

No. 19-40016

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
NORMAN VARNER,
Defendant-Appellant.

On Appeal from the U.S. District Court for the
Eastern District of Texas, No. 4:11-cr-00014

**UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., HUMAN
RIGHTS CAMPAIGN, NATIONAL CENTER FOR TRANSGENDER
EQUALITY, NATIONAL LGBT BAR ASSOCIATION, NATIONAL TRANS
BAR ASSOCIATION, AND TRANSGENDER LAW CENTER, IN
SUPPORT OF APPELLANT'S PETITION FOR REHEARING *EN BANC***

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Sharon McGowan Diana Flynn Lambda Legal Defense and Education Fund, Inc. 1776 K Street, NW, 8 th Floor Washington, DC 20006 T: (202) 804-6245	ATTORNEYS FOR <i>AMICI CURIAE</i>

1. Lambda Legal Defense and Education Fund, Inc. (“Lambda Legal”), Human Rights Campaign (“HRC”), National Center for Transgender Equality (“NCTE”), Transgender Law Center (“TLC”), the National LGBT Bar Association (“LGBT Bar Association”), and the National Trans Bar Association (“NTBA”) hereby respectfully move this Court pursuant to FED. R. APP. P. 29 (a) (3) and (b)(3), for leave to file the attached brief as *amici curiae* in support of Defendant-Appellant’s petition for rehearing *en banc*. In support thereof, proposed *amici* state as follows:

2. Lambda Legal is the oldest and largest national legal organization whose mission is to achieve full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people (“LGBT”), and everyone living with HIV through impact litigation, education, and public policy work. Lambda Legal has extensive experience and expertise in ensuring protection for the rights LGBT people¹ as well

¹ See, e.g., *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (holding the Equal Protection Clause of the U.S. Constitution is violated when a government agent fires a transgender employee because of his or her gender non-conformity); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015)(same sex couples are entitled to civil marriage on the same terms and conditions as different sex couples under the Due Process and Equal Protection Clauses of the U.S. Constitution); *Lawrence v. Texas*, 539 U.S. 558 (2003)(holding unconstitutional a Texas law criminalizing homosexual conduct as a violation of Due Process because “[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”); *Romer v. Evans*, 517 U.S. 620 (1996)(holding a Colorado constitutional amendment that prohibited the state executive, legislative and judicial branches from ensuring equal protections for LGB people under Colorado state laws unconstitutional in violation of Equal Protection).

as on issues implicating judicial independence and fairness in the courts.² In 2005, Lambda Legal established its Fair Courts Project to expand access to justice in the courts for LGBT and HIV-affected communities and to encourage people across the nation to take action to support judicial independence and judicial diversity. The communities Lambda Legal represents depend upon a fair and impartial judicial system to enforce their constitutional and other rights.

3. Human Rights Campaign is the largest national lesbian, gay, bisexual, and transgender political organization. HRC envisions an America where lesbian, gay, bisexual, and transgender people are ensured of their basic equal rights, and can be open, honest, and safe at home, at work, and in the community. Among those basic rights is freedom from discrimination and equal justice under law.

4. The National Center for Transgender Equality is a national social justice organization devoted to advancing justice, opportunity and well-being for transgender people through education and advocacy on national issues. Since 2003,

² See, e.g., Lambda Legal, *Protected and Served? A National Survey Exploring Discrimination by Police, Prisons and Schools Against LGBT People and People Living with HIV in the United States* (2014), available at <http://www.lambdalegal.org/protected-and-served>; *Jury Selection and Anti-LGBT Bias: Best Practices in LGBT-Related Voir Dire and Jury Matters*, available at https://www.lambdalegal.org/publications/20160111_jury-selection; Lambda Legal has participated as *amicus curiae* in cases addressing judicial independence such as, *Florida Family Policy Council v. Freeman*, 561 F.3d 1246 (11th Cir. 2009) (recusal), and *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015) (solicitation of funds in judicial campaigns). Lambda has also participated as *amici curiae* in cases addressing bias against LGBT people within the legal system such as *Berthiaume v. Smith*, 875 F.3d 1354 (11th Cir. 2017) (addressing jury *voir dire* regarding anti-LGBT bias).

NCTE has been engaged in educating legislators, policymakers, and the public, and advocating for laws and policies that promote the health, safety, and equality of transgender people.

5. Transgender Law Center was founded in 2002 and is the largest national trans-led organization advocating self-determination for all people. Grounded in legal expertise and committed to racial justice, TLC employs a variety of community-driven strategies to keep transgender and gender nonconforming (“TGNC”) people alive, thriving, and fighting for liberation. TLC also pursues impact litigation and policy advocacy to defend and advance the rights of TGNC people, transform the legal system, minimize immediate threats and harms, and educate the public about issues impacting our communities.

6. The LGBT Bar Association is a non-partisan, membership-based professional association of lawyers, judges, legal academics, law students and affiliated lesbian, gay, bisexual and transgender legal organizations. The LGBT Bar and its members work to promote equality for all people regardless of sexual orientation, gender identity, and expression, and serve in their roles as lawyers to fight discrimination against LGBT people where it continues to exist. This case stands to impact the LGBT Bar’s membership both professionally and personally. The LGBT Bar acknowledges the effect that this case will have on its members as

both legal practitioners and individual citizens. The LGBT Bar, therefore, finds it necessary to vocalize its support of the Appellant.

7. The National Trans Bar Association (“NTBA”) is a national bar association by and for transgender and gender nonconforming legal professionals and law school students and allies who care about transgender rights. The National Trans Bar Association’s core mission is to support transgender people in the legal profession and to increase the transgender community’s access to affordable and culturally competent legal services. In particular, NTBA strives to secure formal legal protections for TGNC people and meaningfully address issues of equity.

7. Lambda Legal, HRC, NCTE, TLC, LGBT Bar Association, and NTBA offer the accompanying brief as *amici* to assist the Court in deciding whether to grant a rehearing to address the questions raised by Appellant in her petition for rehearing *en banc*.

8. Lambda Legal, HRC, NCTE, TLC, LGBT Bar Association, and NTBA believe that their *amicus* brief will assist the Court by providing it with information about the experiences of transgender people in the courts, the harmful impact of misgendering on transgender people, and the manner in which other courts have decided to address transgender litigants in cases similar to the present case.

9. As such, proposed *amici* would “fulfill the classic role of *amicus curiae* by assisting in a case of general public interest, . . . supplementing the efforts of

counsel, and drawing the court's attention to law that might otherwise escape consideration." *Funbus Systems, Inc. v. California Public Utilities Com.*, 801 F.2d 1120, 1125 (9th Cir. 1986).

10. Amici have contacted all parties. The Appellant and Appellee both have no opposition to the filing of the attached *amici curiae* brief.

11. Accordingly, pursuant to Federal Rule of Appellate Procedure 29(a)(3) and 29(b)(3), movants file the instant motion for leave to file the proposed brief as *amici curiae*.

WHEREFORE, *amici curiae* respectfully move the Court for leave to file the attached *amici curiae* brief in support of Defendant-Appellant's petition for rehearing *en banc*.

March 19, 2020.

Respectfully submitted,

/s/ Shelly Lynn Skeen
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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), the undersigned hereby certifies that:

This motion complies with the type-volume limitation, as provided in Fed. R. App. P. 27(2)(a), because, exclusive of the exempted portions of the motion, the motion contains 1125 words.

This motion complies with the type-face requirements, as provided in Fed. R. App. P. (1)(E), Fed. R. App. P. 32(a)(5), and the type-style requirements, as provided in Fed. R. App. P. 32(a)(6), because the motion has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font.

As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

Respectfully submitted,

/s/ Shelly Lynn Skeen
Shelly Lynn Skeen

CERTIFICATE OF CONFERENCE

Pursuant to 5th Circuit Rule 27.4 and Fed. R. App. P. 29(b), I certify that I have contacted counsel for the United States of America, Mr. Bradley Visosky, on March 16, 2016 via email, and counsel for Appellant, Mr. Jason Steed, on March 17, 2020, via email. Both parties are NOT OPPOSED to this Motion or to the filing of an Amici Brief in Support of Appellant's Petition for Panel Rehearing *En*

Banc as requested herein. In addition, both parties have waived service of paper copies of this Motion and the *Amici Brief*.

/s/ Shelly Lynn Skeen
Shelly Lynn Skeen

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of March, 2020, I electronically filed the foregoing Unopposed Motion for Leave to File Brief of *Amici Curiae* with the Clerk of Court for the U.S. Court of Appeals for the Fifth Circuit by using the CM/ECF system, which will send a notice of electronic filing to all parties in this case whom are registered through the CM/ECF.

/s/ Shelly Lynn Skeen
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