning*, 1993 WL

[2] Indeed, the consequences of failures to respect transgender persons' requested name and pronoun are severe. *See* Stephen T. Russell, *et al.*, *Chosen Name Use Is Linked to Reduced Depressive Symptoms, Suicidal Ideation, and Suicidal Behavior Among Transgender Youth*, 63 J. Adolescent Health 379 (2018).

294184, at *2 n.1 (N.D. Ga. May 21, 1993) (because the defendant "seems intent on being called by her maiden name … [t]he Court will abide by her apparent intention and refer to her in the same manner"); *White v. White*, 623 So.2d 31, 33 (La. Ct. App. 1993) (because "plaintiff prefers to be called" by her maiden name, Mills, "[t]his Court will hereinafter refer to plaintiff as Ms. Mills").

Courts have similarly deferred to litigants who wish to be referred to by a nickname. *See, e.g.*, *In re Thorpe*, 2019 WL 3778359, at *1 (B.A.P. 9th Cir. Aug. 19, 2019) ("Douglas Thorpe ('Doug, as he prefers to be called')"); *In re Marriage of Whalen*, 2019 WL 1487637, at *1 n.1 (Iowa Ct. App. Apr. 3, 2019) (acquiescing to litigant's preference to be called "D.J." instead of "Douglas"). Indeed, sometimes courts defer to a litigant's wish to be called by a name bearing little or no resemblance to the name on the litigant's official records. *See, e.g., United States v. Rowell*, 2016 WL 5477610 at *1 n.1 (E.D. Wis. Sept. 29, 2016) (using the defendant's "preferred name of Denard El Ali Bey" even though the defendant's official name was Denard Anton Rowell); *Nichols v. State*, 620 S.W.2d 942, 942-43 (1981) (noting that the defendant, whose official

name was Penelope Nichols, "prefers to be called Sister Penny" and referring to the defendant as Sister Penny throughout the opinion).

Here, Petitioner made a two-sentence request of the panel, styled as a "Motion to Use Female Pronouns When Addressing Appellant." The totality of Petitioner's request was: "I am a woman and not referring to me as such leads me to feel that I am being discriminated against based on my gender identity. I am a woman—can I not be referred to as one?" *See* Op. 15. Contrary to the panel majority's interpretation of Petitioner's request as "seeking, at a minimum, to require the district court and the government to refer to [Petitioner] with female … pronouns," Petitioner's request was nothing more than a simple entreaty to be addressed by the Court with the courtesy and respect judges are accustomed to extending to litigants. Part II.B of the panel majority's opinion declined to extend this basic courtesy to petitioner. This Court should accordingly grant rehearing and, at a minimum, revise its opinion to extend the courtesy Petitioner requests or, in the alternative, revise the opinion to avoid using pronouns entirely.

B. By Refusing To Refer To Petitioner By Petitioner's Requested Name And Pronoun, The Panel Majority Evidenced Partiality And Bias *Against* Petitioner.

In Part II.B of its opinion, the panel majority considered at length the "delicate questions about judicial impartiality" implicated by Petitioner's request to be called by a requested name and pronoun. Op. 8. The majority concluded that because "federal courts today are asked to decide cases that turn on hotly-debated issues of sex and gender identity," using a transgender litigant's requested pronoun "may unintentionally convey its tacit approval of the litigant's underlying legal position," which is an "appearance of bias" to be "avoided." Op. at 8-9.[3]

The majority's conclusion that referring to Petitioner by Petitioner's requested name and pronoun would reflect bias in favor of Petitioner is at odds with the majority's own, correct observation that "[a]t its core … judicial impartiality is the lack of bias for ***or against*** either party to a proceeding." Op. 8 (emphasis added; internal quotation marks omitted); *see also* Concise Oxford English Dictionary 713 (11th

[3] Amici question this premise, given the long history of courts employing litigants' requested names, but accept it for purposes of discussion.

ed. 2008) (defining "impartial" as "treating all rivals or disputants equally"). Indeed, impartiality is a two-way street—a court should avoid showing bias to ***either*** party.

Thus, assuming *arguendo* that a court's use of a transgender litigant's requested name and pronoun signals bias in that litigant's ***favor***, it is equally true that refusing to use a transgender litigant's requested name and pronoun signals bias ***against*** that litigant. As one scholar explained, "[o]ften … one can guess the court's sympathies, and thus the outcome of the case, from [the] initial language choice [to use or not use a litigant's requested pronoun]. … [W]hen a court refuses to accept an individual's own assertion of gender identity, via the pronoun by which he or she refers to him or herself, it is unlikely to give credence to the … litigant's other related claims." Susan Etta Keller, *Operations of Legal Rhetoric: Examining Transsexual and Judicial Identity*, 34 HARV. C.R.-C.L. L. Rev. 329, 348-49 (1999).

In other words, the majority's effort to avoid showing bias in Petitioner's favor inevitably gives rise to a perception of bias against Petitioner. And in the world of judicial ethics, perception is everything. *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 446 (2015) ("As Justice

Frankfurter once put it for the Court, 'justice must satisfy the appearance of justice.'"). What is more, the majority's decision raises serious concerns over access to justice. If litigants perceive that courts will treat them discourteously, and particularly in such a profoundly hurtful way, litigants are less likely to invoke the judicial process, and more likely to lack confidence that courts are dispensing even-handed justice.

The panel majority readily could have alleviated its concern about signaling bias in favor of Petitioner while at the same time not signaling bias against Petitioner: It could have written its opinion without pronouns and proper names altogether. This is not a novel idea. For example, in *United States v. Jenkins*, 2017 WL 11446244 (D.S.C. Mar. 7, 2017), the defendant, a federal inmate just like Petitioner here, filed a *pro se* motion in the district court for a "religious name change." *Id*. at *1. The defendant, whose given name was David Andrea Jenkins, "converted to Islam and wish[ed] to be called by his adopted name, 'Arma Khaliq Sundiata.'" *Id*. The district court denied the defendant's motion because the defendant had not complied with Bureau of Prisons policy requiring "'verifiable documentation of the name change' so that

the name may be entered as the inmate's 'legal' name." *Id.* At no point in its opinion denying the defendant's motion, however, did the district court refer to the defendant as "Jenkins" ***or*** as "Sundiata," opting instead to use the neutral term "defendant" throughout its opinion.

The panel majority here could have done the same as the court in *Jenkins*—instead of referring to Petitioner using ***any*** proper name or ***any*** pronoun, it could have used a neutral term such as "Movant" or "Defendant." It is feasible to write a judicial opinion using no pronouns or proper names; indeed, this amicus brief uses no identity-defining pronouns at all except when quoting a source.

C. Judicial Courtesy Is A Bulwark That Helps Preserve Courts' Integrity In The Face Of Evolving Language.

"Human language evolves through individuals who live in cultures." Timothy B. Jay, The Psychology of Language 451 (2003). As just one example, "[n]ot so long ago, women faced fierce resistance to changing language from the collective 'he' to 'he or she.' Now it is the accepted rule." Kathleen Dillon Narko, *They and Ze: The Power of Pronouns*, CBA REC., Jan. 2017, 48, 52.

Precisely because language evolves, words and phrases that were once socially acceptable—even to the extent of being codified in law—

are now viewed as scientifically inaccurate, derogatory, or discriminatory.

Today, judges, lawyers, and nonlawyers alike cringe when reading the infamous line from Justice Oliver Wendell Holmes: "Three generations of imbeciles is enough." *Buck v. Bell*, 274 U.S. 200, 207 (1927); *see also Chamul v. Amerisure Mut. Ins. Co.*, 486 S.W.3d 116, 117 (Tex. App. 2016) (noting "terms such as imbecile and feeble-minded were considered scientific and acceptable in the first quarter of the 20th century but were replaced after time with successive euphemisms") (citation omitted)).

Courts used to call paternity suits "bastardy proceedings" (*e.g., State v. Woods*, 170 P. 986, 986 (Kan. 1918)), a term that no one would use today.

Courts have a less than stellar historical record when it comes to the use of outdated terms and concepts in the area of race. *See, e.g., New York Foundling Hosp. v. Gatti*, 203 U.S. 429, 436 (1906) (describing "half-breed Mexican Indians" who were "wholly unfit to be intrusted" with the care of children); *United States v. Sugden,* 226 F.2d 281, 283 (9th Cir. 1955) (referring to Mexicans as "wetbacks");

Robertson v. Natchitoches Par. Sch. Bd., 431 F.2d 1111, 1114 (5th Cir. 1970) ("The record shows that the mulattos once had the school as their own but more recently individuals of a higher percentage of Negro blood have been included …."); *United States v. Michigan*, 471 F. Supp. 192, 207 (W.D. Mich. 1979) (referring to indigenous peoples as "Red Indians"); *Frankin v. World Pub. Co.*, 83 P.2d 401, 403 (Okla. 1938) ("The Chinaman is frequently referred to as a 'Chink'.").

Not only is courtesy an ethical imperative for judges, it is an effective tool judges should employ to help ensure that their decisions are not viewed by future generations as of a piece with *Buck v. Bell*. A court that defers to a litigant's requested pronoun, name, or ethnic terminology can hardly be said to be imposing its own beliefs or values on the case. Thus, judicial courtesy, manifested by deference to litigants' choice of terminology, is consistent with the purpose of the ethical rules governing judicial conduct, which is to "maintain both the reality of judicial integrity and the appearance of that reality" because "[t]he public has confidence in judges who show character, impartiality, and diligence." Abramson, *supra,* page 4, at 951.

CONCLUSION

The petition for rehearing *en banc* should be granted.

Dated: March 20, 2020

Respectfully submitted,

/s/ Geoffrey M. Pipoly

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CERTIFICATE OF SERVICE

I certify that I filed this brief using the Court's CM/ECF system on March 20, 2020. All participants in the case will be served electronically.

Dated: March 20, 2020 _/s/ Geoffrey M. Pipoly_

CERTIFICATE OF COMPLIANCE

Pursuant to Appellate Rule 32(g), the undersigned counsel for Amici Legal Ethics Scholars certifies that this motion:

(i) complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(b)(4) because it contains 2,595 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface and typestyle requirements of Rule 32(a) and Fifth Circuit Rule 32.1 because it has been prepared using Microsoft Office Word and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

Dated: March 20, 2020 *_/s/ Geoffrey M. Pipoly_*

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EXHIBIT B

No. 19-40016

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff–Appellee,

v.

NORMAN VARNER,

Defendant–Appellant

On Appeal from the United States District Court
for the Eastern District of Texas
Case No. 4:11-cr-14-1

BRIEF OF *AMICI CURIAE* CIVIL RIGHTS ORGANIZATIONS IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING *EN BANC*

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CERTIFICATE OF INTERESTED PERSONS
United States v. Norman Varner
No. 19-40016

The undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case as described in the fourth sentence of Rule 28.2.1. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Plaintiff–Appellant

Norman Varner, a/k/a Katherine Jett

Defendant–Appellee

United States of America

Amicus Curiae

Anti-Defamation League
Lawyers' Committee for Civil Rights Under the Law
Leadership Conference on Civil and Human Rights
Mississippi Center for Justice
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March 20, 2020

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INTERESTS OF THE *AMICI CURIAE*

As set out more fully in the accompanying motion for leave to file, *amici* are the following Civil Rights Organizations with expertise in protecting the constitutional and civil rights of historically disadvantaged groups: The **Southern Poverty Law Center**, a nonprofit civil rights organization dedicated to fighting hate and bigotry, and to seeking justice for the most vulnerable members of society; The **Anti-Defamation League**, a nonprofit organization founded in 1913 that works against intolerance and hatred, seeks to stop the defamation of the Jewish people, and fights to secure justice and fair treatment for all; The **Lawyers' Committee for Civil Rights Under Law**, a nonpartisan, nonprofit civil rights organization formed in 1963, at the request of President John F. Kennedy, to enlist the American bar's leadership and resources in defending the civil rights of racial and ethnic minorities; The **Leadership Conference on Civil and Human Rights**, a coalition of more than 200 national organizations, founded in 1950, that seeks to build an inclusive America and to promote and protect the civil and human rights of all individuals in the United States; and the **National Women's Law Center**, a nonprofit legal organization dedicated to the advancement and protection of the legal rights of women and girls, and the right of all persons to be free from discrimination, including LGBTQ individuals.

Amici have participated as counsel or *amicus curiae* in a range of cases before the Supreme Court, federal appellate and district courts, and state courts to secure equal treatment and opportunity for marginalized groups in all aspects of society. We offer relevant information and historical perspective on the judiciary's illegitimate reliance on presumptions and prejudice to justify discrimination.

RULE 29(A)(2) STATEMENT

Amici obtained the consent of all parties to file this brief.

RULE 29(A)(4)(E) STATEMENT

The Southern Poverty Law Center and Johnston Tobey Baruch are the sole authors and funders of this brief. No other party or person authored this brief in whole or in part. No other party or person contributed money for the preparation or submission of this brief.

ARGUMENT

Amici take no position on the merits of the underlying appeal, submitting this brief, instead, to urge the Court to withdraw the majority opinion and replace it with one that respects the litigant's gender identity and, at minimum, excises Section II, Part B.

Fundamentally, *amici* object to the Court's response to a *pro se* litigant's two-sentence request that the Court reference her congruent with her gender identity: "I am a woman and not referring to me as such leads me to feel that I am

being discriminated against based on my gender identity." *United States v. Varner*, 948 F.3d 250, 254 (5th Cir. 2020). Rather than simply honoring the request out of courtesy—or avoiding pronouns altogether by referring to her as "appellant"—this Court repeatedly referred to her using male pronouns and included Section II-B, a hostile rejection of the request that spanned five pages justifying its denial of this simple courtesy.

As detailed herein, because the majority opinion, particularly Section II-B, harkens back to many difficult moments in this nation's history when prejudice against marginalized groups informed judicial opinions; causes harm to the litigant and others; creates an impression of bias; and is out of sync with treating all parties with basic respect and dignity, *amici* urge the Court to withdraw the opinion.

I. The Majority Opinion Repeats Past Errors in Justifying Discrimination and in Creating a Barrier to Justice for a Historically Marginalized Group.

Throughout our nation's history, courts have too often failed to excise the influence of personal bias from decisions involving members of oppressed groups. Racial arrogance, male dominance, and reliance on past prejudice to justify ongoing oppression created obstacles not only to justice but also to cross-cultural understanding and intellectual progress. Court decisions concerning discrimination against people of color and women provide just two examples.

Among the most enduring stains in American jurisprudence are decisions imposing or reinforcing inequality and indignity against Black people based on entrenched ignorance and naked prejudice. For example, in *Dred Scott v. Sandford*, 60 U.S. 393, 405 (1857), the Supreme Court relied on reasoning that shocks the modern conscience. *Id*. at 407 (justifying its decision that descendants of slaves were not citizens on white people's historical perception that Black people were "beings of an inferior order"). *And see*, James F. Simon, Lincoln and Chief Justice Taney: Slavery, Secession, and the President's War Powers 271 (2006) (the *Dred Scott* decision suffers from its reliance on a "rigid march to … doctrinaire conclusions."). Even after a constitutional amendment constructively overturned *Dred Scott*, prejudice cloaked in judicial reasoning continued to thwart equality for non-white people in America.[1]

In recent decades, courts have recognized that disrespectful terminology within the justice system also can impede access to justice. *See*, *e.g.*, *State v. Jackson*, 879 P.2d 307, 311 (Wash. App. 1994) (finding juror's reference to Black people as "coloreds" created an inference of racial bias contrary to fair and impartial jury requirement); *Middleton v. State*, 64 N.E.3d 895, 902 (Ind. Ct. App.

[1] *See, e.g.*, *Plessy v. Ferguson*, 163 U.S. 537, 542 (1896) (justifying segregation as "too clear for argument"), *overruled by Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan*., 347 U.S. 483 (1954); *Loving v. Virginia*, 388 U.S. 1, 3 (1967) (quoting the trial court's reasoning for upholding the conviction of interracial married couple as justified by "[t]he fact that [God] separated the races shows that he did not intend for the races to mix").

2016) (Plye, J., concurring) (finding counsel's use of the term "Negro" to refer to his client in front of potential jurors impeded right "to the fair administration of justice"), *aff'd*, 72 N.E.3d 891 (Ind. 2017).

Women also have been subjugated by judicial fiat, with courts denying that they possess worth, dignity, and abilities equal to men. *See*, *e.g.*, *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879) (noting, without supporting, a state's ability to exclude women from juries), *abrogated by Taylor v. Louisiana*, 419 U.S. 522 (1975); *Women's Liberation Union of R.I. v. Israel*, 379 F. Supp. 44, 50–51 (D.R.I. 1974) (compiling cases that upheld statutes forbidding sale of liquor to women, employment of women, and presence of women in liquor establishments). The justifications for discrimination against women included reliance on "nature's law"[2] and paternalism rooted in sexism.[3]

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[2] *See, e.g.*, *Bradwell v. State*, 21 L. Ed. 442 (1873) (concurring opinion) ("The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life").

[3] *See*, *e.g.*, *Stanton v. Stanton*, 421 U.S. 7 (1975) (striking down gender-based classification based upon traditional assumptions that "the female is destined solely for the home and the rearing of the family and only the male for the marketplace and the world of ideas . . . ."); *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (plurality opinion) (noting that the judicial "attitude of 'romantic paternalism' ... put women, not on a pedestal, but in a cage"); *Bailey v. State*, 219 S.W.2d 424, 428 (Ark. 1949) (upholding exclusion from juries to protect women from "consideration of indecent conduct, the use of filthy and loathsome words, … and other elements that would prove humiliating, embarrassing and degrading to a lady"); *In re Goodell*, 39 Wis. 232, 245–46 (1875) (endorsing ineligibility of women for admission to the bar because "[r]everence for all womanhood would suffer in the public spectacle of women … so engaged").

The Constitution imposes a duty on courts to dispense impartial justice notwithstanding cultural practices that seem appropriate in the moment. Judicial justifications for decisions based on racial and gender discrimination were wrong when decided, with the prejudice and injustice underlying them amplified in hindsight. The majority opinion here invites similar critiques and future derision. The Court provides no legitimate basis to deny appellant's simple request for common curtesy.

II. Courts Should Defer to a Litigant's Self-Identity to Avoid the Appearance of Bias.

The majority opinion transforms the *pro se* litigant's simple, two-sentence request into a long list of unmade demands: "[T]o require the district court and the government" to use female pronouns and "to compel the use of particular pronouns" by "litigants, judges, court personnel, or anyone else." *Varner*, 948 F.3d at 254, 256. But this mischaracterizes the underlying request. Appellant merely asked *this panel* to "use female pronouns when addressing her," explaining that failure to do so "leads [her] to feel that [she is] being discriminated against based on [her] gender identity." *Id*. at 254.

A request by a federal litigant to be referred to with a preferred name or nomenclature is a routine matter and almost never denied. *See*, *e.g.*, *DeYoung v. United States*, No. 1:06-cv-88, 2013 WL 4434244, at *1 (D. Utah Aug. 14, 2013) (based on "the petitioner's prior request, the court refers to petitioner as 'Rulon–

Frederick'"'); *Derisme v. Hunt Leibert Jacobson P.C.*, 880 F. Supp. 2d 339, 345 n.1 (D. Conn. 2012) ("At the Plaintiff's request, the Court refers to her as Fabiola Is Ra El Bey in recognition of her faith and religion."); *United States v. Beasley*, 72 F.3d 1518, 1521 (11th Cir. 1996) (agreeing to refer to Appellant as "Yahweh" despite that "his birth name is Hulon Mitchell, Jr., [because] he rejects that name as a slave name"); *In re Yuska*, 553 B.R. 669, 674 (Bankr. N.D. Iowa 2016) (agreeing to litigant's request to be referenced with first name only throughout opinion), *aff'd*, 567 B.R. 545 (B.A.P. 8th Cir. 2017).

It is hardly "tacit approval of a litigant's underlying legal position" to use the terminology that the litigant uses to refer to themselves. For example, in *United States v. Tyndale*, No. 6:17-cr-25, 2019 WL 440572, at *1 n.1 (E.D. Ky. Feb. 4, 2019), a federal court agreed to "[f]ollow[]" litigant's "lead" and use "African American" in referencing him. *See also*, *e.g.*, *Zenni v. Hard Rock Cafe Int'l, Inc. (N.Y.)*, 903 F. Supp. 644, 645 n.1 (S.D.N.Y. 1995) (explaining decision to use "African–American" as the term used by plaintiff); *Turner v. Arkansas*, 784 F. Supp. 553, 555 (E.D. Ark. 1991) (explaining that it "has chosen to use the term 'blacks' throughout this opinion … letting the original plaintiffs establish the appropriate protocol"), *aff'd sub nom.*, *Turner v. Arkansas*, 504 U.S. 952 (1992); *Hicks v. Makaha Valley Plantation Homeowners Ass'n*, No. CIV. 14-00254 HG-BMK, 2015 WL 4041531, at *2 n.4 (D. Haw. June 30, 2015) (adopting plaintiff's

terminology to describe themselves); *Lynch v. Lewis*, No. 7:14-CV-24 HL, 2014 WL 1813725 (M.D. Ga. May 7, 2014) (using female pronouns to refer to transgender party "because it is the Court's practice to refer to litigants in the manner they prefer to be addressed when possible."). Indeed, the majority opinion admits courts routinely refer to transgender parties with pronouns and titles congruent with their gender identity and that doing so is a "courtesy." *Varner*, 948 F.3d at 255 (citations omitted).

Respecting a litigant's self-identity has no bearing on the court's position or decision on the merits, as is readily apparent in the many cases in which a court accommodated a transgender litigant's request regarding pronouns while ruling against them. *See*, *e.g.*, *Gibson v. Jean-Baptise*, No. W-17-CA-042-RP, 2017 WL 11319412, at *1 n.1 & *4 (W.D. Tex. Dec. 11, 2018); *Williams v. Rodriguez*, No. 1:09-cv-01882, 2011 WL 6141117, at *1 n.1. (E.D. Cal. Dec. 9, 2011). The use of pronouns congruent with the litigant's gender identity simply reflects the courtesy, respect, and dignity due to all parties who appear before a court.

By contrast, refusal to respect a party's self-identity, as here, can suggest bias and call into question whether the litigant received a fair hearing. The Supreme Court noted as much in *Hamilton v. Alabama*, 376 U.S. 650 (1964) (per curiam), reversing a contempt citation against Mary Hamilton, a Black woman who refused to answer a state court judge in Alabama when he addressed her as

"Mary" despite her requests to be addressed as "Miss Hamilton." *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 445 (1968) (citing *Hamilton* as evidence of ongoing injustice against Black people in America); *see also El-Hakem v. BJY Inc.*, 415 F.3d 1068 (9th Cir. 2005) (finding employer violated Title VII by calling Arabic employee "Manny" despite the employee's requests to be referred to as "Mamdouh").

Additionally, failure to respect a transgender party's identity—commonly known as "misgendering"—can be incredibly harmful. *See*, *e.g.*, *Hampton v. Baldwin*, No. 3:18-cv-550, 2018 WL 5830730, at *1 (S.D. Ill. Nov. 7, 2018) (referencing expert testimony that "misgendering transgender people can be degrading, humiliating, invalidating, and mentally devastating"); *Prescott v. Rady Children's Hosp.-San Diego*, 265 F. Supp. 3d 1090, 1096 (S.D. Cal. 2017) (noting that "[f]or a transgender person with gender dysphoria, being referred to by the wrong gender pronoun is often incredibly distressing" and allowing claims against hospital for suicide of transgender adolescent alleged to result, in part, from misgendering).

The reasoning of the Indiana Court of Appeals in a case involving similar circumstances is relevant here:

> Throughout its order, the trial court fails or refuses to use M.B.'s preferred pronoun. The order is also permeated with derision for M.B. We would hope that the trial courts of this state would show far greater respect (as

> well as objectivity and impartiality) to all litigants appearing before them.

Matter of M.E.B., 126 N.E.3d 932, 934 n.1 (Ind. Ct. App. 2019). *Amici* wholeheartedly agree. Federal courts, including this Court, should respect transgender litigants' gender identity as a sign of courtesy, respect, and dignity.

III. The Majority Opinion Imposes a Disadvantage on a Class of People.

Jurists must be vigilant against the insidious danger of allowing bias to invade their courtrooms or the law. *See, e.g.*, *Buck v. Davis*, 137 S. Ct. 759, 776 (2017) (finding counsel's action in eliciting, and allowing, expert to testify that defendant was more likely to pose a future danger based on fact that he was a Black man appealed to a racial stereotype that prejudiced defendant sufficient to find incompetent representation); *Hassan v. City of New York*, 804 F.3d 277, 306 (3d Cir. 2015) (noting that "appeals to 'common sense' which might be infected by stereotypes" were insufficient justification for government action); *Davis v. Bd. of Sch. Comm'rs of Mobile Cty.*, 517 F.2d 1044, 1051 (5th Cir. 1975) (recognizing the potential for facts that "would demonstrate bias of such a nature as to amount to a bias against a group of which the party was a member"). Judicial opinions, like all government actions, must not have as a "purpose and effect" the "disapproval of" disadvantaged people, thereby "impos[ing] a disadvantage, a separate status, and so a stigma" on the targeted group contrary to established law. *United States v. Windsor*, 570 U.S. 744, 770 (2013).

Although the majority opinion reasons that its refusal to use pronouns consistent with transgender people's gender identities indicates impartiality, it misses the stated objective. Instead, the opinion highlights that it disapproves of transgender people. By contrast, using the appropriate pronoun for the litigant, or avoiding the use of pronouns, would simply reflect common courtesy, respect and the equal dignity that courts are obligated to give to all litigants. *Amici* urge this Court to remove the obvious disapproval and anti-transgender bias and stigma from the opinion in this matter.

CONCLUSION

For the reasons stated herein, *amici* urge the Court to withdraw the majority opinion and replace it with an opinion that respects appellant's gender identity and excises Section II, Part B of the majority opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that this brief was filed electronically via the Appellate CM/ECF system on March 20, 2020. All counsel of record are registered users, and notice was provided to them by this electronic filing.

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EXHIBIT C

No. 19-40016

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

NORMAN VARNER,
Defendant-Appellant.

On Appeal from the U.S. District Court for the
Eastern District of Texas, No. 4:11-cr-00014

BRIEF OF *AMICI CURIAE* LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., HUMAN RIGHTS CAMPAIGN, NATIONAL CENTER FOR TRANSGENDER EQUALITY, NATIONAL LGBT BAR ASSOCIATION, NATIONAL TRANS BAR ASSOCIATION, AND TRANSGENDER LAW CENTER, IN SUPPORT OF DEFENDANT-APPELLANT'S PETITION FOR REHEARING EN BANC

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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Walter O. Bockting, et al., *Stigma, Mental Health, and Resilience in an Online Sample of the U.S. Transgender Population*, 103 Am. J. of Pub. Health 943 (2013) 7

INTEREST OF THE AMICI CURIAE[1]

Amici Lambda Legal Defense and Education Fund, Inc., Human Rights Campaign, National Center for Transgender Equality, Transgender Law Center, National LGBT Bar Association, and National Trans Bar Association are organizations who are dedicated to ensuring the civil rights of all transgender people, including transgender litigants, attorneys, and transgender people who are otherwise impacted by the legal system. Detailed statements of interest are contained in the accompanying motion.

INTRODUCTION

Transgender people are entitled, as are all people, to courts that treat them with fairness and respect. Too often, however, transgender people report experiencing discrimination and mistreatment within the court system.[2] Transgender people experience high rates of discrimination in all sectors of life,[3] and may wish to access the courts to seek redress for this discrimination. For this reason, discriminatory treatment by the courts inflicts a distinct and compounding

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[1] Amici state that no counsel for a party authored this brief in whole or in part, and no person other than amici or its counsel made a monetary contribution to this brief's preparation or submission. Counsel for all parties have consented to the filing of this brief.

[2] Lambda Legal, *Protected and Served?* (2012), *available at* https://tinyurl.com/wy8p3ru (hereinafter "*Protected and Served?*"); Sandy E. James, *et al*., National Center for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey* (2016), *available at* https://tinyurl.com/yyytml4b (hereinafter "*2015 U.S. Transgender Survey*").

[3] *2015 U.S. Transgender Survey, supra.*

harm on transgender people, who are estimated to comprise at least 1.4 million adults[4] in this country.

Part II Section B of this Court's opinion sends a dangerous and inappropriate message of disrespect to transgender people. Appellant's Pet. for Reh'g, Ex. 1, 5-10. Without the benefit of any record evidence, and in response to a two-sentence request by a *pro se* litigant, the majority issued what amounts to an advisory opinion that purports to make findings limiting the use of pronouns respectful of a litigant's gender identity. In doing so, the majority expressed views that could limit effective development of important legal and factual issues that are presented in future cases brought by transgender litigants.

Amici are concerned that the dicta in Part II Section B of the Court's opinion undermines the public confidence in the integrity and casts doubt on the impartiality of the Court with respect to transgender litigants. In addition, this portion of the Court's opinion sends a message to transgender litigants that they may not even be treated in a fair and respectful manner.

The majority's refusal to refer to Appellant ("Ms. Jett"), with pronouns consistent with her gender identity is contrary to the norms established by numerous federal and state courts. Part II Section B of the majority opinion

[4] Andrew R. Flores, *et al*., The Williams Institute, *How Many Adults Identify as Transgender in the United States?* (2016), *available at* https://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf.

attempts to justify its deliberate misgendering of a *pro se* transgender litigant by incorrectly speculating that using pronouns consistent with a litigant's gender identity may violate a judge's ethical responsibilities. These arguments are wholly without merit. If anything, the Code of Conduct for U.S. Judges suggests that the exact opposite is true. In sum, Part II Section B sends a powerful and harmful message to transgender litigants that they will not be treated with respect in this Court, let alone receive fair consideration of their claims or defenses.

For these reasons, and as explained further below, *amici* respectfully request that this Court revise its opinion by removing Part II Section B.[5] Additionally, *amici* urge the Court – as a simple matter of courtesy and respect – to use female pronouns when referring to Ms. Jett in its amended opinion.

ARGUMENT

I. The Court's Advisory Opinion on the Use of Pronouns Consistent with a Litigant's Gender Identity is Dicta Offered Without the Benefit of Any Record or Briefing and Should be Removed.

The majority could have chosen simply to treat a transgender litigant with respect. Instead, the majority relied on Ms. Jett's *pro se* two-line request that the Court use pronouns consistent with her gender identity as justification for issuing an advisory opinion. Reaching far beyond the issues before the Court, the majority

[5] *Amici* agree with Ms. Jett's assertion that this Court erred in finding that the District Court did not have jurisdiction to hear Ms. Jett's post-conviction motion to change her name. However, *amici* write only to address Part II Section B of the majority opinion.

made inappropriate factual determinations and reached untenable legal conclusions, all without the benefit of adversarial briefing.

Compounding these errors, the Court opined at length about the "quixotic undertaking" of respectful pronoun usage, noting particularly the use of pronouns for nonbinary transgender people. Appellant's Pet., Ex. 1, at 10. To be sure, there are cases involving the legal status of nonbinary people, *see*, *e.g.*, *Zzyym v. Pompeo*, 341 F. Supp. 3d 1248 (D. Colo. 2018), *appeal docketed*, No. 18-1453 (10th Cir.). This case is not one of them. The majority's discussion of nonbinary people was completely extraneous to any issue conceivably before this Court. Furthermore, it is inappropriate to foreclose the ability of nonbinary litigants (or any future litigants) to receive respectful treatment, including being referred to correctly.

The majority's inappropriate and unfounded dicta should be expunged from the jurisprudence of this Court. Although this Court has made clear that it is not bound by dicta, including its own, *United States v. Becton*, 632 F.2d 1294, 1296 n.3 (5th Cir. 1980), *amici* are concerned that the dicta in the majority's opinion signals to transgender people that they will not be treated respectfully in this Court and the courts of this circuit, and undermines public confidence in the integrity and impartiality of the courts with regard to transgender litigants. Likewise, as this case does not involve a nonbinary person, the language from the Court on this subject is

quintessential dicta. This Court should remove Part II Section B, as it is an advisory opinion, which addresses the use of pronouns for people who have not, but may in the future come before this Court.

II. A Court's Refusal to Use Pronouns Consistent with a Litigant's Gender Identity is Disrespectful and Harmful to Transgender Litigants and Thus Undermines Public Confidence in the Fairness of the Court.

Judges have an ethical duty to ensure that all people, including transgender people, are treated fairly and respectfully in court. *See* Judicial Conference, *Code of Conduct for United States Judges,* Canon 3(A)(3) (2019) (requiring judges to "be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity"). This duty includes "the responsibility to avoid comment or behavior that could reasonably be interpreted as harassment, prejudice or bias."[6] Judges are, additionally, forbidden to engage in misconduct, including discrimination based on gender identity.[7] It is vital that courts operate in a way that the public perceives to be impartial and in which everyone receives equal treatment under the law. This is of particular concern in cases involving people who are already disproportionately discriminated against in society.

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[6] Judicial Conference, *Code of Conduct for United States Judges,* Commentary on Canon 3(A)(3) (2019).

[7] Judicial Conference, *Rules for Judicial-Conduct and Judicial-Disability Proceedings,* Article II, (4) (a) (3) (2019).

Widespread discrimination is reported by transgender people, including in public accommodations such as government offices.[8] Transgender people, like all people, must be able to access the courts free from concerns about bias, prejudice, and discrimination. Unfortunately, transgender people experience negative interactions in the courts, just as they do in other aspects of their lives. In one national survey, 33% of transgender and gender non-conforming respondents reported hearing discriminatory comments about sexual orientation or gender identity/gender expression in the courts.[9] In another survey, 13% of respondents who had visited a court in the previous year where employees thought or knew that they were transgender, experienced at least one type of negative experience, including being denied equal treatment or service, verbally harassed, and/or physically attacked.[10]

Misgendering is the misclassification of someone's gender identity, which includes the use of a gendered pronoun that does not align with a person's gender identity.[11] The U.S. Equal Employment Opportunity Commission has held that in the context of intentional employment discrimination, "[p]ersistent failure to use

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[8] *2015 U.S. Transgender Survey*, *supra* note 2, at 16.

[9] *Protected and Served*?, *supra* note 2.

[10] *2015 U.S. Transgender Survey*, *supra* note 2, at 214.

[11] Kevin A. McLemore, *A Minority Stress Perspective on Transgender Individuals' Experiences With Misgendering*, 3 Stigma & Health 53 (2016).

the employee's correct name and pronoun may constitute unlawful, sex-based harassment if such conduct is either severe or pervasive enough to create a hostile work environment." *Lusardi*, EEOC DOC 0120133395, 2015 WL 1607756, at *11 (Apr. 1, 2015).

Studies indicate that transgender people are "frequently misgendered by others" and "these experiences le[a]d them to feel stigmatized."[12] Misgendering is perceived to be a "stigmatizing event because it is associated with psychological distress."[13] Transgender people have disproportionately high rates of depression, anxiety, and other psychological distress.[14] This is directly associated with the stigma and discrimination they experience.[15] Intentionally misgendering transgender people is stigmatizing and causes psychological distress.

As the majority noted, Ms. Jett made clear that being misgendered made her feel "very uneasy and disrespected" and that she was "being discriminated against based on [her] gender identity." Appellant's Pet. Ex. 1, at 5. The majority then explained that other courts have used correct pronouns when referring to

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[12] McLemore, *supra* note 11 at 54 (citing Kevin A. McLemore, *Experiences of Misgendering: Identity Misclassification of Transgender Spectrum Individuals*, 14 Self & Identity 51 (2014)).

[13] *Id.* at 61.

[14] Walter O. Bockting, et al., *Stigma, Mental Health, and Resilience in an Online Sample of the U.S. Transgender Population*, 103 Am. J. of Pub. Health 943, 948 (2013).

[15] *Id.*

transgender litigants "purely as a courtesy to parties," but refused to extend that courtesy to Ms. Jett. Appellant's Pet. Ex. 1, 6-7.

This Court should remove Part II Section B, because it is inconsistent with the requirement that litigants be treated with courtesy, respect, and impartiality.

III. Courts Routinely Use Pronouns Consistent with a Litigant's Gender Identity While Maintaining Impartiality.

State and federal courts have used pronouns consistent with a transgender litigant's gender identity in hundreds of written opinions.[16] Every Circuit Court of Appeals in the country has issued at least one opinion in which the pronouns consistent with the gender identity of a transgender person were appropriately used. *E.g., Kosilek v. Spencer*, 740 F.3d 733 (1st Cir.), *reh'g en banc granted, opinion withdrawn* (Feb. 12, 2014), *on reh'g en banc,* 774 F.3d 63 (1st Cir. 2014); *Cuoco v. Moritsugu*, 222 F.3d 99 (2d Cir. 2000); *U.S. v. Newswanger*, 784 Fed. Appx. 96 (3d Cir. 2019); *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016), *vacated and remanded*, 137 S. Ct. 1239 (2017); *Rush v. Parham*, 625 F.2d 1150 (5th Cir. 1980); *E.E.O.C. v. R.G. &. G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018), *cert. granted in part sub nom. R.G. & G.R. Harris Funeral Homes, Inc. v. E.E.O.C.*, 139 S. Ct. 1599 (2019); *Whitaker By*

[16] On March 11, 2020, through a Westlaw advance search for: transgender or transsex! & "pronoun" *amici* found 320 opinions and orders where a court used the pronoun consistent with the litigant's gender identity when referring to a transgender litigant. This research is available from counsel for *amici* upon request.

Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034 (7th Cir. 2017); *Smith v. Rasmussen*, 249 F.3d 755 (8th Cir. 2001); *Edmo v. Corizon, Inc.*, 949 F.3d 489 (9th Cir. 2020); *Farmer v. Perrill*, 275 F.3d 958 (10th Cir. 2001); *Shorter v. Warden*, No. 19-10790, 2020 WL 820949 (11th Cir. Feb. 19, 2020); *Schroer v. Billington*, 525 F.Supp.2d 58 (D.C. Cir. 2007).

Moreover, courts that have used pronouns consistent with the litigant's gender identity have easily distinguished between: (1) a substantive ruling on the merits or a legal or factual finding on a litigant's gender identity and (2) the respect owed a litigant by using the litigant's correct pronouns. In *Lynch v. Lewis*, No. 7:14-CV-24 HL, 2014 WL 1813725 (M.D. Ga. May 7, 2014), the Court explained:

> The Court and Defendants will use feminine pronouns to refer to the Plaintiff in filings with the Court. Such use is not to be taken as a factual or legal finding. The Court will grant Plaintiff's request as a matter of courtesy, and because it is the Court's practice to refer to litigants in the manner they prefer to be addressed when possible.

*2 n.2. *See also, e.g., DeGroat v. Townsend*, 495 F. Supp. 2d 845, 846 n.4 (S.D. Ohio 2007) ("The Court will use feminine pronouns to refer to the Plaintiff. Such use is not to be taken as a factual or legal finding. Rather, the Court considers it to be a matter of courtesy."); *Smith v. Rasmussen*, 57 F. Supp. 2d 736, 740 n.2 (N.D. Iowa 1999), *aff'd in part, rev'd in part,* 249 F.3d 755 (8th Cir. 2001) ("As a matter of courtesy, the masculine pronoun will be used in reference to the plaintiff

throughout this opinion, as it was throughout the trial by all parties. The court appreciates such courtesy… whatever the legal merits on any issue may be.”).

The majority speculates that referring to Ms. Jett by her correct pronouns shows partiality in her favor with respect to its decision on the merits, instead of respect for a litigant before it. However, courts have certainly shown this respect to litigants in cases where they found against the litigant on the merits. The Eleventh Circuit did exactly that just last week. *See Keohane v. Fla. Dep't of Corr. Sec'y*, No. 18-14096, 2020 WL 1160905 (11th Cir. Mar. 11, 2020). In fact, some courts have made clear that using the pronouns consistent with a litigant’s gender identity shows not only respect but also objectivity and impartiality.

> [W]e are obliged to address the fact that the trial court failed to treat R.E. with the respect R.E. deserves and that we expect from fellow judicial officers. Unfortunately, this is not the first such occasion we have had to publicly admonish one of our trial courts for such derision. In *In re M.E.B.*, we noted: “Throughout its order, the trial court fails or refuses to use [the petitioner’s] preferred pronoun. The order is also permeated with derision for [the petitioner]. We would hope that the trial courts of this state would show far greater respect (as well as objectivity and impartiality) to all litigants appearing before them.”

Matter of R.E., No. 19A-MI-2562, 2020 WL 1173967, at *8 (Ind. Ct. App. Mar. 12, 2020) (citing *In Matter of M.E.B.*, 126 N.E.3d 932, 934, n.1 (Ind. Ct. App. 2019)).

In sum, the norm that has developed in courts across the country is to use the pronouns that are consistent with a litigant's gender identity. Such is in keeping with the respectful and courteous treatment required of all judges.

Simply put, Part II Section B was unnecessary to the majority's decision and sends a message to transgender people that they will not be accorded respect by this Court. It should be removed.

CONCLUSION

For the reasons stated herein, *amici* respectfully request this Court grant a rehearing, remove Part II Section B, and refer to Ms. Jett with female pronouns throughout the amended opinion.

Dated: March 19, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Respectfully submitted,

/s/ Shelly Lynn Skeen
Shelly Lynn Skeen
Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 2559 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman font size 14, with footnotes in Times New Roman font size 12.

Respectfully submitted,

/s/ Shelly Lynn Skeen
Shelly Lynn Skeen
Counsel for Amici Curiae

EXHIBIT D

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
CAMPANELLA, KRAUSS, and PENLAND
Appellate Military Judges

UNITED STATES, Appellee
v.
Private First Class BRADLEY E. MANNING (nka CHELSEA E. MANNING), United States Army, Appellant

ARMY 20130739

ORDER

WHEREAS:

A military judge sitting as a general court-martial convicted appellant of various violations of Articles 92 and 134 of the Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. §§ 892, 934 (2006). The military judge sentenced appellant to a dishonorable discharge, confinement for 35 years, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority approved the adjudged sentence and credited appellant with 1,293 days against the sentence to confinement.

On 4 February 2015, appellant filed a "Motion for Court Order to Use Appellant's Legal Name and to Preclude the Use of Appellant's Former Name in All Court Documents."

On 9 February 2015, appellee filed a "Response to Appellant's Motion for Court Order to Use Appellant's Legal Name and to Preclude the Use of Appellant's Former Name in All Court Documents."

On 18 February 2015, with leave from this court, appellant filed a "Reply to Government Response to [Appellant's] Motion for Court Order to Use Appellant's Legal Name and to Preclude the Use of Appellant's Former Name in All Court Documents."

NOW, THEREFORE, IT IS HEREBY ORDERED:

Appellant's "Motion for Court Order to Use Appellant's Legal Name and to Preclude the Use of Appellant's Former Name in All Court Documents" is GRANTED IN PART and DENIED IN PART. In respect to historic fact and this court's standard practice, the caption will remain as is. Reference to appellant in all

future formal papers filed before this court and all future orders and decisions issued by this court shall either be neutral, e.g., Private First Class Manning or appellant, or employ a feminine pronoun.

DATE: 4 March 2015

FOR THE COURT:

MALCOLM H. SQUIRES, JR.
Clerk of Court

CF:
JALS-DA JALS-CR3
JALS-GA JALS-CCR
JALS-CCZ
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