NO. 05-4193

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

KRYSTAL ETSITTY,
Plaintiff-Appellant,
-v.-
UTAH TRANSIT AUTHORITY and BETTY SHIRLEY,
in her individual and official capacities,
Defendants-Appellees.

Appeal from the United States District Court for the District of Utah, Central Division
Honorable David Sam, United States District Judge
District Court Civil Action No. 2:04CV00616 DS

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF UTAH, LAMBDA LEGAL DEFENSE & EDUCATION FUND, INC., AND NATIONAL CENTER FOR LESBIAN RIGHTS

IN SUPPORT OF APPELLANT KRYSTAL ETSITTY AND REVERSAL OF THE DISTRICT COURT

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INTERESTS OF AMICI CURIAE

American Civil Liberties Union and ACLU of Utah

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 400,000 members. The ACLU of Utah is the local affiliate of the ACLU in the State of Utah, with more than 2,400 members. Since its founding in 1920, the ACLU and its affiliates have devoted their resources and energies to protecting the constitutional rights and individual liberties of all Americans.

Over the last four decades, the ACLU and the ACLU of Utah have appeared in numerous cases involving the proper interpretation of civil rights laws, both as direct counsel and as *amicus curiae*. The ACLU has advocated for interpretations of civil rights laws, including Title VII, that will ensure that all individuals have equal access to the workplace and are not disadvantaged because of protected characteristics such as race, sex, or disability. This case involves the scope of Title VII's protections against sex stereotyping. The proper resolution of that question is a matter of significant concern to the ACLU and its members throughout the country.

Lambda Legal Defense and Education Fund, Inc.

Founded in 1973, *Amicus* Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is the nation's oldest and largest non-profit

legal organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people, and people living with HIV, through impact litigation, education, and public policy work. Lambda Legal has appeared as counsel or amicus curiae in numerous landmark cases in federal and state courts involving the interpretation and application of national, state, and local anti-discrimination laws, including *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998) (permitting same-sex sexual harassment claims under Title VII) (amicus); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1068, 1072 (9th Cir. 2002) (majority of en banc panel accepting sex stereotyping as a viable theory of sex discrimination under Title VII) (amicus); and *Jespersen v. Harrah's Operating Company, Inc.*, 392 F.3d 1076 (9th Cir. 2004) (holding that sex-specific make-up requirements did not impose an unequal burden on the sexes), petition for en banc review granted, 409 F.3d 1061 (9th Cir. 2005) (counsel for plaintiff-appellant). Because transgender people are frequent targets of employment discrimination on the basis of sex, and because advancing the rights and freedoms of transgender people is an integral part of Lambda Legal's mission (*see*, *e.g.*, *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000) (amicus); *In re Maloney*, 96 Ohio St. 3d 307, 774 N.E.2d 239 (2002) (amicus); *Brandon v. County of Richardson*, 264 Neb. 1020, 653 N.W.2d

829 (2002) (co-counsel for plaintiff-appellant)), Lambda Legal has a strong interest in the correct decision of this motion.

National Center for Lesbian Rights

The National Center for Lesbian Rights (NCLR) is a national non-profit law firm with headquarters in San Francisco and regional offices in St. Petersburg, Florida and Washington, D.C. NCLR is committed to achieving equality for all people who are discriminated against on the basis of sexual orientation or gender, including transgender people who are denied equal employment opportunities because of their sex. Each year NCLR serves more than 4,500 clients in all fifty states.

SUMMARY OF ARGUMENT

The Supreme Court repeatedly has held that "[i]n forbidding employers to discriminate against individuals because of their sex [by enacting Title VII], Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (citations omitted). Consistent with the Court's holding in *Price Waterhouse* that Title VII prohibits discrimination based on sex stereotyping, other circuits have recognized that discrimination against transgender people because of their

failure to conform to sex stereotypes is unlawful sex discrimination, just as it would be for any other litigant.[1] *See, e.g.*, *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000).

Here, Plaintiff-Appellant Krystal Etsitty ("Plaintiff," or "Etsitty") was hired by Defendant-Appellee Utah Transit Authority ("UTA") to be a public bus driver. Despite the fact that Plaintiff had performed her job well without any complaints or criticisms about her performance, Plaintiff was terminated from her position shortly after she informed her employer that she is transgender and would be assuming a traditionally feminine appearance. There is no dispute that UTA terminated Plaintiff for this reason. Indeed, UTA specifically stated Plaintiff was fired because they were concerned that third parties might react negatively to Plaintiff's appearance and in particular might be upset to see Plaintiff using a women's restroom.

The district court granted summary judgment to UTA. First, the court followed a twenty-year old decision from the Seventh Circuit, *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), and held that the term

[1] The terms "transsexual" and "transgender" often are used interchangeably to describe individuals whose innate sense of being a man or a woman ("gender identity") differs from the sex that was assigned at birth. *See* Stedman's Medical Dictionary 1865 (27th ed. 2000) (defining a transsexual person as "[a] person with the external genitalia and secondary sex characteristics of one sex, but whose personal identification and psychosocial configuration is that of the opposite sex").

"sex" as used in Title VII is limited to "common and traditional interpretation," and should only include discrimination based on being "biological[ly] male or biological[ly] female." *Etsitty v. UTA*, No. 2:04CV616 DS, Slip. Op. at 6-7 (D. Utah June 24, 2005) (hereinafter "Op. at __"). Second, the court held that Plaintiff did not state a claim because Congress did not intend Title VII to protect transgender people. *Id.* at 7. Finally, the court held that even if Title VII did protect transgender people from sex stereotyping, Plaintiff had not proven that she was "fired for failure to conform to a particular gender stereotype." *Id.* at 10.

Amici urge this Court to reject the district court's erroneous holding that transgender people are excluded from protection under Title VII. As the Supreme Court has made clear, Title VII was intended to eradicate the entire spectrum of sex discrimination, including discrimination because a person fails to conform to stereotypes about how men and women are supposed to behave or appear. *See* Part I, *infra.* The evidence presented by Plaintiff fully supports the inference that she was terminated by UTA because of her failure to conform to sex stereotypes and because UTA feared that third parties would be uncomfortable with her appearance. *See* Part II, *infra*. Finally, UTA's fear that other people will be uncomfortable with Plaintiff's gender presentation is not a legitimate defense. To the contrary, it is well

settled that deference to such discriminatory fears is itself unlawful conduct that is prohibited by Title VII. Moreover, UTA's contention that permitting Plaintiff to remain on the job would subject UTA to potential lawsuits from persons who might object to her use of a women's bathroom has no basis in the law. Not only has no court has ever ruled in favor of such a complainant, but a growing number of municipal and private entities have adopted policies permitting employees to use the restroom consistent with their gender identity and expression. Such policies – which protect the dignity and privacy of all employees – are certainly lawful, and have not resulted in disruption or upheaval. *See* Part III, *infra.*

ARGUMENT

I. TITLE VII PROTECTS ALL EMPLOYEES, REGARDLESS OF THEIR SEX, FROM DISCRIMINATION BECAUSE OF THEIR ACTUAL OR PERCEIVED FAILURE TO CONFORM TO SEX STEREOTYPES.

Title VII of the Civil Rights Act of 1964 provides, in relevant part, that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). Notwithstanding the Supreme Court's holding that Title VII prohibits discrimination because a person fails to conform to the sex stereotypes of his

or her gender, the district court nonetheless found that this "prohibition against sex stereotyping should not be applied to transsexuals," Op. at 7. The district court based its erroneous holding on its view that the term "sex" should be narrowly construed to mean a person's biological sex at birth, and its belief that Congress did not intend to cover transsexuals when it enacted Title VII. *See id.* at 8-9 (citing *Ulane*, 742 F.2d at 1084). Both these arguments, however, have been rejected by the Supreme Court, and a number of federal courts have recognized that discrimination against transgender people can constitute sex discrimination.

A. Decisions that are based on an employee's perceived failure to conform to sex stereotypes are "because of sex."

In *Price Waterhouse*, the Supreme Court held that punishment for an employee's perceived failure to conform to sex stereotypes, including stereotypical norms about dress and appearance, was a form of sex discrimination actionable under Title VII. *See Price Waterhouse*, 490 U.S. at 251. Ann Hopkins, the plaintiff, was a female senior manager in an accounting firm who was denied partnership in part because her employer considered her to be too "'macho'" for a woman. *Id.* at 235. Her employer advised her that she could improve her chances for partnership if she were "to take 'a course at charm school,'" "'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and

wear jewelry.'" *Id.* Rejecting Price Waterhouse's argument that these comments did not evidence discrimination based on sex, the Supreme Court made clear that penalizing an employee for failing to behave or appear in a stereotypical manner is prohibited by Title VII, just as much as reserving a particular job for men only or women only. *Id.* at 251. Ultimately, the Court emphasized, "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group." *Id.* at 251.

Following *Price Waterhouse*, this Circuit has recognized that an employee states a claim of sex discrimination under Title VII where discrimination occurred because the employee "did not conform to the stereotypes of his or her gender." *James v. Platte River Steel Co.*, No. 03-1356, 113 Fed. Appx. 864, 867 (10th Cir. Oct. 25, 2004) (stating that a plaintiff can establish a Title VII claim if he can show "that [he was harassed] due to the fact that he failed to conform to gender stereotypes");[2] *accord Medina v. Income Support Div., New Mexico*, 413 F.3d 1131, 1135 (10th Cir. 2005) ("[A] plaintiff may satisfy her evidentiary burden [in a Title VII case] by showing that the harasser was acting to punish the plaintiff's noncompliance with gender stereotypes.").

[2] Pursuant to 10th Cir. R. 36.3, a copy of this decision is reproduced in the Addendum to this brief as Addendum A (hereinafter "Addendum__").

These decisions are in accord with those of other federal circuits recognizing that employers may not discriminate against employees because they do not conform to traditional stereotypes of masculinity or femininity. *See, e.g.*, *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1068, 1072 (9th Cir. 2002) (en banc) (accepting sex stereotyping as a viable theory of sex discrimination under Title VII); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 262-63 (3d Cir. 2001) (upholding claim of sex discrimination under Title VII where the "harasser's conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender"); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874-75 (9th Cir. 2001) (harassment "based upon the perception that [the plaintiff] is effeminate" is discrimination because of sex in violation of Title VII); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n.4 (1st Cir. 1999) ("just as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity . . . a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity"); *Doe v. City of Belleville*, 119 F.3d 563, 581 (7th Cir. 1997) ("a man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he exhibits his masculinity in a way that does not meet

his coworkers' idea of how men are to appear and behave, is harassed 'because of his sex'"), *vacated and remanded on other grounds*, 523 U.S. 1001 (1998).

Price Waterhouse and these subsequent cases thus make clear that one of the underlying bases of the district court's opinion – that Title VII only prohibits discrimination based on biological sex – is simply incorrect as a matter of law. Rather, as these courts have recognized, Title VII also prohibits discrimination based upon an employer's stereotypical expectations about how a man or woman should behave or appear. Where, as here, an employer takes the drastic step of terminating an otherwise qualified employee because the employer fears that others will be uncomfortable with the employee's gender presentation, that employer has engaged in impermissible sex stereotyping.

B. Title VII protects all employees, including transgender employees, from sex-based discrimination.

In addition to holding that Title VII only prohibits discrimination based on biological sex, the district court erroneously held that Plaintiff did not state a claim under Title VII because she is transgender and Congress did not intend to protect transgender people. *See* Op. at 7-10. As a growing number of courts have recognized, this argument simply cannot be reconciled with the Supreme Court's express rejection of this approach to

the relationship between statutory construction and congressional intent in *Oncale v. Sundowner Offshore Oil Services, Inc.*, 523 U.S. 75 (1998), and other cases.

In *Oncale*, the Court held that the scope of Title VII was not limited to the specific harms – or the specific plaintiffs – that were specifically considered or envisioned by the enacting Congress. In that case, a male plaintiff sued his former employer under Title VII, alleging that he was subjected to physical sexual attacks and sexual harassment by his male co-workers. *Oncale*, 523 U.S. at 77. While the Court acknowledged that Congress was not specifically concerned with men harassing other men when it enacted Title VII, the Court emphasized that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Id*. at 79. *Accord Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 680-81 (1983) (rejecting the employer's argument that Title VII did not apply to the claims of male employees and holding that "congressional discussion focused on the needs of female members of the work force . . . does not create a 'negative inference' limiting the scope of the Act to the specific problem that motivated its enactment"). The same reasoning applies here.

Regardless of whether Congress was specifically concerned with discrimination against transgender people when it enacted Title VII, discrimination against transgender people because they fail to conform to sex stereotypes falls well within the spectrum of disparate treatment based on sex stereotyping.

Contrary to the district court's suggestion, there is no principled distinction between discrimination against a woman because her employer does not perceive her to be sufficiently feminine, as in *Price Waterhouse*, and discrimination against a transsexual woman, such as Plaintiff, who is perceived not to fully conform to sex stereotypes associated with either men or women. In either case, the employer has discriminated on the basis of sex by "assuming or insisting that [employees match] the stereotype associated with their group." *Price Waterhouse*, 490 U.S. at 251. As the Sixth Circuit recently observed:

> After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex. It follows that employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex.

Smith v. City of Salem, 378 F.3d 566, 574 (6th Cir. 2004) (emphasis in original); *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005) (same).

Accordingly, a growing number of federal courts have concluded that early cases holding that discrimination against transgender individuals cannot constitute sex discrimination in violation of Title VII, such as *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), and *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977), relied on by the district court below, are inconsistent with *Price Waterhouse* and are no longer good law. The cases demonstrate both the range of discrimination experienced by transgender people and that such discrimination may be "because of sex."

For example, in *Smith*, the Sixth Circuit held that a transgender firefighter who was subjected to discrimination after she began treatment for Gender Identity Disorder[3] by dressing in a feminine manner at work stated a claim for sex discrimination under Title VII because she was treated differently than other employees for failing to conform to sex stereotypes. *See Smith*, 378 F.3d 566. After Smith began "'expressing a more feminine

[3] As Plaintiff's expert explained below, Gender Identity Disorder is "a medical condition in which a person's gender identity does not match their anatomical sex at birth." Joint Appendix, at 90 (hereinafter "JA __").

appearance'" at work, as prescribed by her doctors, her co-workers harassed her, and her employer subjected her to three separate psychological evaluations and later suspended her. *Id.* at 568-69. Like UTA here, Smith's employer argued that Title VII did not protect transgender employees.

In upholding Smith's Title VII claim, the Sixth Circuit reasoned that to find that transsexuals are not protected by Title VII is to "superimpose classifications such as 'transsexual' on a plaintiff, and then legitimize discrimination based on the plaintiff's gender non-conformity by formalizing the non-conformity into an ostensibly unprotected classification." *Id.* at 574. As the court noted, decisions rejecting the claims of transgender employees contain "analyses [that] cannot be reconciled with *Price Waterhouse*, which does not make Title VII protection against sex stereotyping conditional or provide any reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is a transsexual." *Id.* at 574-75. *Accord Barnes*, 401 F.3d at 737 (holding that the transgender plaintiff "established that he was a member of a protected class by alleging discrimination against the City for his failure to conform to sex stereotypes").

Similarly, the Ninth Circuit has recognized that discrimination against a transsexual individual can constitute sex discrimination. *See Schwenk*, 204

F.3d 1187. In *Schwenk*, the court held that transsexual individuals are protected under the Gender Motivated Violence Act ("GMVA") based on the Supreme Court's reasoning in *Price Waterhouse* and *Oncale*.[4] Crystal Schwenk was a transsexual prisoner who sued after being assaulted by a guard. The guard argued that sex discrimination laws do not protect transsexuals, relying on *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977) (Title VII does not prohibit discrimination against transsexual employees). The court in *Schwenk* renounced that holding:

> The initial judicial approach taken in cases such as *Holloway* has been overruled by the logic and language of *Price Waterhouse*. In *Price Waterhouse*, . . . the Supreme Court held that Title VII barred not just discrimination based on the fact that Hopkins was a woman, but also discrimination based on the fact that she failed "to act like a woman" – that is, to conform to socially-constructed gender expectations. . . . Thus, under *Price Waterhouse*, "sex" under Title VII encompasses both sex – that is, the biological differences between men and women – *and* gender. Discrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII.

204 F.3d at 1201-02 (emphasis in original). Accordingly, the court concluded that Schwenk stated a viable sex discrimination claim under GMVA because "the evidence offered by Schwenk tends to show that [the guard's] actions were motivated, at least in part, by Schwenk's gender – in

[4] As the Ninth Circuit noted in *Schwenk*, courts construing the GMVA looked to Title VII case law and vice versa. *Id.*

this case, by her assumption of a feminine rather than a typically masculine appearance or demeanor." *Id.* at 1202.

Other federal and state courts also have applied the analysis in *Price Waterhouse* to conclude that sex discrimination laws protect transgender people. *See, e.g.*, *Rosa v. Park W. Bank & Trust Co*., 214 F.3d 213, 214-16 (1st Cir. 2000) (holding that a biologically male plaintiff dressed in "traditionally feminine attire" may seek redress for discrimination based on the perception that his "attire did not accord with his male gender"); *Doe v. United Consumer Fin. Servs.*, No. 1:01 CV 1112, 2001 WL 34350174, at *4 (N.D. Ohio Nov. 9, 2001) (holding that a transgender plaintiff could prevail under Title VII by showing that "her appearance and behavior did not meet [her employer's] gender expectations") (Addendum B); *Enriquez v. W. Jersey Health Sys.*, 777 A.2d 365, 373 (N.J. App. 2001) (holding that a transgender plaintiff was protected from gender stereotyping under the state's sex discrimination statute); *Lie v. Sky Publ'g Corp.*, No. 013117J, 2002 WL 31492397, at *5 (Mass. Super. Oct. 7, 2002) (holding that a transgender plaintiff had stated a claim of sex discrimination where she alleged "that the defendant's conduct was based on stereotyped notions of 'appropriate' male and female behavior in the same manner as the conduct of the defendant in *Price Waterhouse*") (Addendum C).

This reasoning is echoed by several international tribunals, which have adopted the approach espoused in *Price Waterhouse* and *Oncale* when determining how their sex discrimination laws apply to transgender people. For example, in *P v. S and Cornwall County Council*, Case C-13/94, 1996 E.C.R. I-2143 (April 30, 1996) (Addendum D), the European Court of Justice ruled that, "[i]n view of its purpose and the nature of the rights" that the European Community's directive against sex discrimination sought to safeguard, the law should be construed broadly so as to apply not only to traditional forms of sex discrimination, but also "to discrimination arising, as in this case, from the gender reassignment of the person concerned." *Id.* at 10.

Despite this extensive caselaw holding that discrimination against transgender employees for failure to comply with sex stereotypes is prohibited under Title VII, the district court expressed the opinion that "[t]here 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. Such drastic action cannot be fairly characterized as a mere failure to conform to stereotypes." Op. at 8. The extent of a person's gender nonconformity, however, is irrelevant in an analysis under Title VII because "Congress has always intended to

protect *all* individuals from sex discrimination in employment." *Newport News*, 462 U.S. at 681 (emphasis added).[5]

Accordingly, there is no basis for the district court's conclusion that transgender employees are somehow outside the scope of protection offered by Title VII from sex discrimination. When a transgender employee, or any employee, is subjected to employment discrimination because of his or her perceived failure to conform to sex stereotypes, such conduct violates Title VII.[6]

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[5] While the district court also believed that holding that UTA's conduct here violated Title VII would mean that "any male employee could dress as a woman, appear and act as a woman, and use the women's restrooms," Op. at 9, there is no basis for this concern. Protecting transsexual employees from discrimination based on their perceived failure to conform to sex stereotypes does not mean that employers cannot continue to require their employees to adhere to reasonable dress and grooming requirements and enforce reasonable rules regarding restroom use. Moreover, it is worth noting that, in the more than fifteen years that have passed since *Price Waterhouse* was decided, the courts have not seen a rush of claims by men wishing to dress as women or use women's restrooms. Abstract concerns about unlikely hypothetical situations should not be used to deny much needed protections to transgender employees. The question here is whether terminating an employee based on unfounded fears of complaints from persons who might be discomfited by her gender non-conformity violates Title VII.

[6] Because, as discussed *infra* Part II, the evidence here is sufficient to show that UTA terminated Plaintiff because of her failure to conform to sex stereotypes, this Court need not reach the broader question of whether all transgender discrimination is *per se* sex discrimination. *Cf., e.g.*, *Maffei v. Kolaeton Ind., Inc.*, 164 Misc.2d 547, 626 N.Y.S.2d 391, 396 (N.Y. Sup. Ct. 1995) ("the creation of a hostile work environment . . . relating to the fact that . . . an employee changed his or her sexual status creates discrimination based on 'sex,' just as would comments based on the secondary sex characteristics of a person").

II. A reasonable fact finder could conclude that UTA's decision to terminate Etsitty was motivated, at least in part, by UTA's perception that Etsitty failed to comply with sex stereotypes.

The district court also held that even if Title VII provided some protection to transsexuals, Etsitty had failed to show that she "was fired because she failed to conform her appearance to a particular gender stereotype." Op. at 10. The district court's reasoning fails to construe all inferences in favor of Plaintiff, and ignores evidence from which a reasonable fact finder could conclude that UTA terminated Etsitty, at least in part, because of her failure to conform to sex stereotypes. While the district court focused exclusively on the restroom usage question as the grounds for UTA's decision, Plaintiff presented extensive evidence that, if credited by the jury, would show that UTA's stated basis for Plaintiff's termination – its fear that third parties would be uncomfortable with Plaintiff's gender presentation in women's restrooms – were based on sex stereotypes. Accordingly, UTA is not entitled to summary judgment.

First, *amici* note that UTA explicitly argued in its briefing below that it terminated Etsitty in part because she "planned to dress and appear as a woman." [JA 598] UTA thus admitted that it based its employment decision, at least in part, on Etsitty's feminine appearance. As discussed above, UTA's discomfort with Etsitty's gender presentation is not a

legitimate basis for its employment decisions, and these admissions by UTA are evidence from which a jury could conclude that Etsitty's firing was motivated by UTA's unlawful sex stereotyping.

Second, the record provides extensive support for Plaintiff's claim that she was terminated because UTA was worried that other employees or customers would be uncomfortable with her appearance. Reliance on the alleged discomfort of third parties, however, is prohibited by Title VII, because:

> it would be totally anomalous if we were to allow the preferences and prejudices of the customers [and co-workers] to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome. Thus, we feel that customer [and co-worker] preference may be taken into account only when it is based on the company's inability to perform the primary function or service it offers.

Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 389 (5th Cir. 1971).

In this case, shortly after Plaintiff informed her direct supervisor that she was transgender, her supervisor told the operations manager, Betty Shirley, who promptly called a meeting with Plaintiff and an employee from human resources, Bruce Cardon. [JA 161-62] At that meeting, Plaintiff was interrogated about the details of her medical treatment and physical appearance, and was suspended from driving for UTA. [JA 163, 144-45] Both Shirley and Cardon made clear that they terminated Etsitty because of

their concern that third parties might be uncomfortable with Etsitty's gender presentation if Etsitty were seen using a women's restroom while working for UTA. *See, e.g.*, Deposition of Betty Shirley at 57 [JA 159] (explaining that her decision to terminate Plaintiff was because "[w]hich restroom is he using? *What's going to be the perception of the customers that we serve?*"); *id.* at 80 [JA 163] ("[I]f we have someone that's going into a female restroom who is a male and is observed as being a male in the female restroom, I think someone could probably call in a lawsuit, have complaints, have concerns. This individual is representing UTA."); Deposition of Bruce Cardon at 60 [JA 190] (stating that it was "not professional to be seen as a male using a male restroom one day and as a female using a female restroom another day"). Cardon admitted, however, that he never asked Plaintiff whether she intended to use both the male and female restrooms, which she did not. *Id.*

As Plaintiff explained to Shirley and Cardon, whether or not she had completed genital surgery was not relevant as no one sees other people's genitalia in the bathroom because there are stalls for privacy. [JA 145-46] Moreover, UTA has never alleged, nor is there a shred of evidence to suggest, that Plaintiff ever engaged in any improper behavior in the restroom or anywhere else. Accordingly, it is clear that UTA's alleged concern about

Plaintiff's use of the restrooms was directly related to Plaintiff's gender presentation; specifically, UTA was concerned that Plaintiff might be viewed negatively by others because her appearance might not conform to sex stereotypes. A reasonable fact finder certainly could conclude from this evidence that UTA fired Plaintiff because of UTA's concerns about her actual or perceived gender non-conformity. *See, e.g.*, *Doe v. United Consumer Financial Services*, 2001 WL 34350174, at *4 (holding that evidence that the plaintiff's employer expressed an "inability to categorize [plaintiff] as male or female just from looking" suggested that plaintiff's termination was based on her failure to conform to sex stereotypes) (Addendum B).

Third, UTA's failure to investigate any ways to ameliorate its alleged concerns further supports the inference that UTA terminated Plaintiff because of its discomfort with her failure to conform to sex stereotypes. Indeed, Shirley and Cardon made no efforts to determine whether there were a sufficient number of private or unisex restrooms that Plaintiff could use, nor did they ever ask Plaintiff whether she would be willing to use only private or unisex restrooms while out in the field. [JA 146, 190-92]

Fourth, Shirley's alleged concern about liability if anyone discovered that Plaintiff was using the women's restroom is equally suspect because, as

explained further in Part III below, there is no such liability. *See Cruzan v. Special Sch. Dist., #1*, 294 F.3d 981, 984 (8th Cir. 2002) (rejecting as insufficient teacher's assertion that her "personal privacy" was invaded when school permitted transgender woman to use women's room). Indeed, as explained *infra* Part III, many employers and localities have policies that affirmatively require employers to provide employees who are undergoing sex-reassignment with access to the appropriate restroom.

Finally, while district court relied heavily on Shirley's claim that she would re-hire Plaintiff if she had genital surgery, this fact does not mandate the court's conclusion that Plaintiff was not terminated "because she did not act or appear in conformance with stereotypical notions about how males should behave or appear." Op. at 10. Rather, just the opposite is true. The fact that Defendant stated that it would rehire Plaintiff after she completed sex-reassignment surgery makes clear that her termination was not related in any way to her ability to perform her job, but instead, was related solely to Defendant's perception that it was inappropriate for a person with male genitalia to dress and act in a traditionally feminine way. *See Doe v. United Consumer Financial Services*, 2001 WL 34350174, at *4 (Addendum B); *Kastl v. Maricopa Cty. Comm. Coll. Dist.*, No. Civ. 02-1531PHX-SRB, 2004 WL 2008954, at *2 (D. Ariz. June 3, 2004) ("The presence or absence

of anatomy typically associated with a particular sex cannot itself form the basis of a legitimate employment decision unless the possession of that anatomy (as distinct from the person's sex) is a bona fide occupational qualification (BFOQ). Therefore, neither a woman with male genitalia nor a man with stereotypically female anatomy, such as breasts, may be deprived of a benefit or privilege of employment by reason of that nonconforming trait.") (Addendum E).[7]

In conclusion, the district court erred in granting summary judgment to UTA by improperly drawing inferences against Plaintiff, and failing to recognize that UTA's alleged concern about Plaintiff's use of the restrooms could also support the inference that Plaintiff was terminated, at least in part, because UTA believe that she failed to conform to sex stereotypes.

III. Employers do not risk liability by permitting transgender employees to use the restroom that corresponds to their gender identity and expression.

UTA's unsupported contention that it had to fire Plaintiff to insulate itself from potential lawsuits by persons who might be offended by Plaintiff's use of a women's restroom has no basis in the law. Allowing transgender employees to use the restroom that corresponds to their gender

[7] Further, the district court improperly drew inferences against Etsitty from the lack of evidence that she was subjected to other forms of harassment. *See* Op. at 10. The lack of other harassment does not render the evidence that Etsitty was terminated because of her failure to conform to sex stereotypes any less probative.

identity and expression does not create liability for employers, and, moreover, is good public policy. Many employers throughout the country have adopted sensible policies that protect the privacy and needs of transgender employees without creating any undue burden or facing legal liability.[8]

All people, including transgender people, have a physiological need for access to restroom facilities. Most people now take for granted that they will be able to use a restroom when necessary during the course of their daily lives. Throughout our nation's history, history, denial or restriction of access to restrooms has been used as a means to degrade and humiliate persons of color,[9] to exclude women from traditionally male jobs,[10] to

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[8] For a list of employers that have adopted non-discrimination policies protecting transgender employees, see Human Rights Campaign's "Corporate Equality Index 2005," available at http://www.hrc.org/cei_press/full_report.pdf.

[9] *See, e.g. Bruckner v. Goodyear Tire & Rubber Co.*, 339 F. Supp. 1108, 1112-13 (N.D. Ala. 1972) (describing racially segregated restrooms as among the discriminatory employment practices of Goodyear Tire before 1962).

[10] *See, e.g.*, *DeClue v. Central Ill. Light Co.,* 223 F.3d 434, 438-39 (7th Cir. 2000) (Rovner, J., dissenting in part) ("the cases teach us that some employers not only maintain, but deliberately play up, the lack of restroom facilities and similarly inhospitable work conditions as a way to keep women out of the workplace") (internal citations omitted). As Judge Rovner explained:

> When my nomination to the Court of Appeals was announced in 1992, the late Judge Walter J. Cummings wrote me a kind note of congratulations that ended with the observation, "At long last, the ladies' room off the [judges'] conference room will have some use!" Thank goodness there *was* a women's room! When women . . . arrive in workplaces that hitherto were all-male, they often discover that the facilities for women are inadequate, distant, or missing altogether. *See* Gail Collins, *Potty Politics: The Gender Gap (Installation of Bathrooms for*

exploit workers,[11] to exclude persons with disabilities from access to public accommodations and employment,[12] and–as in this case–to discriminate against transgender people.

Refusing to permit transgender people to use the restroom that corresponds to their gender identity and expression puts them in an impossible position of being forced to choose between physical safety and their physiological need to use restroom facilities.[13] If a transgender woman like Plaintiff were forced to use the men's restroom, she would risk humiliation, abuse, and even physical violence. Any fear or discomfort

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> *Women)*, WORKING WOMAN, March 1, 1993, at 93. Women know that this disparity, which strikes many men to be of secondary, if not trivial, importance, can affect their ability to do their jobs in concrete and material ways. As recently as the 1990s, for example, women elected to the nation's Congress—which had banned gender discrimination in the workplace some 30 years earlier—found that without careful planning, they risked missing the vote on a bill by heeding the call of nature, because there was no restroom for women convenient to the Senate or the House chamber.

Id. at 437-38 (citation omitted).

[11] *See, e.g.*, *Acevedo Garcia v. Vera Monroig*, 30 F. Supp. 2d 141, 156-57 (D.P.R. 1998) (holding that allegations that municipal employees were forbidden from using the bathroom at work to retaliate against them for their political support of another political party stated a claim for discrimination based on political affiliation), *aff'd in part, appeal dismissed in part*, 204 F.3d 1 (1st Cir. 2000).

[12] *See, e.g.*, *Smith v. Wal-Mart Stores, Inc.*, 167 F.3d 286, 291 (6th Cir. 1999) (emphasizing the importance of access to restrooms by disabled persons).

[13] Because it is necessary for a person who has been diagnosed as transsexual to live as a member of the gender with which they identify for at least a year before sex-reassignment surgery, UTA's belief that a person like Plaintiff who is medically required to dress and appear as a woman before she can have surgery can only use the women's restroom after surgery puts her in an impossible catch-22. *See* Affidavit of Dr. Michael J. Meyer III, at ¶ 18 [JA 092].

about sharing a bathroom with a transgender person is based on invidious and unfounded stereotypes, which should not be permitted to legitimate discrimination.

Moreover, as previously noted, no court has ever held that there is any legal right to privacy that would be violated simply by permitting a transgender person to use a public bathroom that corresponds to his or her gender identity. To the contrary, in the only reported appellate decision that has addressed such a claim to date, the court rejected it. *See Cruzan*, 294 F.3d at 984. As the district court in *Kastl v. Maricopa County Community College District*, observed:

> to create restrooms for each sex but to require a woman to use the men's restroom if she fails to conform to the employer's expectations regarding a woman's behavior or anatomy, or to require her to prove her conformity with those expectations, violates Title VII.

2004 WL 2008954, at *3 (Addendum E).

In fact, courts in this country and elsewhere have determined that allowing transgender people to use the bathroom corresponding to their gender identity is necessary to implement principles of equal protection and non-discrimination. *See, e.g.*, *Sheridan v. Sanctuary Investments Ltd,* (B.C. Human Rights Tribunal Jan. 8, 1999) (holding that British Columbia's Human Rights Code required defendant to allow female transsexual to use women's restroom and noting that "the preference of patrons is not a defense

to a complaint of discrimination") (Addendum F)[14]; *Cruzan*, 294 F.3d 981 (affirming summary judgment for school district that permitted a transgender employee to use the women's restroom); *Doe v. McConn*, 489 F. Supp. 76 (S.D. Tex. 1980) (ruling, by implication, that it would be unconstitutional to arrest transgender persons for using the restroom designated for the sex consistent with their gender identity).

In addition, a number of municipalities and private entities have determined that allowing transgender persons to use the restroom that corresponds to their gender identity is essential to providing a non-discriminatory environment that supports the human dignity of all people. *See, e.g.*, San Francisco Human Rights Commission, *Compliance Guidelines to Prohibit Gender Identity Discrimination* ("Individuals have the right to use the bathroom/restroom that is consistent with and appropriate to their gender identity.")[15]; City of Boston Municipal Code, Section 12–9.7 (stating that it shall be unlawful to prevent or prohibit the use of restrooms that correspond to the gender identity expressed or asserted by a person seeking to use such facility); Ontario Human Rights Commission, *Policy on*

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[14] This decision is available at http://www.bchrt.bc.ca/decisions/1999/pdf/sheridan_vs_sanctuary_investments_ltd_dba_b.j.%27s_lounge_jan_8_99.pdf.

[15] This document is available at http://www.sfgov.org/site/sfhumanrights_page.asp?id=6274.

Discrimination and Harassment Because of Gender Identity (holding that a transsexual woman must be permitted to use the women's restroom regardless of whether she has undergone genital reconstructive surgery)[16]; *Workplace Guidelines for Transgendered Lucent Employees* ("Lucent recommends that transgendered people use the restroom matching their current gender presentation.").[17]

As these entities have found, allowing transgender people to use a bathroom that corresponds to their gender identity does not jeopardize anyone's safety or privacy. Treating transgender persons with compassion, dignity, and respect has caused no upheavals or problems for others, and there is no reason to believe it would cause any such problems for the Utah Transit Authority.

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[16] This document is available at http://www.ohrc.on.ca/english/publications/gender-identity-policy.shtml.

[17] This policy is available at http://www.tgender.net/taw/tggl/rr.html.

CONCLUSION

This Court's review of the district court's decision below should be guided by the Supreme Court's instruction that Title VII must be interpreted to strike at the entire spectrum of discrimination based on sex. *Price Waterhouse* and *Oncale* unequivocally reject the notion that the scope of Title VII is limited to those particular forms of discrimination that the enacting Congress specifically intended to cover. The narrow interpretation urged by Defendants and adopted by the district court – that "sex" means no more than an individual's biological sex at birth – runs contrary to widespread jurisprudence in the wake of those cases. Because Defendants are not entitled to judgment as a matter of law under Title VII and because Plaintiff has raised genuine issues of material fact as to whether she was terminated for failure to conform to sex stereotypes, the district court's judgment in favor of Defendants should be vacated and remanded.

Dated: October 5, 2005 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief is proportionally spaced, in 14 point font, and contains 6,972 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I relied on my word processor to obtain the count and it is Microsoft Word.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

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CERTIFICATE OF SERVICE

I, Rose A. Saxe, hereby certify that on October 5, 2005, two hard copies of the foregoing brief and an electronic copy of the brief on CD-ROM were served by first class mail, postage prepaid, upon counsel for plaintiff, Erik Strindberg, Strindberg Scholnick & Chamness, LLC, 44 Exchange Place, 2nd Floor, Salt Lake City, UT, 84111, and upon counsel for defendants, Scott Hagen, Ray Quinney & Nebeker, 36 South State Street #1400, Salt Lake City, UT, 84145.

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