

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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INTEREST OF THE AMICI CURIAE¹

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

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 adults⁴ 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.

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

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

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,

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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.

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