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
National Women's Law Center
Southern Poverty Law Center

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March 20, 2020

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Civil Rights Organizations

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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.

s/Charles "Chad" Baruch
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