21-1365

United States Court of Appeals for the Second Circuit

SELINA SOULE, a minor, by Bianca Stanescu, her mother, CHELSEA MITCHELL, a minor, by Christina Mitchell, her mother, ALANNA SMITH, a minor, by Cheryl Radachowsky, her mother, ASHLEY NICOLETTI, A MINOR, by Jennifer Nicoletti, her mother,
Plaintiffs-Appellants,

v.

CONNECTICUT ASSOCIATION OF SCHOOLS, INC, DBA CONNECTICUT INTERSCHOLASTIC ATHLETIC CONFERENCE, BLOOMFIELD PUBLIC SCHOOLS BOARD OF EDUCATION, CROMWELL PUBLIC SCHOOLS BOARD OF EDUCATION, GLASTONBURY PUBLIC SCHOOLS BOARD OF EDUCATION, CANTON PUBLIC SCHOOLS BOARD OF EDUCATION, DANBURY PUBLIC SCHOOLS BOARD OF EDUCATION,
Defendants-Appellees,

and

ANDRAYA YEARWOOD, THANIA EDWARDS on behalf of her daughter, T.M., CONNECTICUT COMMISSION ON HUMAN RIGHTS,
Intervenors-Appellees.

On Appeal from the United States District Court for the District Of Connecticut, Case No. 3:20-CV-00201 (RNC)

BRIEF OF 42 LEGAL ETHICS SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

EVAN M. TAGER
Mayer Brown LLP
1999 K Street NW
Washington, DC 20006
(202) 263-3000

GEOFFREY M. PIPOLY
JACEY D. NORRIS
Mayer Brown LLP
71 S. Wacker Drive
Chicago, IL 60606
(312) 782-0600

Counsel for Legal Ethics Scholars

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INTEREST OF *AMICI CURIAE*[1]

Amici are 42 legal scholars whose scholarship, teaching, and professional service have focused on legal ethics and professional responsibility, including the professional norms governing lawyers and judges. Collectively, *amici* have authored hundreds of articles and books regarding the norms governing the legal profession, including on the subjects of judicial ethics and attorney ethics, and on issues of courtesy towards litigants. *Amici* are uniquely well-qualified to comment on the issues arising from Plaintiffs' counsel's refusal to comply with the district judge's order to stop referring to the Intervenor-Defendants, who are transgender girls, as "males" with no further nuance or qualification.

The opinions contained in this brief reflect the individual views of the *amici* scholars and not of the institutions that employ the *amici* scholars.

The attached Appendix contains a complete list of *amici*.

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[1] *Amici* have notified all parties of their intent to file this brief. All parties consented to the filing of the brief. No party's counsel authored this brief in whole or in part. No entity or person, other than *amici* and their counsel, made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION

A bedrock principle of the United States justice system is that all people must receive fair and equal treatment under the law. This includes transgender people. One way that judges ensure the fair treatment of litigants is by maintaining an atmosphere of courtesy and civility in their courtrooms, which ensures that litigants are respected during legal proceedings. Courtesy and respect towards a transgender person requires the use of language that conforms with that person's gender identity. When lawyers fail to demonstrate common courtesy and demean opposing counsel, litigants, or witnesses by referring to them in terms that they find offensive and hurtful, judges must be empowered to stop it.

The district judge in this case had the authority (if not an obligation) to ensure that the litigants before him were being treated with respect—and so he issued an order requiring nothing more than that. Plaintiffs do not dispute that the two Intervenor Defendants in this case are transgender girls. However, Plaintiffs' counsel repeatedly referred to the Intervenor Defendants as "males" with no further nuance or qualification. These references were not necessary to advance Plaintiffs'

case and served no purpose other than to abase the two transgender youths whose athletic achievements are at the core of this litigation. The judge's order was narrowly tailored to address the harm caused by Plaintiffs' counsel. It required Plaintiffs' counsel to stop referring to two transgender girls as "males" without appropriate qualification, but it did not require Plaintiffs' counsel to start referring to the Intervenor Defendants as "females" without qualification. To the contrary, it expressly allowed Plaintiffs' counsel to opt out of using gendered language altogether, stating that terms like "transgender athletes" would be perfectly acceptable. Indeed, the judge even permitted Plaintiffs' counsel to refer to the Intervenor Defendants as "biologically male" and as possessing "male bodies." For Plaintiffs' counsel, even this broad menu of options was not enough—and so they sought the judge's recusal on the basis that his order betrayed bias against them.

Plaintiffs are incorrect. The district judge's order was entirely consistent with the rules of judicial and legal ethics, which obligate judges to treat litigants with courtesy and respect and which require the attorneys in their courtrooms to do the same. Courts are vested with the power to impose decorum, courtesy, and respect in their courtrooms.

Using that power as the district judge did here is appropriate in order to maintain the authority and dignity of our judicial system. It was well within the judge's authority to draw the line between zealous advocacy and harassment and to ensure that the line is not crossed in his courtroom. Drawing that line here did not demonstrate bias against Plaintiffs or their counsel; it simply advanced the goal of maintaining civility. In this case, as in life more generally, courtesy costs nothing; it is an incontrovertible societal benefit. It should not be sacrificed on the false altar of zealous advocacy.

ARGUMENT

I. The Judge's Order—Which Did Nothing More Than Stop Plaintiffs' Counsel From Referring To The Intervenor Defendants As "Males, Period"—Was Not An Abuse Of Discretion.

"Civil behavior is a core element of attorney professionalism." Jayne R. Reardon, *Civility as the Core of Professionalism*, AMERICAN BAR ASSOCIATION BUSINESS LAW TODAY, Sept. 2014, at 1. Thus, attorneys should "embody civility in all they do." *Id.* Court orders that require attorneys to abide by tenets of civility in turn advance this "core element" of the legal profession.

Indeed, judges have broad discretion and authority to control conduct within their courtrooms "to achieve the orderly and expeditious

disposition of cases." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (cleaned up). As part of this authority, judges "'are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates.'" *Id.* (quoting *Anderson v. Dunn*, 6 Wheat. 204, 227 (1821)). In using this power, judges enjoy broad discretion to ensure that litigants and lawyers alike act civilly and courteously towards one another while in the courtroom. *Id.* at 44-45. Indeed, "[t]he power of a court over members of its bar is at least as great as its authority over litigants" and that power includes the ability to enter orders aimed at "protecting the due and orderly administration of justice and in maintaining the authority and dignity of the court." *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764, 766 (1980) (cleaned up).

That is all that happened here. To advance the goal of civility in his courtroom, the district judge issued an order requiring Plaintiffs' counsel to stop referring to the Intervenor Defendants—who are two transgender girls—as "males, period" because that term was "not accurate" and "needlessly provocative." JA022. Importantly, the judge allowed Plaintiffs' counsel to refer to the Intervenor Defendants by

numerous other terms, including "transgender females", *id.*, or as "transgender athletes." JA109. The judge even allowed Plaintiffs' counsel to refer to the Intervenor Defendants as "'biologically male' with 'male bodies.'" JA022. The *only* term Plaintiffs' counsel was not permitted to use was "males, period." *Id.*

The judge's order was in line with core principles of attorney and judicial ethics, which require judges to treat litigants with courtesy and to ensure that attorneys in their courtrooms do the same. The judge's order in this case, moreover, is squarely in line with what courts across the country—including this Court and the U.S. Supreme Court—do all the time. As a matter of simple courtesy, courts regularly refer to transgender litigants by their requested names and pronouns. For these reasons, the judge's order was not an abuse of his broad discretion.

Plaintiffs' counsel argues—as they did in the district court—that the judge's order hamstrung their ability to zealously advocate for their clients. But although the ethics rules impose a duty on lawyers to zealously advocate for their clients' position, those same ethics rules say that zealous advocacy and civility go hand-in-hand. This Court should

reject Plaintiffs' counsel's argument that the *only* way they could zealously advocate for their clients is by using the term "males, period."

This Court should similarly reject Plaintiffs' argument that the judge's order adversely impacted their First Amendment rights. It is beyond peradventure that lawyers' speech rights are limited while they are in the courtroom itself. It was not an abuse of the judge's broad discretion to ensure that Plaintiffs' counsel treated all litigants with courtesy and respect.

A. The Judge's Order Was Not An Abuse Of Discretion Because It Was Consistent With The Ethics Rules And With Courts' Routine Practice.

1. The Judge's Order Was Consistent With The Ethics Rules.

"All persons involved in the judicial process—judges, litigants, witnesses, and court officers—owe a duty of courtesy to all other participants." *In re Snyder*, 472 U.S. 634, 647 (1985). To further this principle, state and federal courts alike have adopted codes of judicial conduct that require judges to treat litigants with courtesy and respect.

For example, Canon 2 of the ABA's Model Code of Judicial Conduct specifies that judges "shall perform the duties of the judicial office impartially, competently, and diligently" including by "requir[ing]

lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment . . . against parties, witnesses, lawyers, or others" based upon attributes including sex and gender under Rule 2.3(C). For purposes of Rule 2.3(C), harassment means "verbal or physical conduct that denigrates or shows hostility or aversion toward a person" on bases including sex and gender. Model Rule of Judicial Conduct 2.3, cmt. 3. Further, under Rule 2.8(B), judges "shall be patient, dignified, and courteous to litigants . . . and shall require similar conduct of lawyers." Canon 3(A) of the Code of Conduct for United States Judges likewise counsels that judges "should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity" and "should require similar conduct by those subject to the judge's control, including lawyers to the extent consistent with their role in the adversary process."

Similar duties apply to lawyers. For example, ABA Model Rule of Professional Conduct 8.4(g) provides that it is professional misconduct for any attorney to "engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual

orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law." Comment 3 to that Rule states that "[d]iscrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others" including "demeaning verbal or physical conduct."

But the ethics rules expect lawyers to do much more than merely avoid engaging in overt discrimination and harassment. Thus, a lawyer's actions need not rise to the level of actionable professional misconduct before those actions become repugnant to the principles of attorney ethics. The U.S. District Court for the District of Connecticut has expressly adopted rules related to attorney courtesy, including Connecticut Rule of Professional Conduct 4.4(a). U.S. Dist. Ct. for the Dist. Conn. Local Rule 83.2 (adopting Connecticut Rules of Professional Conduct). That rule states, in relevant part, that, "[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person." Conn. Rule of Pro. Conduct 4.4(a); *accord* ABA Model Rule of Pro. Conduct 4.4(a).

Similarly, the Lawyers' Principles of Professionalism issued by the Connecticut Bar Association recognize that "[c]ivility and courtesy are the hallmarks of professionalism" and instruct attorneys to be "courteous, polite, respectful, and civil, both in oral and in written communications." Lawyers' Principles of Professionalism, https://bit.ly/2WEu3og.

The district judge's order here was entirely consistent with these ethics rules and principles. The order required *only* that Plaintiffs' counsel stop referring to Intervenor Defendants as "males, period" while providing Plaintiffs' counsel with numerous additional options for referring to the Intervenor Defendants. JA022. The order was a recognition that referring to the Intervenor Defendants as "males, period" was discourteous, inaccurate, and unduly provocative. JA022. To permit Plaintiffs' counsel to continue to refer to transgender girls as "males" would have been in tension with Model Rule 2.3(C) because such behavior "denigrates or shows hostility or aversion" towards transgender girls based on sex or gender.[2] Similarly, repeated references to

[2] The consequences of failing to respect transgender persons' requested names and pronouns are severe. *See* Stephen T. Russell, *et al.*,

transgender girls as "males" without any further qualification or nuance served no "substantial purpose other than to embarrass, delay, or burden" the Intervenor Defendants, in violation of Model Rule 4.4(a). The judge had a duty to prevent such harassment and embarrassment. His order did just that. It perforce was no abuse of discretion.

2. The Judge's Order Was Consistent With Courts' Routine Practice.

The judge's order in this case also was in line with what courts already have been doing for years. Consistent with the ethics rules and notions of basic courtesy, judges around the country regularly refer to transgender litigants by their requested names and pronouns. The district judge did not abuse his discretion by issuing an order aligned with the manner in which numerous courts already behave as a matter of routine.

One recent high-profile example of courts extending courtesy to transgender litigants by using their requested names and pronouns is Justice Gorsuch's majority opinion in *Bostock v. Clayton County*, 140 S.

Chosen Name Use Is Linked to Reduced Depressive Symptoms, Suicidal Ideation, and Suicidal Behavior Among Transgender Youth, 63 J. ADOLESCENT HEALTH 379 (2018).

Ct. 1731 (2020). *Bostock* involved the question whether Title VII's protection from workplace discrimination based on sex applies to gay and transgender persons. Throughout the majority opinion, the Court referred to a transgender litigant, Aimee Stephens, by her requested name and pronouns. *See, e.g. id.* at 1738 ("*Aimee Stephens* worked at R.G. & G.R. Harris Funeral Homes . . . . When *she* got the job, *Ms.* Stephens presented as a male.") (emphasis added). The Court did not see the need to explain *why* it was referring to Ms. Stephens as "Aimee Stephens" or "she"—it did so without giving the issue a second thought. This approach is consistent with basic notions of common courtesy: Because Ms. Stephens referred to herself as "she," so did the Court.

Bostock is hardly an outlier. For decades, state and federal courts have referred to transgender litigants by their requested names and pronouns as a matter of judicial courtesy.[3] *See, e.g., Kachalsky v. Cnty.*

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[3] Judicial courtesy with regard to how litigants self-identify is not limited to transgender persons. Courts have for years deferred to litigants' preferences on far less serious issues of identity including the use of maiden names and nicknames. *See, e.g., Herwig v. United States*, 105 F. Supp. 384, 385 (Ct. Cl. 1952) (because the plaintiff "designated herself by her maiden name . . . hereinafter she will be referred to by said maiden name"); *Trust Co. Bank of Nw. Ga., N.A. v. Manning*, 1993 WL 294184, at *2 n.1 (N.D. Ga. May 21, 1993); *White v. White*, 623 So. 2d 31,

of Westchester, 701 F.3d 81, 88 (2d Cir. 2012) (referring to a transgender woman litigant as "she" without further comment); *Mbendeke v. Garland,* --- Fed. App'x ---, 2021 WL 2026082 at *2 (2d Cir. May 21, 2021) (acknowledging that petitioner in immigration case "now identifies as transgender" and referring to the petitioner as "she" without further comment); *Farmer v. Haas,* 990 F.2d 319, 320 (7th Cir. 1993) (Posner, J.); *United States v. McGrath,* 80 F. App'x 207, 207 n.1 (3d Cir. 2003); *Smith v. Palmer,* 24 F. Supp. 2d 955, 957 n.1 (N.D. Iowa 1998); *Phillips v. Mich. Dep't of Corr.,* 731 F. Supp. 792, 793 n.2 (W.D. Mich. 1990) (using plaintiff's requested pronoun "out of respect for plaintiff" notwithstanding that "whether plaintiff is indeed a transsexual" was a contested issue in the case); *Littleton v. Prange,* 9 S.W.3d 223, 224 (Tex. Ct. App. 1999) ("Throughout this opinion Christie will be referred to as 'She.' This is for grammatical simplicity's sake, and out of respect for the litigant, who wishes to be called 'Christie' and referred to as 'she.' It has

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33 (La. Ct. App. 1993); *In re Thorpe*, 2019 WL 3778359, at *1 (B.A.P. 9th Cir. Aug. 9, 2019) ("Douglas Thorpe ('Doug', as he prefers to be called)"); *In re Marriage of Whalen*, 2019 WL 1487637, at *1 n.1 (Iowa Ct. App. Apr. 3, 2019) (acquiescing to a litigant's preference to be called "D.J." instead of "Douglas").

no legal implications."); *Gloucester Cty. Sch. Bd. v. G.G. By* ***His*** *Next Friend & Mother, Dierdre Grimm*, 137 S. Ct. 369 (Oct. 28, 2016) (Mem.) (emphasis added) (using transgender litigant's requested pronoun in the case caption).[4]

The courts' decisions in these cases to refer to transgender litigants by their requested names and pronouns were not controversial. They were consistent with the ethics rules to which judges are bound and reflect the judicial courtesy to which each litigant is entitled. The judge's order in this case is of a piece with decades of courteous behavior from other judges. It was, accordingly, well within his discretion.

[4] To be sure, there has been one notable exception. *See United States v. Varner*, 948 F.3d 250 (5th Cir. 2020). Needless to say, *amici* disagree with the panel majority's refusal in that case to call the party by her requested pronoun or even use no pronoun at all. But for present purposes, what matters is that numerous courts have elected to treat transgender litigants with dignity and courtesy—placing the district court's decision to do so in this case well within the mainstream and greatly undermining the contention of Plaintiffs' counsel that it was an abuse of discretion.

B. Plaintiffs' Counsel's Arguments That The Judge's Order Impeded Their Ability to Zealously Advocate For Their Clients Or Otherwise Infringed On Plaintiffs' Rights Are Insubstantial.

Plaintiffs' counsel assert that the judge's order "conflict[s] with [their] duty to vigorously represent Plaintiffs' position." Opening Br. 50. They took a similar tack in the district court, asserting that they were "not sure" that they could "vigorous[ly] represent" their clients *unless* they could refer to the Intervenor Defendants as "males" without any further qualification. JA106. In other words, Plaintiffs' counsel have taken the position that the *only* way they can zealously advocate for their clients is by referring to the Intervenor Defendants as "males, period." That position represents a misunderstanding of the ethics rules and of the judge's order.

The ethics rules do indeed recognize that zealous advocacy is a critical value of the legal profession. For example, the commentary to Connecticut Rule of Professional Conduct 1.3 states that a lawyer "must . . . act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." *Accord* ABA Model Rule of Pro. Conduct 1.2, cmt. 1. But that very same commentary makes clear that zealous advocacy "*does not require the use of offensive tactics or*

preclude the treating of all persons involved in the legal process with courtesy and respect." Conn. Rule of Pro. Conduct 1.3, commentary (emphasis added); *accord* ABA Model Rule of Pr. Conduct 1.3, cmt. 1. Put simply, "[a]ppropriate zeal . . . never extends to offensive tactics." Reardon, *supra* p. 4, at 1. Indeed, there need not be tension between lawyers' dual obligations to zealously advocate for their clients and to extend courtesy and civility to other litigants. As one federal judge observed:

> Civility is courtesy, dignity, decency and kindness. Moreover, civility is not inconsistent with zealous advocacy. Civility is the trademark of a winner. . . . The principles of civility are not mere ideals; they have practical benefits, as well. . . . In the long run, such behavior not only is totally consistent with zealous advocacy, but also inexorably promotes the interests of justice.

Phila. Gear Corp. v. Swath Int'l, Ltd., 200 F. Supp. 2d 493, 497, 498 (E.D. Pa. 2002) (cleaned up). Hence, though it may be difficult to draw, there is a "line between zealous advocacy and unacceptable courtroom tactics," and "the line must be drawn." *United States v. Kouri-Perez*, 187 F.3d 1, 12 (1st Cir. 1999). "Counsel must represent their clients' interest within that line, and not beyond it." *Id.*

The judge's order here struck the appropriate balance between protecting Plaintiffs' counsel's right to zealously advocate and protecting the Intervenor Defendants' right to be treated with courtesy, civility, and respect. Under the judge's order, the *only* restriction placed on Plaintiffs' counsel was the instruction not to refer to the Intervenor Defendants as "males, period." The judge did *not* require Plaintiffs' counsel to refer to the Intervenor Defendants simply as "females." Instead, he asked that Plaintiffs' counsel use terms such as "transgender females," which both acknowledges the Intervenor Defendants' female gender identity and allows Plaintiffs' counsel to differentiate transgender girls from cisgender girls. The judge also permitted Plaintiffs' counsel to use neutral terms such as "transgender athletes" if they wish to avoid using the term "females" altogether. JA109. The judge even permitted the use of the term "male" as a qualified descriptor, explaining that Plaintiffs' counsel would still be permitted to refer to the Intervenor Defendants as "'biologically male' with 'male bodies.'" JA022.

Plaintiffs do not dispute that the Intervenor Defendants are transgender. In fact, Plaintiffs' counsel stated that "[g]ender identity is not the point of this case. The point of the case is physiology of bodies

driven by chromosomes and the documented athletic advantage that comes from a male body, male hormones, and male puberty in particular." JA105-106. Nothing in the judge's order prevented Plaintiffs from vigorously pursuing the case as Plaintiffs themselves have described it.

Under the judge's order, Plaintiffs were still permitted to refer to the Intervenor Defendants' "male bodies" and "male puberty" for purposes of their arguments but were required to refrain from using language that misgendered the Intervenor Defendants without qualification. After all, Plaintiffs themselves take the position that gender is irrelevant in this litigation, so by their own account they should not need to misgender the Intervenor Defendants to zealously advocate for their clients.

Plaintiffs' additional argument that the order "deprives the Plaintiffs of Due Process rights . . . as well as First Amendment rights" (ECF No. 103-1, at 14) is meritless. As every lawyer knows, "an attorney is not free to say literally anything and everything imaginable in a courtroom under the pretext of protecting his client's rights to a fair trial and fair representation." *United States v. Cooper*, 872 F.2d 1, 3 (1st Cir. 1989). Here, the very minor limitation imposed upon counsel's speech

did not affect Plaintiffs' ability to fully argue their claims; nor did it prevent Plaintiffs' counsel from acting as zealous advocates—especially given that the judge's order permitted them to use neutral, non-offensive terms like "transgender athletes."

Further, "whatever right to 'free speech' an attorney has is extremely circumscribed" while that attorney is in the courtroom. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1071 (1991). This is because in courtrooms "the First Amendment rights of everyone (attorneys included) are at their constitutional nadir." *Mezibov v. Allen*, 411 F.3d 712, 718 (6th Cir. 2005). Attorney speech in court and in motion papers "has always been tightly cabined by various procedural and evidentiary rules, along with the heavy hand of judicial discretion." *Id.* at 717. An attorney engaged in client advocacy is "not engaged in free expression" and "retains no personal First Amendment rights" during the representation of a client in courtroom proceedings. *Id.* at 712. Thus, neither Plaintiffs' nor their counsel's First Amendment rights were violated by the judge's order.

II. The Judge's Order Did Not Demonstrate Bias Against Plaintiffs Or Their Counsel.

Plaintiffs' argument that the judge's order demonstrated bias against them is wrong. The order simply sought to enforce civility among the litigants, a goal that is unrelated to any personal feelings or opinions about the underlying issues in the case. *See supra,* pp. 7-11. And the judge's order is entirely consistent with what courts do out of courtesy all the time: refer to transgender litigants by their requested names and pronouns. *See supra*, pp. 11-14. Given how common it already is for courts to refer to transgender people in the way they request, that the judge did so here is hardly an indication of bias.

Moreover, the judge's order gave Plaintiffs' counsel a wide menu of options for how to refer to the Intervenor Defendants. As described above, *supra* p. 17, Plaintiffs' counsel could use conditioned language—"transgender females"—that differentiates the Intervenor Defendants from cisgender females. Plaintiffs' counsel could have used totally gender-neutral terms such as "transgender athletes." Plaintiffs' counsel was even permitted to use the term "male," so long as it was appropriately qualified. For example, under the judge's order, Plaintiffs are still permitted to refer to the Intervenor Defendants as persons with

"male bodies" and to reference "male puberty." As the judge made clear in his order denying Plaintiffs' Motion to Transfer/Disqualify/Recuse Judge, the requirement that Plaintiffs' counsel refer to the Intervenor Defendants using terms "in accordance with their gender identity would entail no concession whatsoever relating to the merits of this case; plaintiffs' counsel would still be able to refer to them as 'biologically male' with 'male bodies.' They just couldn't refer to them as 'males, period.'" JA022. Again, under the judge's order, the *only* language that Plaintiffs' Counsel was not permitted to use in reference to the Intervenor Defendants was "males, period." Given the numerous options that the judge left open for Plaintiffs' counsel, there is no reasonable basis to conclude that the judge's order was biased against Plaintiffs—after all, Plaintiffs' counsel could still use the term "male"; they just had to use appropriate qualifications.

The judge's order on the motion to recuse also directly refuted Plaintiffs' assertion that the judge displayed bias by saying that his requirement that counsel refer to the Intervenor Defendants as "transgender females" is consistent with "science." The judge explained that:

> In the telephone conference, I stated that referring to the transgender youth involved in this case as "transgender females" would be consistent with "science, common practice, and perhaps human decency." That statement does not reflect a preconceived conclusion on the issue of unfair competitive advantage presented by this case. In fact, and as I think objective members of the public would readily understand, the "science" I referred to is not the science relating to the issue of unfair competitive advantage but the science that tells us calling transgender girls "males" can cause significant mental and emotional distress. The insight provided by this science has led to a "common practice" of referring to transgender persons by their gender identity, which is viewed by many as a matter of "human decency." Thus, as I said, referring to these transgender youth as "transgender females" would be consistent with "science, common practice, and perhaps human decency." By referring to science in this way, in this context, and for this purpose, I did not state or imply anything about whether the transgender youth in this case do or do not enjoy an unfair competitive advantage when they compete in girls' track.

Id.

Nothing in this order demonstrates that the judge had any particular ideological assumptions about any disputed issue of fact or law in the case—especially considering that Plaintiffs themselves do not dispute that the Intervenor Defendants are transgender. The judge's order was a simple recognition of how language used in judicial proceedings impacts those involved in the proceedings. If anything, the judge's order was aimed at, and was precisely tailored to, *prevent* bias in

his courtroom. Courtesy is not only an ethical imperative for judges; it is necessary to "maintain public confidence in the judiciary by avoiding all impropriety and the appearance of impropriety." *See* Leslie W. Abramson, *Canon 2 of the Code of Judicial Conduct,* 79 MARQ. L. REV. 949, 958 (1996). Judges who acknowledge the modern common usage of terms and defer to litigants' requests regarding pronouns, names, or ethnic terminology are not imposing their beliefs or values on the case; instead, they are simply following the ethical mandate to be courteous. Insisting on courtesy is consistent with the purpose of the ethics rules governing judicial conduct, which is to "maintain both the reality of judicial integrity and the appearance of that reality" because "[t]he public has confidence in judges who show character, impartiality, and diligence." *Id.* at 951.

CONCLUSION

The Court should affirm the district court's order denying Plaintiffs' motion to Transfer/Disqualify/Recuse. And even if the Court rules in favor of Plaintiffs on the merits of the appeal, it should decline their request to assign the case to a different district judge on remand.

Dated: October 14, 2021

Respectfully submitted,

/s/ Jacey D. Norris

EVAN M. TAGER
Mayer Brown LLP
1999 K Street NW
Washington, DC 20006
(202) 263-3000

GEOFFREY M. PIPOLY
JACEY D. NORRIS
Mayer Brown LLP
71 S. Wacker Drive
Chicago, IL 60606
(312) 782-0600

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,034 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirement of Fed. R. App. P. 32(a)(6) because it was prepared in a proportionately spaced typeface using Microsoft Word in Century Schoolbook 14-point type for text and footnotes.

Dated: October 14, 2021

/s/ Jacey D. Norris
Jacey D. Norris
Mayer Brown LLP
71 S. Wacker Dr.
Chicago, IL 60606
(312) 782-0600

APPENDIX

LIST OF *AMICI CURIAE*[*]

James J. Alfini
Professor of Law and Dean Emeritus, South Texas College of Law Houston

Ava Ayers
Associate Professor of Law, Albany Law School

Paul D. Bennett
Clinical Professor and Co-Director of Clinics, University of Arizona College of Law

Nicky A. Boothe
Professor of Law, Florida Agricultural and Mechanical University College of Law

Raymond H. Brescia
Hon. Harold R. Tyler Chair in Law and Technology and Professor of Law, Albany Law School

Lonnie T. Brown Jr.
A. Gus Cleveland Distinguished Chair of Legal Ethics and Professionalism & Josiah Meigs Distinguished Teaching Professor, University of Georgia School of Law

Sande Buhai
Clinical Professor of Law and Director of Public Interest and Pro Bono Programs, Loyola Law School, Los Angeles

Steven Alan Childress
Conrad Meyer III Professor of Law, Tulane University Law School

Scott L. Cummings
Robert Henigson Professor of Legal Ethics, UCLA School of Law

---

[*]*Amici curiae* appear in their individual capacities; institutional affiliations are provided here for identification purposes only.

Meredith J. Duncan
Alumnae College Professor of Law and Assistant Dean for Diversity, Inclusion & Metropolitan Programs, University of Houston Law Center

Benjamin Edwards
Director of the Public Policy Clinic and Associate Professor of Law, University of Nevada, Las Vegas School of Law

Nora F. Engstrom
Ernest W. McFarland Professor of Law and Co-Director, Stanford Center on the Legal Profession, Stanford Law School

George Fisher
Judge John Crown Professor of Law and Co-Director, Criminal Prosecution Clinic, Stanford Law School

Charles Geyh
Distinguished Professor and John F. Kimberling Professor of Law, Indiana University School of Law

Cynthia Godsoe
Professor of Law, Brooklyn Law School

Bruce A. Green
Louis Stein Chair of Law and Director of Louis Stein Center for Law and Ethics, Fordham University School of Law

Lawrence K. Hellman
Professor Emeritus and Dean Emeritus, Oklahoma City University School of Law

Brooks R. Holland
J. Donald and Va Lena Scarpelli Curran Professor of Legal Ethics and Professionalism, Gonzaga University School of Law

Robert M. Jarvis
Professor of Law, Nova Southeastern University College of Law

Peter A. Joy
Henry Hitchcock Professor of Law, Washington University in St. Louis School of Law

Richard Daniel Klein
Professor of Law, Touro College Law Center

Renee Knake Jefferson
Doherty Chair in Legal Ethics, University of Houston Law Center

Rory K. Little
Joseph W. Cotchett Professor of Law, UC Hastings College of Law

David Luban
University Professor and Professor of Law and Philosophy, Georgetown University Law Center

Steven Lubet
Edna B. and Ednyfed H. Williams Memorial Professor of Law, Northwestern University Pritzker School of Law

Peter Margulies
Professor of Law, Roger Williams University School of Law

Lawrence C. Marshall
Professor of Law, Stanford Law School

Judith A. McMorrow
Professor of Law, Boston College Law School

Kevin C. McMunigal
Krupansky & Vargo Professor of Law, Case Western Reserve University School of Law

Ellen Murphy
Professor of Practice, Wake Forest University School of Law

Russell Pearce
Professor of Law, Edward and Marilyn Bellet Chair in Legal Ethics, Morality, and Religion, Fordham University School of Law

Nancy B. Rapoport
Garman Turner Gordon Professor of Law, Boyd School of Law, and Affiliate Professor of Business Law & Ethics, Lee Business School, University of Nevada, Las Vegas School of Law

Cassandra Burke Robertson
John Deaver Drinko – BakerHostetler Professor of Law and Director, Center for Professional Ethics, Case Western Reserve University School of Law

Jennifer Romig
Professor of Practice, Emory University School of Law

Paula Schaefer
Associate Dean for Academic Affairs and Art Stolnitz Professor of Law, University of Tennessee College of Law

Barry Scheck
The Innocence Project, Co-Director, Cardozo Law School

Carole Silver
Professor of Global Law and Practice, Northwestern, Prizker School of Law

Marjorie Silver
Professor of Law, Touro College Law Center

Jeffrey W. Stempel
Doris S. & Theodore B. Lee Professor of Law, University of Nevada Las Vegas School of Law

John Strait
Emeritus Professor of Law, Professional Ethics Counsel, Seattle University School of Law

Lance Tibbles
Professor of Law Emeritus, Capital University Law School

Ellen C. Yaroshefsky
Howard Lichtenstein Distinguished Professor of Legal Ethics and Executive Director of the Monroe H. Freedman Institute for the Study of Legal Ethics, Maurice A. Deane School of Law at Hofstra University