ORIGINAL

21-5678

No.

IN THE

Supreme Court of the United States

Shawn Kelly Thomason,

Petitioner

v.

United States of America,

Respondent

On Petition For Writ Of Certiorari
To The Eighth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

Shawn Kelly Thomason
In Pro Per
#21761-041
FCI ELKTON
Federal Correctional Institute
P.O. Box 10
Lisbon, OH 44432

QUESTION(S) PRESENTED

It is common practice for courts to refer to transgender litigants using their pronouns. Since at least 1980, the Eighth Circuit has issued opinions that use the pronouns of litigants, but did not do so here. Does this offend the Constitution's guarantee of equal protection under the law?

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[X] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Petitioner Shaun Kelly Thomason is currently detained at FCI Elkton, PO Box 10, Lisbon, Ohio 44432, (330) 420-6200, and is hereinafter referred to as "Thomason."

Respondents Emily Polachek, Katharine Buzicky, and Michael Cheever represent the United States of America at the United States Attorney's Office, 600 U.S. Courthouse, 300 South Fourth Street, Minneapolis, Minnesota 55415, (612) 664-5600, and are hereinafter referred to as "opposing counsel."

RELATED CASES

United States v. Thomason, No. 19-cr-05, U.S. District Court for the District of Minnesota. Judgment entered July 10, 2019.

United States v. Thomason, 991 F.3d 910 (8th Cir. 2020), U.S. Court of Appeals for the Eighth Circuit. Judgment entered March 16, 2021.

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OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☒ reported at United States v. Thomason, 991 F.3d 910 (8th Cir. 2020); or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
☒ is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was March 16, 2021.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: May 20, 2021, and a copy of the order denying rehearing appears at Appendix C.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISOINS INVOLVED

Equal Protection and Due Process Clauses, U.S. Const. amend. XIV, §1; V.

The Equal Protection Clause provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws," U.S. Const. amend. IXV, § 1, and it applies to the federal government through the Due Process Clause of the Fifth Amendment. U.S. Const. amend. V. The Equal Protection Clause demands that similarly situated persons be treated alike. It protects fundamental rights, suspect classifications, and arbitrary or irrational government actions.

Substantive Due Process, U.S. Const. amend. V.

Substantive Due Process protects fundamental liberty interests in individual dignity, autonomy, and privacy from unwarranted government intrusion. U.S. Const. amend. V. These fundamental interests include the right to make decisions concerning bodily integrity and self-definition central to an individual's identity.

Free Speech Clause, U.S. Const. amend. I, XIV.

The Free Speech Clause provides that neither the government nor the states may "abridge[e] the freedom of speech." U.S. Const. amend. I. Free Speech is protected by the First Amendment from infringement by the government, U.S. Const. amend. I, and is among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action. U.S. Const. amend. XIV. The expression of a person's clinically-verified gender identity through dress is protected speech.

18 U.S.C. § 2261A - The Interstate Stalking Act, Pub. L. No. 104-201, 110 Stat. 2422 (1996).

18 U.S.C. § 2264 - The Violence Against Women Act (VAWA), Pub. L. No. 103-322, Title IV, 108 Stat. 1902 (1994)

34 U.S.C. § 1229 (b)(13)(A) - The Violence Against Women Reauthorization Act of 2013 (Nondiscrimination Clause)
Pub. L. No. 103-322, Title IV, §40002 (2013)

STATEMENT OF THE CASE

This is a case involving two romantic partners, one transgender and the other cisgender from a romantic union gone awry. After meeting in college, Thomason and the former partner ("JNS") formed a relationship. (DCD 43 at 2). In that time, the two often spent time as females, as Thomason began the transition from male to female and thus frequently wears women's clothing and makeup (DCD 71 at 25). In the spring of 2018, after a year and a half, JNS discussed the need to separate and subsequently moved from Michigan to Minnesota to be with family. (DCD 43 at 2).

Thomason later traveled to JNS' location in Minnesota where Thomason placed a tracking device to the vehicle she had purchased for JNS, and thereafter, checked up on the car and JNS, culminating in an attempt to reconcile with JNS. (DCD 43 at 2). On January 8, 2019, a one count indictment was filed in the District of Minnesota, charging Thomason with interstate stalking in violation of 18 U.S.C. § 2261A(1), for proscribed conduct between the months of October, 2018, and December, 2018, (DCD 14). After standard pretrial motion practice, Thomason pleaded guilty to the single count of the indictment as charged. (CDC 43 at 1). Despite informing former trial counsel of her transgender status, the plea agreement referred to Thomason using male pronouns. (DCD 43).

Active in the LGBTQ community, Thomason previously volunteered at a local LGBTQ community center for four years, wearing a name badge indicating a preference for gender neutral pronouns. (DCD 71 at 27). Thomason requested the same in her District Court. (DCD 71 at 1). This fell on deaf ears. Rather, Thomason was addressed by male pronouns in all court proceedings, including by former trial counsel. At the nearly five hour sentencing hearing, (DCD 68), the parties and the District Court addressed Thomason by male pronouns, at which

time the District Court imposed a total term of 45 months with three years of supervision. (DCD 120). The District Court also ordered restitution to JNS (DCD 128).

After the matter of restitution, Thomason filed a motion for recusal based on the District Court's failure to apply mitigating circumstances, such as Thomason's history of mental health issues, as well as the District Court's overt animosity toward Thomason after she chose to forego the right to counsel. (DCD 122 at 7, 10). Thomason also presented the prosecution's misconduct and discriminatory state of mind, paired with the District Court's failure to admonish the prosecution for intentional and repeated use of male pronouns, further demonstrating that the District Court was motivated by assumptions and attitudes related to said discriminatory state of mind. (DCD 122 at 11). The District Court denied Thomason's request. (DCD 128).

An appeal to the Eighth Circuit Court of Appeals followed. See *United States v. Thomason*, 991 F.3d 910 (8th Cir. 2020). There Thomason presented the question of whether the intentional or repeated refusal to use transgender person's pronoun, paired with stereotyping, and despite affirmative knowledge of the transgender person's status, constitutes a requisite intent to discriminate sufficient to warrant dismissal of an indictment on the basis of impermissible prosecutorial misconduct. (Id.). Thomason further requested the Eighth Circuit honor her previously requested pronoun. After oral argument on the matter, the panel of the Eighth Circuit affirmed the District Court's ruling in a published opinion, using male pronouns to address Thomason. (Appendix, Tab A). A petition for rehearing was timely filed, with Amici Curiae but was also denied. (Appendix, Tab C).

The petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

I. To Maintain Public Confidence in the Federal Judiciary, and Equal Protection of the Laws, the Pronouns of Transgender Litigants Must be Honored

In a nation committed to protecting fundamental freedoms, fairness and equality, public confidence in the institutions devoted to uphold these basic human rights is essential. That confidence erodes when politically unpopular groups are nevertheless treated disparately on account of an illegitimate motive such as race or sex. Confidence erodes further, still, when courts diverge from longstanding traditions to deny transgender persons basic dignity and respect. If the events of the past year - a global health crisis, mass protests against police brutality, a surge in hate crimes - have taught us anything, it's that we must protect society by closing the gap between our nation's ideals and its vast inequities.

Here, Thomason petitioned the Eighth Circuit Court of Appeals for relief. The Eighth Circuit Court panel, however, issued an opinion which forces this nation further away from its core ideals and constitutional promises. One prominent issue in debate is the adoption of preferred gender pronouns which, categorically, courts honor as a matter of courtesy and respect. Few others have taken another approach, referring to transgender litigants in an inflammatory and potentially harmful manner. This case is an illustration of the latter, prompting the question: Should federal courts and the litigants to these tribunals be prohibited from referring to transgender litigants according to their biological sex rather than their gender identity?

Textually speaking, a preferred pronoun inherently suggests a preference for one gender label over another; however, in this case, and many others, that request is intrinsically linked to a clinically-verified condition of physical and neurobiological origin, and is representative of a person's true sex. Such a defining characteristic speaks to such fundamental liberties as "the right to define and express one's identity." *Obergefell v. Hodges*, 576 U.S. 644, 663 (2015).

The very essence of this right reflects a general tradition of self-sovereignty and involves "basic and intimate exercises of personal autonomy." *Planned Parenthood v. Casey*, 505 U.S. 833, 847 (1992). This necessarily elevates the issue above a desire to express one's personal preference.

The right to independently define one's identity through dress and an accompanying gender pronoun seems to rise from a better understanding of how constitutional imperatives define a liberty that becomes emergent in our time. Indeed, these are sensible needs of a growing population of Americans, and it is our constitution that demands equal protection of the laws, providing a direction that these are not merely abstract propositions to bend and manipulate at whim. U.S. Const. amend. XIV. § 1; U.S. Const. amend. V. Denying persons the autonomy to define for themselves an identity denies equal protection, dignity and respect. The injury here strips the very essence of personhood and the right to be respected as human being; and this fails to comport with rights implicit in the concept of ordered liberty.

These liberties define our society and as a society we are inextricably linked. We can only do so much to protect our interests individually; we're much safer when we prioritize the health of the whole community - here, the entire nation. Transgender persons are part of this community and cannot be treated as social outcasts or as inferior in dignity and worth. Thus, to maintain public confidence in the federal judiciary, and equal protection of the laws, the pronouns of transgender Americans must be honored with the same care and respect that all other persons in litigation are afforded. The health of our nation depends on it.

II. The Eighth Circuit Panel in Thomason's Case Diverged from a Longstanding Tradition of Honoring the Pronouns of Transgender Litigants.

After volunteering at a local LGBTQ community center for many years using gender neutral pronouns as a name badge, Thomason thought nothing of requesting the same in her district court. A distinct request such as this is not so easily forgotten; however, Thomason's

request was cast aside in lieu of a stereotype. Thus, Thomason brought the issue before the Eighth Circuit on direct appeal. *United States v. Thomason*, 991 F.3d 910 (8th Cir. 2020). There, Thomason asked the Eighth Circuit to decide whether intentional or repeated refusal to use a transgender person's pronoun constitutes a requisite intent to discriminate sufficient to warrant impermissible prosecutorial misconduct. At a minimum, Thomason requested the Eighth Circuit honor her pronoun.

While it was clear the problem existed, it was also obvious how simple it was to solve. The Eighth Circuit panel, however, did not address this argument. The opinion, rather, used male pronouns against Thomason's wishes because it was "[c]onsistent with the proceedings in the district court," Panel op. at 7.n.s., for which Thomason appealed. Not only is this a startling departure from accepted norms, as noted by Thomason on petition for rehearing, this failure necessarily implicates all future Eighth Circuit jurisprudence with regard to the gender identity of litigants and the duties owed those litigants by the Eighth Circuit Court of Appeals.

The decision notably diverges from a longstanding tradition of honoring the pronouns of transgender litigants. Since at least 1980, the Eighth Circuit has issued opinions that use the pronouns of these various litigants. See *Pinneke v. Preisser*, 623 F.2d 546 (8th Cir. 1980); *Sommers v. Budget Mktg. Inc.*, 667 F.2d 748 (8th Cir. 1982); *Smith v. Rasmussen*, 249 F.3d 755, 762 n.8 (8th Circuit 2000) ("[W]e will refer to Smith in accordance with his preference, by using masculine pronouns."). This remains true for criminal defendants. See *United States v. Adams-Reading*, 787 Fed. App'x 355, 356 n.l. (8th Cir. 2019) ("Adams-Reading goes by Erika and is in the process of gender transition. Accordingly, this opinion refers to her using feminine pronouns.").

Like the defendant in *Adams-Reading*, Thomason's identifiable group is transgender, and Thomason has been mid-transition. Moreover, Thomason identifies with the female gender, and prefers female pronouns. Finally, like *Adams-Reading*, Thomason was previously referred to with male pronouns, including in a plea agreement. The notable difference is the offense of conviction: Thomason's prescribed conduct is alleged to be motivated by gender. This Court has repeatedly stated that gender is an irrational motive, no matter the cause. See e.g., *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 728 (1982).

A. This Question Has Important Legal Ramifications for the Entire Nation

This recent development certainly creates a crisp circuit split in joining the only other Circuit Court of Appeals to diverse from the majority. See *United States v. Varner*, 948 F.3d 250, 252 (5th Cir. 2020). In *Varner*, the Fifth Circuit observed that "no law compels granting or denying such a request..." *Varner* 948 F.3d at 260. But this Court and our nation's traditions have made clear that our constitutional system promises that individuals need not await legislative action before asserting such a right. *Obergefell*, 576 U.S. at 677. One may not simply forfeit a fundamental right. Moreover, in some situations, equal protection rights may well demand the use of affirming pronouns. *Tay v. Dennison*, No. 19-CV-00501, 2020 WL 2104962 (S.D. Ill. May 1, 2020) (Defendant's violated equal protection rights by subjecting the transgender plaintiff to abuses such as verbal harassment, including misgendering).

Taken together, the issue is a matter of national importance, one which deserves the utmost care and sensitivity. The people of this nation conferred power upon officials in government to represent their best interests, and further consented to be governed under the Constitution, all of which includes protection under the Constitution. The government fails to represent the interests of the people by subjecting them to abuses such as verbal harassment.

This speaks to a denial of civility and respect in the very institutions designed to protect the people and violates the will of the people.

B. The Eighth Circuit Panel's Failure to Address the Question Presented Should Not Prevent Thomason from a Petition before this Court

As a traditional rule, this court will not grant a petition for certiorari when the question presented was not pressed or passed upon below. In this case, the Eighth Circuit failed to address Thomason's argument under *Bostock v. Clayton Cty*, 140 S.C.T. 1731 (2020), and also failed to explicitly pass upon the argument. The opinion does not even mention *Bostock*. Nevertheless, this should not preclude Thomason, or the people of this nation, from obtaining relief in this court. There exists a greater need now more than ever to protect values reflecting society's deeply felt belief that the criminal law cannot be used as an instrument of unfairness. The wholesale denial of dignity and respect to litigants in federal courts of law does not comport with traditional ideas of fair play and decency. And one cannot simply forfeit a fundamental right simply because the matter of concern was not properly addressed.

As observed by the Fifth Circuit and now the Eighth Circuit, no authority supports the proposition that courts must refer to "gender dysphoric" litigants with pronouns matching their subjective identity. However, therein lies the problem and solution. The very practice of reducing transgender litigants to mere "gender dysphoric" persons necessarily strips a layer of personhood, rendering the proceedings particularly dehumanizing. It is not socially acceptable to poke fun at a physically or mentally handicapped person - it is likewise not acceptable to denigrate a person over a birth defect of physical and neurobiological origin, especially when the motivating factor is gender.

Of particular concern, the issue of judicial impartiality materialized in the Fifth Circuit, suggesting that this impartiality may be called to question by honoring a party's request for

address by affirming pronouns, more specifically by unintentionally conveying tacit approval of the litigant's underlying legal position. *Varner*, 948 F.3d at 256. But that argument itself rests on the proposition that being transgender is a legal position at all. Gender is not a defined objective identity; it's human experience. And there cannot be a legitimate government objective in needlessly attempting to shame and invalidate that human element in an inflammatory and potentially harmful manner.

It is simply not within our constitutional traditions to issue rulings such as this. Central to both the idea of the rule of law and to our Constitution's guarantee of equal protection is the principle that the government and each of its parts remain open and fair to all. The Eighth Circuit's ruling now raises the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. This itself reflects a broader concern for public confidence in the administration of justice, that justice must also satisfy the appearance of justice. This ruling does not - it necessarily harms the integrity of the process and this mainstay of our democracy. The Eighth Circuit's patent refusal to apply well-established precedent in a neutral way is indefensible, and will undermine confidence in the judiciary as a fair and neutral arbiter for years to come.

III. Conclusion

The Eighth Circuit has entered a decision in conflict with the decisions of nearly every Court of Appeal, including its own longstanding tradition, and has thus far so departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's supervisory power.

Federal courts and the officers to these legal tribunals have an affirmative duty to maintain public confidence in the legal profession, and to insure the integrity of judicial

proceedings. Discretionary review is in the interest of the people, not least of which includes LGBTQ Americans because society cannot be protected without courts. It is essential that these tribunals be open and impartial to all, even in disagreement. Allowing invalidating and denigrating practices like those observed here would be to make the courts instruments of oppression and a means of gratifying spite and hatred without any responsibility.

The question has not been, but should be, settled by this court. The petition for a writ of certiorari should be granted.

Respectfully submitted,

Shawn Thomason

Date: August 26, 2021