No. 19-40016

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States of America,
Appellee,
v.

Norman Varner,
Appellant.

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

UNOPPOSED MOTION OF CIVIL RIGHTS ORGANIZATIONS TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING *EN BANC*

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

Amici Curiae

Anti-Defamation League
Lawyers' Committee for Civil Rights Under the Law
Leadership Conference on Civil and Human Rights
Mississippi Center for Justice
National Women's Law Center
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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Under Rule 29(b) of the Federal Rules of Appellate Procedure, the Southern Poverty Law Center, the Anti-Defamation League, Lawyers Committee for Civil Rights Under the Law, the Leadership Conference for Civil and Human Rights, Mississippi Center for Justice, and the National Women's Law Center ("Civil Rights Organizations") move for leave to file a brief as *amici curiae* in support of Appellant's petition for rehearing *en banc*.

All parties to this case were contacted and consented to this motion and the filing of the brief. The proposed brief of *amicus curiae* is filed with this motion.

IDENTITY AND INTERESTS OF *AMICI*

The **Southern Poverty Law Center** (SPLC) has provided *pro bono* civil rights representation to low-income individuals since 1971, with particular focus on seeking justice for the most vulnerable people in society. SPLC has litigated numerous cases to enforce the civil rights of historically disadvantaged and marginalized groups, including the lesbian, gay, bisexual, and transgender (LGBT) communities, to ensure that they are treated with dignity and fairness. SPLC monitors and exposes extremists who attack or malign groups of people based, primarily, on their immutable characteristics. SPLC is dedicated to reducing prejudice and ensuring justice for vulnerable and targeted communities.

The **Anti-Defamation League** (ADL) is a 501(c)(3) 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. Through its 25 regional offices throughout the United States, ADL provides materials, programs and services to combat anti-Semitism and all forms of bigotry. As part of its commitment to protecting the civil rights of all persons, ADL has filed amicus briefs in numerous cases addressing the unconstitutionality or illegality of discriminatory practices or laws, as well as amicus briefs supporting anti-discrimination laws and policies that protect historically persecuted groups.

The Lawyers' Committee for Civil Rights Under Law (Lawyers' Committee) is a nonpartisan, nonprofit organization that was formed in 1963 at the request of President John F. Kennedy to enlist the private bar's leadership and resources in combating racial discrimination. The Lawyers' Committee has participated in hundreds of impact lawsuits challenging race discrimination prohibited by the Constitution and federal statutes. As a leading national racial justice organization, the Lawyers' Committee has a vested interest in ensuring that racial and ethnic minorities, including minorities who identify as lesbian, gay, bisexual, transgender, and queer/questioning (LGBTQ), have strong, enforceable protections from discrimination.

The **Leadership Conference on Civil and Human Rights** (Leadership Conference) is the nation's oldest, largest, and most diverse coalition of more than 200 national organizations committed to the protection of civil and human rights in the United States. The Leadership Conference was founded in 1950 by leaders of the civil rights and labor rights movements, grounded in the belief that civil rights would be won not by one group alone but through coalition. The Leadership Conference works to build an America that is inclusive and as good as its ideals by promoting laws and policies that promote the civil and human rights for all individuals in the United States

The **Mississippi Center for Justice** (MCJ) is a non-profit public interest law organization founded in 2003 in Jackson, Mississippi and committed to advancing racial and economic justice. Supported and staffed by attorneys and other professionals, MJC develops and pursues strategies to combat discrimination and poverty statewide. In 2016, MJC filed suit against the State of Mississippi challenging HB 1523, which targeted LGBTQ individuals—particularly transgender individuals—by condoning discrimination against them. MCJ has remained concerned about the lack of civil rights accorded Mississippi's LGBTQ population.

The National Women's Law Center (Center) is 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 sex discrimination. Since its founding in 1972, the Center has focused on issues of key importance to women and their families, including economic security, employment, education, and health, with particular attention to the needs of low-income women and those who face multiple and intersecting forms of discrimination. The Center has participated as counsel or amicus curiae in a range of cases before the Supreme Court, federal Courts of Appeals, federal district courts and state courts to secure equal treatment and opportunity in all aspects of society. The Center seeks to ensure that all individuals, including LGBTQ individuals, enjoy the full protections against sex discrimination as promised by our laws and affirm that all individuals must be treated with dignity and respect as they take part in any aspect of this nation's judicial system.

GROUNDS FOR GRANTING MOTION FOR LEAVE TO FILE BRIEF

As set forth above, and in the brief filed with this motion, *amici* are highly respected civil rights organizations who, collectively, have been working to advance and protect the rights of historically disadvantaged and marginalized groups and individuals for more than 250 years. The Civil Rights Organizations' missions involve ensuring that the legal, civil, and human rights of all individuals are protected. Their memberships include marginalized groups—including

transgender and gender non-conforming individuals—subject to the jurisdiction of the Fifth Circuit Court of Appeals.

The prospective *amici* believe Appellant's petition for rehearing *en banc* merits close attention and that the brief filed with this motion is relevant to the disposition of the pending petition and will aid the Court's consideration by showing that the majority opinion's rejection of a litigant's request to be referred to in accordance with her self-identity is discordant with prevailing judicial norms and antithetical to the judiciary's obligation of ensuring access to justice for historically disadvantaged groups. *Amici* are legal organizations with extensive experience advancing and protecting constitutional, civil and human rights in the courts. Between them, they have appeared before the Supreme Court, federal courts of appeals, federal district courts, and state courts in numerous cases that have set precedents and standards, and otherwise helped to establish the course and limits of constitutional and civil rights in this nation.

In the corresponding brief, the Civil Rights Organizations offer legal principles and historical perspective, pointing to the ways in which court decisions illegitimately have relied on circular reasoning and failed to adequately excise personal prejudice and bias, and the harm that ensued not only to the individuals and groups maligned, but to the institution of the judiciary.

CONCLUSION

The Court should grant this motion for leave to file the proposed brief because *amici* regularly appear as counsel and file *amicus* briefs in cases that raise issues of vital concern to the nation and the direction of constitutional, civil, and human civil rights; have expertise and experience concerning the rights of historically disadvantaged groups and individuals, including the transgender community, as well as knowledge regarding the obligation of the government—including the judiciary—to excise prejudice and bias from its opinions in order to provide access to, and the appearance of, impartial justice.

Respectfully submitted,

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Certificate of Conference

I certify that I conferred with counsel for both parties, and both of them confirmed they do not oppose this motion.

s/Charles "Chad" Baruch
Counsel for Amici Curiae

Certificate of Service

I certify that this motion 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.

s/Charles "Chad" Baruch
Counsel for Amici Curiae

Certificate of Compliance with Type-Volume Limit, Typeface Requirements, and Type-Style Requirements

1. This document complies with the type-volume limited of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 1,361 words.

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word, version 2016, in Times New Roman Font 14-point type (with 12-point for footnotes).

s/Charles "Chad" Baruch
Counsel for Amici Curiae

Certificate of Electronic Compliance

I certify that, in the foregoing motion filed using the Fifth Circuit CM/ECF document filing system, (1) the privacy redactions required by Fifth Circuit Rule 25.213 have been made, (2) the electronic submission is an exact copy of the paper document, and (3) the document has been scanned for viruses with the most recent version of Kaspersky Small Office Security 5, and is free from viruses.

s/Charles "Chad" Baruch
Counsel for Amici Curiae

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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
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March 20, 2020

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TABLE OF CONTENTS

Certificate of Interested Parties i

Table of Contents iii

Table of Authorities iv

Interest of Amici Curiae 1

Rule 29(a)(2) Statement 2

Rule 29(a)(4)(E) Statement 2

Argument 2

I. The Majority Opinion Repeats Past Errors in Justifying Discrimination and in Creating a Barrier to Justice for a Historically Marginalized Group 3

II. Courts Should Defer to a Litigant's Self-Identity to Avoid the Appearance of Bias 6

III. The Majority Opinion Imposes a Disadvantage on a Class of People 10

Conclusion 11

Certificate of Service 12

Certificate of Compliance with Type-Volume Limit, Typeface Requirements, and Type-Style Requirements 12

Certificate of Electronic Compliance 13

TABLE OF AUTHORITIES

Cases

Bailey v. State,
219 S.W.2d 424 (Ark. 1949) 5

Bradwell v. State,
21 L. Ed. 442 (1873).. 5

Buck v. Davis,
137 S. Ct. 759 (2017).. 10

Davis v. Bd. of Sch. Comm'rs of Mobile Cnty.,
517 F.2d 1044 (5th Cir. 1975) 10

Derisme v. Hunt Liebert Jacobson P.C.,
880 F. Supp. 2d 339 (D. Conn. 2012).. 7

DeYoung v. United States,
No. 1:06-cv-88, 2013 WL 4434244 (D. Utah Aug. 14, 2013) 6

Dred Scott v. Sanford,
60 U.S. 393 (1857)... 4

El-Hakem v. BJY Inc.,
415 F.3d 1068 (9th Cir. 2005) 9

Frontiero v. Richardson,
411 U.S. 677 (1973).. 5

Gibson v. Jean-Baptiste,
No. W-17-CA-042-RP, 2017 WL 11319412 (W.D. Tex. Dec. 11, 2018).............. 8

Hamilton v. Alabama,
376 U.S. 650 (1964) (per curiam)... 8

Hampton v. Baldwin,
No. 3:18-cv-550, 2018 WL 5830730 (S.D. Ill. Nov. 7, 2018) 9

Hassan v. City of New York,
804 F.3d 277 (3d Cir. 2015) 10

Hicks v. Makaha Valley Plantation Homeowners Ass'n,
No. CIV. 14-00254 HG-BMK, 2015 WL 4041531 (D. Haw.
June 30, 2015) 7

In re Goodell,
39 Wis. 232 (1875) 5

In re Yuska,
553 B.R. 669 (Bankr. N.D. Iowa 2016), *aff'd*, 567 B.R. 545
(B.A.P. 8th Cir. 2017) 7

Jones v. Alfred H. Mayer Co.,
392 U.S. 409 (1968)... 9

Loving v. Virginia,
388 U.S. 1 (1967).. 4

Lynch v. Lewis,
No. 7:14-CV-24 HL, 2014 WL 1813725 (M.D. Ga. May 7, 2014) 8

Matter of M.E.B.,
126 N.E.3d 932 (Ind. Ct. App. 2019) 9–10

Middleton v. State,
64 N.E.3d 895 (Ind. Ct. App. 2016), *aff'd*, 72 N.E.3d 891 (Ind. 2017) 4–5

Plessy v. Ferguson,
163 U.S. 537 (1896), *overruled by Brown v. Bd. of Ed. of Topeka, Shawnee
Cnty., Kan.*, 347 U.S. 483 (1954) 4

Prescott v. Rady Children's Hosp.-San Diego,
265 F. Supp. 3d 1090 (S.D. Cal. 2017).. 9

Stanton v. Stanton,
421 U.S. 7 (1975).. 5

Strauder v. West Virginia,
100 U.S. 303 (1879), *abrogated by Taylor v. Louisiana*,
419 U.S. 522 (1975).. 5

State v. Jackson,
879 P.2d 307 (Wash. App. 1994) 4

Turner v. Arkansas,
784 F. Supp. 553 (E.D. Ark. 1991), *aff'd sub. nom.*,
Turner v. Arkansas, 504 U.S. 952 (1992) 7

United States v. Beasley,
72 F.3d 1518 (11th Cir. 1996) 7

United States v. Tyndale,
No. 6:17-cr-25, 2019 WL 440572 (E.D. Ky. Feb. 4, 2019) 7

United States v. Varner,
948 F.3d 250 (5th Cir. 2020) 3, 6, 8

United States v. Windsor,
570 U.S. 744 (2013).. 10

Williams v. Rodriguez,
No. 1:09-cv-01882, 2011 WL 6141117 (E.D. Cal. Dec. 9, 2011)............................ 8

Women's Liberation Union of R.I. v. Israel,
379 F. Supp. 44 (D.R.I. 1974) 5

Zenni v. Hard Rock Cafe Int'l, Inc. (NY),
903 F. Supp. 644 (S.D.N.Y. 1995) 7

Other Authorities

James F. Simon, Lincoln and Chief Justice Taney: Slavery, Secession,
and the President's War Powers (2006).. 4

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.

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[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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