No. 18-6102

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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

v.

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

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

AMICUS CURIAE LAMBDA LEGAL'S MOTION FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF CROSS-APPELLEE DR. RACHEL TUDOR URGING AFFIRMANCE ON THE CROSS-APPEAL AND TENDERED PROPOSED BRIEF

On November 13, 2018, the Court conditionally granted the motion of amicus curiae Lambda Legal to file its brief in support of Dr. Rachel Tudor, in her role as cross-appellee, within a week of her filing of the "Third Brief" in this appeal, in which Tudor would be defending the judgment of liability that she won below. Tudor filed the Third Brief on February 11, 2019, and Lambda Legal

hereby submits this motion on the first court day (February 19) following the one week period set forth in the order, which falls on Presidents' Day, February 18.

Because the consent of Cross-Appellant Southeastern Oklahoma State University ("Southeastern") was "conditional," the Court ordered that the amicus brief be accompanied by a motion filed in accord with Federal Rule of Appellate Procedure 29(a)(2). The motion was to reflect whether "any party object[s] to submission of the proposed amicus brief." Undersigned counsel conferred via email with counsel for Tudor and counsel for Southeastern and can represent that neither side objects to the filing of this brief. *See* 10th Cir. L. R. 27.1

Because the Order specifically required compliance with Fed. R. App. P. 29(a)(3), the motion below states both "the movant's interest" and "the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case."

STATEMENT OF INTEREST

Lambda Legal is the nation's largest national legal organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and everyone living with HIV through impact litigation, education and public policy work, with a help desk that processes over 7,000 calls a year annually, with employment call always comprising the largest or near-largest category. Lambda Legal has been counsel or amicus in some of the most

important cases in which transgender workers have invoked federal protections against sex discrimination. *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (counsel); *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.* 884 F.3d 560 (6th Cir. 2018) (amicus); *Etsitty v. Utah Transit Auth*., 502 F.3d 1215 (10th Cir. 2007) (amicus). Lambda Legal also has been involved in cases interpreting Title VII's protections against sexual orientation discrimination, successfully representing the plaintiff-appellant in *Hively v. Ivy Tech Community College,* 853 F.3d 339 (7th Cir. 2017) (en banc), and successfully presenting oral and written argument as amicus curiae in *Zarda v. Altitude Express*, 883 F.3d 100 (2d Cir. 2018) (en banc), which agreed with *Hively* that Title VII covers sexual orientation discrimination. Lambda Legal also has served as *amicus curiae* in many other employment discrimination cases involving the rights of LGBT people. *See*, *e.g.*, *Rene v. MGM Grand Hotel*, 305 F.3d 1061 (9th Cir. 2002) (en banc); *EEOC v. Scott Med. Health Ctr., P.C.*, 217 F. Supp. 3d 834 (W.D. Pa. 2016); *TerVeer v. Billington*, 34 F. Supp. 3d 100 (D.D.C. 2014).

In this capacity, Lambda Legal wants to assist the Court in the proper assessment of the issues raised in this appeal. Lambda Legal also wants to bring focus to how *Etsitty*'s rulings should be characterized and understood, specifically as a repudiation of the *Etsitty* district court's broader disqualification of transgender workers from Title VII's protections, and as a careful, targeted

disposition of that particular appeal, with explicit qualifications that its ruling should be understood in the context of the facts of that case, and the arguments that were are were not advanced by Ms. Etsitty.

DESIRABILITY OF AMICUS BRIEF AND RELEVANCE OF CONTENTS

First and foremost, amicus seeks to assist the Court applying the proper principles of Title VII law to resolve the appeal. Additionally, amicus seeks to play a special role in pointing out what is not necessary to resolve the appeal and the potentially problematic ramifications from unnecessarily opining on those points, especially insofar as Dr. Tudor did not need to and understandably address those points. Thus, the general concern that briefing not address extraneous points is not necessarily a reason to reject an amicus brief that is trying to make the point about what the court need not say, precisely because it is unnecessary. To the extent that there is a jurisprudential assumption that courts will not opine unnecessarily on issues, or that future courts will not imbue those statements with undue legal significance, amicus can attest that the actual history of many courts is to the contrary on the particular issue of Title VII's coverage of discrimination against the LGBT community. Thus, amicus respectfully submits that a true "friend of the court" role can lend experience to alert a court as to the potential problems with language that might be misconstrued or mis-cited, because it is

unrealistic to expect a court, with its vast and varied docket to be able to anticipate such problems.

CONCLUSION

For the aforementioned reasons, Lambda Legal respectfully requests that this Court accept for filing the brief submitted concurrently herewith.

DATED: February 19, 2019

Respectfully submitted,

LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.

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

CERTIFICATE OF COMPLANCE WITH RULE 32

This motion complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type-style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016, in 14-point Times New Roman font, and contains only 841 words.

DATED: February 19, 2019 By: */s/ Gregory R. Nevins*
Gregory R. Nevins

CERTIFICATE OF SERVICE

I, Gregory R. Nevins, hereby certify that on February 19, 2019, I electronically filed a copy of the foregoing with the Clerk of Court using the CM/ECF system, which will automatically serve all counsel of record.

/s/ Gregory R. Nevins

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), the undersigned counsel for amicus curiae states that amicus is a non-profit organization and does not have a parent corporation and does not issue stock,

DATED: February 19, 2019

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AMICUS CURIAE'S IDENTITY, INTEREST, AND AUTHORITY TO FILE

Lambda Legal is the nation's largest national legal organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and everyone living with HIV through impact litigation, education and public policy work. Lambda Legal has been counsel or amicus in some of the most important cases in which transgender workers have invoked federal protections against sex discrimination. *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (counsel); *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018) (amicus); *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007) (amicus). Lambda Legal employees staff a help desk that processes over 7,000 calls a year annually, with employment calls always comprising the largest or near-largest category. Thus, the issues in this appeal are both familiar and important to Lambda Legal and its members.

The timing of the filing is authorized by the Court's Order of November 13, 2018; that order provided that the brief must be accompanied by a motion for leave.[1]

[1] Given the voluminous record in the case over the multiyear litigation and seven-day jury trial, amicus did ensure that its understanding of the record was correct through consultations with Dr. Tudor's counsel. Nevertheless, no party's counsel authored the brief in whole or in part; nor did anyone other than amicus, its member or counsel, contribute money that was intended to fund preparing or submitting the brief. Fed. R. App. P. 29(a)(4)(E).

INTRODUCTION

The primary error by Southeastern is its contention that the law required Tudor to plead her case in one particular way – that is incorrect, as we explain. We then will address a number of other objections that Southeastern makes, none of which provide any basis for disturbing the jury verdict here, particularly due to the proper jury instruction regarding liability, to which there was no objection.

I. THE DISTRICT COURT CORRECTLY RULED THAT TUDOR COULD PURSUE A TITLE VII CLAIM THAT, AS A WOMAN, SHE ENDURED DISCRIMINATION BY DEFENDANTS WHO REGARDED HER AS A MAN.

The District Court properly rejected Southeastern's contention below that, under *Etsitty*, it is impermissible "to allow Plaintiff to bring a claim as a female." See Second Brf. at 38. The court below was also correct in ruling that Plaintiff's claims could go forth as "sex-stereotyping" claims, reasoning that "[h]ere, it is clear that Defendants' actions as alleged by Dr. Tudor occurred because she was female, yet Defendants regarded her as male. Thus, the actions Dr. Tudor alleges Defendants took against her were based upon their dislike of her presented gender." *Id*. at 37-38; see also *Id*. (district court held that "Plaintiff was not 'complaining that transgender persons were treated different' but rather contending that 'once she was a woman, [Plaintiff] was treated differently.'").

In arguing that Tudor could not proceed as a woman, Southeastern incorrectly extrapolates from the fact that in *Smith v. Salem*, 378 F.3d 566 (6th Cir. 2004), Jimmie Smith described himself as "biologically and by birth a male," *id.* at 568, and was allowed by the court to pursue these claims as he had framed them, that all transgender women are legally compelled to bring Title VII claims as males. Indeed, Smith's decision to bring a Title VII claim as a man, notwithstanding Smith's female identity, is permissible (and, in Smith's case, was likely advisable) pursuant to a particular principle of Title VII law providing that a plaintiff does not need to embrace the vision that the discriminators have in order to frame a claim based on that vision. *See EEOC v. Boh Bros., Inc.*, 731 F.3d 444, 456 (5th Cir. 2013) (en banc) (plaintiff can frame a Title VII discrimination claim from "the alleged harasser's subjective perception of the victim").[2]

Against this legal backdrop, the District Court ruled that Tudor was not "complaining that transgender persons were treated different" but rather contending that "once she was a woman, [Plaintiff] was treated differently." (Second Brf. at 37). In so ruling, the District Court appropriately recognized that:

[2] *See also id*. at 456-57 ("We do not require a plaintiff to prop up his employer's subjective discriminatory animus by proving that it was rooted in some objective truth; here, for example, that Woods was not, in fact, "manly."); *see generally Deneffe v. Skywest, Inc*., No. 14-CV-00348-MEH, 2015 WL 2265373, at *6 (D. Colo. May 11, 2015) (relying on *Boh Brothers* to hold that plaintiff survived a motion to dismiss based on allegations "that a supervisor viewed" him "as 'insufficiently masculine'").

- The fact that Jimmie Smith decided to describe himself in his complaint as a gender non-conforming man, and the fact that the Sixth Circuit and this Court endorsed the availability of that option, do not mean that all transgender individuals who begin at a given workplace presenting as a man, and then later transition on the job, **must** proceed as a man;
- The statements in *Etsitty* depicting the claim in terms of the "use of the women's restroom . . . as a male-to-female transsexual" or of a male's "[u]se of a restroom designated for the opposite sex"[3] reflected depictions of what Krystal Etsitty actually argued, as opposed to appropriate universal characterizations of what transgender women inherently argue when seeking to use the women's room that they regard as the appropriate and safe option for them. *See Etsitty*, 502 F.3d at 1224

Southeastern is simply mistaken that the *Smith* and *Etsitty* courts required the plaintiffs to proceed as they did. Such a contention is at odds with what this Court said in footnote 3 of the *Etsitty* opinion:

Although Etsitty identifies herself as a woman, her Price Waterhouse claim is

[3] *See Etsitty*, 502 F.3d at 1223 (usage of women's bathrooms could not be justified on the theory that Krystal Etsitty was "entitled to protection as a biological male who was discriminated against for failing to conform to social stereotypes about how man a should act and appear.").

> based solely on her status as a biological male. Etsitty does not claim protections under Title VII as a woman who fails to conform to social stereotypes about how a woman should act and appear. 502 F.3d at 1223 n.3

Additionally, *Kastl v. Maricopa Cty. Comm. Coll. Dist*., 325 F. App'x 492 (9th Cir. 2009) provides additional support for the lower court's ruling that Tudor could bring a Title VII claim as a woman. There, the Ninth Circuit specifically held that a transgender woman, proceeding as a woman, stated a prima facie case "that impermissible gender stereotypes were a motivating factor in [the employer's] actions against her," rejecting the part of the trial court's ruling that had thrown her case out for failure to prove she was a woman. *See Id.* at 493.

Southeastern's contention that Tudor **could** not claim discrimination as a woman finds no support in *Etsitty*'s observation that Krystal Etsitty **did** not claim discrimination as a woman.[4] In sum, the District Court correctly ruled that Tudor could proceed as a woman in advancing her Title VII claim.

[4] Indeed, Southeastern's brief acknowledges that "Etsitty **sought** 'protection as a biological male who was discriminated against for failing to conform to social stereotypes'" rather than this Court having limited her to such a claim. Second Brf. at 6, quoting *Etsitty*, 502 F.3d at 1223 (emphasis added).

II. SOUTHEASTERN ADVANCES AND RELIES UPON MANY OTHER MISTAKEN PREMISES REGARDING *ETSITTY*.

Amicus now turns to addressing Southeastern's various other attacks on the jury verdict, which find no support in *Etsitty* or Title VII law generally.

A. *Etsitty* Does Not Mandate Automatic Dismissal of a Lawsuit by a Plaintiff who Questions Those Holdings in Pretrial Procedures.

Southeastern's brief is rife with citations to pretrial allegations and arguments regarding the definition of "sex" and how rules about bathroom usage can constitute sex discrimination, the most salient being how "jarring" it is that twenty-five paragraphs of the complaint concern bathroom usage. See Second Brf. at 40. Whatever Tudor alleged or argued pretrial is completely irrelevant to this appeal, which must focus only on the evidence, arguments, and instructions the jury heard. As explained by this Court in *Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1228 (10th Cir. 2000): "Once there has been 'a full trial on the merits, . . . we are left with the single overarching issue whether plaintiff adduced sufficient evidence to warrant a jury's determination that adverse employment action was taken against' the plaintiff because of his or her protected status." *Id*. at 1226 n.7 (*quoting Fallis v. Kerr–McGee Corp*., 944 F.2d 743, 744 (10th Cir.1991) and *citing U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714–15 (1983).

Indeed, Southeastern explicitly acknowledges that Tudor streamlined her trial presentation so as to avoid issues that were still in contention regarding the scope of Title VII's sex discrimination protections. See Second Brf. at 39 n.4. Because Southeastern stipulated that its trial presentation would follow the District Court's rulings regarding the meaning of "sex," Tudor did not call as a witness her expert on that subject, Dr. George Brown. *Id*.

In short, this Court should reject any argument by Southeastern that focuses on what Tudor argued and alleged over the long course of this litigation in what ended up being an unnecessary effort to get an expanded view of Title VII's coverage.

B. Southeastern's Contentions that Tudor's Trial Presentation "Focused" or "Centered" on Improper Considerations Under *Etsitty* Are Irrelevant Legally and Incorrect Empirically.

Throughout its brief, Southeastern complains about the "focus" of Tudor's case, alternatively phrased as what Tudor's case "centered" on, or "focused on." *E.g.*, Second Brf. at 3, 13, 14. When the losing side at trial complains in such vague fashion, the appellate court can and should expect to be directed to (1) the jury instruction that allowed the jury to return a verdict on an improper basis, and (2) the losing side's objection thereto. The Court will search Southeastern's brief in vain for either; instead, the record reflects a jury instruction that was proper and unobjectionable to Southeastern: "Thus, for Plaintiff to prevail, you must find that

any wrongful action occurred because of her gender, or that any wrongful action occurred because of a perception that that person does not conform to a typical gender stereotype." Tudor Appendix, Vol. 2 at 47. Southeastern does not challenge this instruction on appeal nor explain how the jury was necessarily mistaken in rendering a verdict in Dr. Tudor's favor given the evidence cited in both its brief and the Third Brief (from Dr. Tudor).

Indeed, to the extent that Southeastern contends that any evidence regarding bathroom use restrictions was problematic, it is noteworthy that its own recitation of supposedly problematic evidence consists of fifteen examples, only two of which even refer to bathrooms or restrooms.

Southeastern also complains about the supposed introduction of the subject of McMillan's religious beliefs into the trial. Or more aptly, a failed attempt to introduce religious belief into the proceedings, given that, under Kendrick, the only relevant instances would be what the jury heard. Per Southeastern, Tudor's counsel invoked religion in two instances at trial. First, he engaged in an unsuccessful attempt to elicit testimony that McMillan's religion caused him to adversely affect others' jobs, when McMillan actually **helped** someone else get a job because his religious belief inspired him to do so. *See* Second Brf. at 21. Southeastern also depicts a ham-handed attempt by Tudor's counsel in closing argument to prompt a Perry Mason-esque confession by goading McMillan that a

true man of faith would confess to his malfeasance. *Id*. It didn't work. While these may be examples of a bad day at the office for Tudor's counsel, they offer no support whatsoever for the contention that religious bias infected the jury's verdict.

C. Southeastern Fails to Appreciate that Title VII Protects All Workers from Sex Stereotyping Discrimination, Whether They Are Cisgender or Transgender.

Southeastern's arguments about discrimination based on pronoun usage and gender nonconformity emanating from a worker's on-the-job transition reflect a discredited notion that transgender workers are not protected against sex stereotyping discrimination. In so arguing, Southeastern seems to misunderstand the results of the *Etsitty* litigation. There, the district court held that transgender workers had no protection under Title VII. *Etsitty v. Utah Transit Auth*., No. 2:04CV616, 2005 WL 1505610, **4-6 (D. Utah June 24, 2005) ("There is a huge difference between a woman who does not behave as femininely as her employer thinks she should, and a man who is attempting to change his sex and appearance to be a woman."). But this ruling no longer stands, as this Court stated that it would be error to affix the label "transgender" to workers and deny them the same protections against sex stereotyping that cisgender workers enjoy.[5] *See Etsitty*,

[5] The flaw in Southeastern's approach is illustrated by its contentions that sex stereotyping discrimination that otherwise is unlawful becomes lawful if "presented through the prism of transgenderism" or if it occurs as a "reaction[] to" one's "gender transition and identity." See Second Brf. at 15-16.

502 F.3d at 1222 n.2 ("The conclusion that transsexuals are not protected under Title VII as transsexuals should not be read to allow employers to deny transsexual employees the legal protection other employees enjoy merely by labeling them as transsexuals."); *see also Glenn v. Brumby*, 724 F. Supp. 2d 1284, 1298 n.22 (N.D. Ga. 2010) ("the Tenth Circuit rejected the notion that transsexuals are excluded from Title VII protections."), *aff'd*, 663 F.3d 1312 (11th Cir. 2011).

For purposes of resolving this appeal, it suffices to apply the simple standard that the pieces of evidence listed below, cited by Tudor at pages 3-6 of the Third Brief, reflect possible hypothetical experiences of gender nonconforming cisgender women that the jury reasonably could find constituted sex stereotyping discrimination:

- having one's gender characterized as being "weird."
- someone saying that in a picture you are "trying to look feminine" but "you aren't"
- having your "raspy" voice mocked as trying to not sound so—like a male"
- Being referred to by male pronouns, by people who definitively know that you identify as a woman, and indeed especially by people who have only ever known you as identifying as a woman.
- Being told that you will be fired if your "make-up" is not "right"
- Having your clothing choices specially policed, including being told to watch your skirt length.

One part of Southeastern's premise is particularly baffling – the notion that deliberately using masculine words, pronouns, and names for someone one knows identifies as a woman is not sex stereotyping discrimination. It is prototypical sex

stereotyping discrimination, and Southeastern never explains how it could be otherwise. If Southeastern is laboring under the delusion that one must be transgender to endure deliberate misgendering and being described by words of the other gender, the reality is flatly to the contrary. *E.g.*, *Boh Bros., Inc.*, 731 F.3d at 478 (en banc) (cisgender, heterosexual male derided as a "princess" and a "bitch"); *Lewis v. Heartland Inns of Am., LLC*, 591 F.3d 1033, 1036 (8th Cir. 2010) (cisgender, heterosexual female was mistaken for a male and referred to as "tomboyish."); *Spearman v. Ford Motor Co.*, 231 F.3d 1080 (7th Cir. 2000) (cisgender black gay man referred to as RuPaul), *overruled by Hively v. Ivy Tech. Comm. Coll.*, 853 F.3d 339 (7th Cir. 2017) (en banc).

Amicus's selection of the most obvious and indisputable examples of sex stereotyping evidence cited by Tudor should in no way imply that the other examples cited at pages 3-6 of the Third Brief do not also qualify as sex stereotyping discrimination. In a sufficiency of the evidence challenge, the cited examples are more than sufficient to sustain the jury's verdict. Indeed, the supposedly problematic evidence cited by Southeastern at pages 18-20 of the Second Brief are sufficient to sustain the jury's verdict.

III. THIS COURT SHOULD REJECT ANY ARGUMENT BY SOUTHEASTERN THAT TUDOR WAS REQUIRED TO SHOW MORE THAN DISCRIMINATION BASED ON HER GENDER NONCONFORMITY.

In a cryptic passage of its brief, Southeastern argues:

> Even if Etsitty allows Plaintiff to bring a sex-stereotyping claim as a woman, that is not the claim Plaintiff pursued in allegations or evidence. Etsitty makes clear that "[t]he critical issue under Title VII 'is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.'" Etsitty, 502 F.3d at 1225 (citation omitted).

Second Brf. at 40. Southeastern's embrace of Jury Instruction 6 disposes of any attempt to argue that Tudor, to prevail, was required to show something more than discrimination based on gender stereotypes. This Court should reject the argument on this basis alone, but with the comfort of knowing that, on its merits, it is a red herring.

For starters, the "citation" that Southeastern "omit[s]" is to *Oncale v. Sundowner Offshore Servs, Inc.*, 523 U.S. 75 (1998). The Supreme Court in *Oncale*, and in *Harris v. Forklift Sys*., from whence the "critical issue" quote came,[6] both involved the rejection of defense arguments that the mere existence of

[6] *See Oncale*, 523 U.S. at 80, *quoting Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring).

differential treatment by gender was not enough to state a Title VII claim. Moreover, it is wholly untenable to suggest that *Oncale* requires any showing regarding how the other sex was treated comparatively, as women were nowhere to be found near the worksite of the plaintiff, who "was employed as a roustabout on an eight-man crew" on an "oil platform in the Gulf of Mexico." *See Oncale*, 523 U.S. at 77. More fundamentally, those rulings in no way undermine the Court's command forbidding "sex based considerations" in employment action and decreeing that "[g]ender must be irrelevant to employment decisions." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240-42 (1989), as multiple courts of appeals have already recognized. *See Lewis*, 591 F.3d at 1039 (approving the lower court's recognition that "sex stereotyping comments may be evidence of discrimination" while rejecting its "mistaken view that a Title VII plaintiff must produce evidence that she was treated differently than similarly situated males"); *see also Boh Bros. Inc.*, 731 F.3d at 456.

That gender stereotyping discrimination violates Title VII is true in no small part because that aspect of *Price Waterhouse* was affirmed and amplified by Congress in passing the Civil Rights Act of 1991, which explicitly provided that "[e]xcept as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment

practice, even though other factors also motivated the practice." 42 U.S.C. 2000e-2(m). Thus, it remains true that the consideration of gender and sex-based considerations inherent in sex stereotyping cannot motivate an employment action; Title VII does not require proof regarding treatment of the other gender.

In sum, this Court should reject any stealth attempt by Southeastern to augment, post-verdict, the standard for liability for sex discrimination.

IV. AMICUS RESPECTFULLY SUBMITS THAT ANY DISCUSSION OF *ETSITTY* MAKE CLEAR THAT THE DECISION IS TO BE UNDERSTOOD IN LIGHT OF THE FACTS AND POSTURE OF THAT CASE.

The foregoing dispenses with Southeastern's cross-appeal; however, the troubling aspect of some of cross-appellant's arguments suggests that clarity regarding Etsitty's holdings might be helpful going forward. The *Etsitty* opinion states that a Title VII plaintiff "may not claim protection under Title VII based upon her transsexuality per se" and that "[u]se of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes." *Etsitty*, 502 F.3d at 1224. A judge assessing whether those statements are definitive statements of the law, or necessarily need to be considered as such, should take into account that this Court never would have needed to opine on those issues, had Krystal Etsitty claimed that she was a woman, that her corresponding use of the women's bathroom was thus the appropriate and safe option for her and

for everyone else, and that she was being refused the use of women's bathrooms because she was not deemed enough of a woman or a proper woman. As was noted in both the *Etsitty* and *Kastl* lawsuits, transgender women customarily assert that, as women, it is both appropriate and safe for them to use the women's bathroom and that it is inappropriate to consign them to using the men's room, which is both inappropriate and unsafe. *See Kastl v. Maricopa Cty. Comm. Coll. Dist.*, 325 F. App'x at 493 ("After all, Kastl identified and presented full-time as female, and she argued to MCCCD that the men's restroom was not only inappropriate for but also potentially dangerous to her.");[7] *Etsitty v. Utah Transit Auth.*, No. 2:04CV616, 2005 WL 1505610 *7 (D. Utah June 24, 2005) ("many women would be . . . concerned for their safety if a man used the public restroom designated exclusively for women. . . . Even Plaintiff stated in her deposition that it would be inappropriate for a man to use a women's restroom.").

To appreciate this very important context is to appreciate this Court's consternation when Etsitty argued that she was a man entitled to use the women's

[7] That Kastl did not ultimately prevail on appeal may be due to her failure to argue that the college's bathroom restriction was impermissibly and inextricably linked to the protected trait of her status as a woman and therefore could not qualify as a legitimate nondiscriminatory reason for her firing. *See generally Johnson v. State of New York*, 49 F. 3d 75, 80 (2nd Cir. 1995) (holding that a policy requiring active membership in an organization where membership was automatically rescinded at age 60 was not neutral; it was, instead, "inextricably linked" with age).

restroom, or that she was a transsexual entitled to use any restroom.[8] Indeed, this Court specifically stated that its pronouncements were based on what Ms. Etsitty argued and adduced in the record. *Etsitty*, 502 F.3d at 1222 ("At this point in time and with the record and arguments before this court, however, we conclude discrimination against a transsexual because she is a transsexual is not 'discrimination because of sex.'").

More importantly, the aforementioned exposition of the *Etsitty* and *Kastl* rulings is **not** geared to establishing that those cases compel the legal conclusion that the bathroom restrictions at issue in those case were invalid, only that those restrictions were not per se valid, nor adjudged to be so. Instead, the rulings in those cases were based "[a]t this point in time and with the record and arguments before this court." *Etsitty*, 502 F.3d at 1222. Amicus respectfully submits that this Court should honor the careful and measured approach that the *Etsitty* Court employed.

[8] Etsitty's challenge to the bathroom restriction included both an argument that "the use of women's restrooms is an inherent part of Etsitty's status as a transsexual and, thus, an inherent part of her non-conforming gender behavior" and that, even if Title VII does not cover discrimination against transsexuals *per se*, "she is nevertheless entitled to protection as a biological male who was discriminated against for failing to conform to social stereotypes about how a man should act and appear." *See Etsitty*, 502 F.3d at 1223-24.

CONCLUSION

For the aforementioned reasons, the judgment should be affirmed, and pronouncements regarding *Etsitty* should take into account the particular facts and contentions in that litigation and that opinion's explicit limitations regarding the breadth of its statements regarding Title VII.

DATED: February 19, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gregory R. Nevins, hereby certify that on February 19, 2019, I electronically filed a copy of the foregoing with the Clerk of Court using the CM/ECF system, which will automatically serve all counsel of record.

By: /s/ Gregory R. Nevins

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