Nos. 17-1618, 17-1623, 18-107

IN THE

Supreme Court of the United States

GERALD LYNN BOSTOCK, *Petitioner,*

v.

CLAYTON COUNTY, GEORGIA, *Respondent.*

ALTITUDE EXPRESS, INC., AND RAY MAYNARD, *Petitioners,*

v.

MELISSA ZARDA AND WILLIAM MOORE, JR., AS CO-INDEPENDENT EXECUTORS OF THE ESTATE OF DONALD ZARDA, *Respondents.*

R.G. & G.R. HARRIS FUNERAL HOMES, INC., *Petitioner,*

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND AIMEE STEPHENS, *Respondents.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE ELEVENTH, SECOND, AND SIXTH CIRCUITS

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF THE EMPLOYEES

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF THE EMPLOYEES

INTEREST OF *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 55 national and international labor organizations with a total membership of over 12 million working men and women.[1] The AFL-CIO and its affiliate unions have a long history of advocating on behalf of employees who face discrimination in the workplace on the basis of their sexual orientation or transgender status. For a quarter of a century, Pride at Work has served as the AFL-CIO's constituency group representing lesbian, gay, bisexual, and transgender union members and their allies nationally and in local chapters across the country.

The questions presented in these cases are: "Whether the prohibition in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), against employment discrimination 'because of . . . sex' encompasses discrimination based on an individual's sexual orientation,"[2] in Nos. 17-1618 and 17-1623; and "Whether

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[1] Counsel for the parties in each of the three cases have consented to the filing of this amicus brief. No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amicus curiae*, made a monetary contribution to the preparation or submission of this brief.

[2] The question in No. 17-1618 is phrased as "[w]hether discrimination against an employee because of sexual orientation constitutes prohibited employment discrimination 'because of . . . sex' within the meaning of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2."

Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)," in No. 18-107.

The AFL-CIO has a strong interest in the proper resolution of these questions because members of AFL-CIO-affiliated unions, including many lesbian, gay, bisexual, and transgender employees, are entitled to Title VII's protections, either directly or via a collective bargaining agreement that "expressly covers . . . statutory . . . discrimination claims" under Title VII. *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 264 (2009). In addition, the AFL-CIO and its affiliated unions are subject to Title VII's requirements, either as employers under 42 U.S.C. § 2000e-2(a), labor organizations under 42 U.S.C. § 2000e-2(c), or both.

SUMMARY OF ARGUMENT

The established definition of Title VII's statutory term "sex" reaches beyond biological differences between men and women to encompass the character of being male or female generally. The character of being male or female, in turn, involves a combination of social and emotional traits associated with being a man or a woman in our society.

The Court has long interpreted Title VII's prohibition on sex discrimination in this manner, making clear that the law forbids "[p]ractices that classify employees in terms of . . . sex" based on "traditional assumptions about groups," *i.e.*, "sex stereotypes." *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13, 709 (1978). Importantly, the Court has held that this prohibition applies both to employer policies "assuming . . . that [employees] match[] the stereotype associated with their group" and to policies "insisting" that em-

ployees do so by punishing nonconformance with sex-based stereotypes. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality opinion).

The belief that an individual should only choose a partner of a different sex, and the belief that an individual's outward presentation of their sex should correspond with their sex assigned at birth, are examples of traditional assumptions about the character of being male or female. A lesbian woman does not conform with the traditional sex-based assumption that a woman should only form intimate relationships with men. A transgender man does not conform with the traditional sex-based assumption that a person who is assigned the female sex at birth should remain a female and present as a woman in terms of name, appearance, and mannerisms. When an employer makes an employment decision based on an employee's nonconformance with one of these sex-based characteristics—*e.g.*, because an employee is gay or because of an employee's transgender or transitioning status—the employer acts "because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a).

To be sure, it is likely that Congress, in enacting Title VII, would not have anticipated that the law's prohibition on sex discrimination encompassed discrimination based on sexual orientation or transgender status. But that was a result of the criminalization and stigmatization of homosexuality that reigned in our society at the time, not the meaning of the statutory term Congress chose to use. It is understandable as a historical matter that, as long as same-sex intimacy remained a criminal offense under state law, lower courts did not interpret Title VII's prohibition on sex discrimination as reaching discrimination based on sexual orientation. But now that those laws

are no more and social views have changed, there is no longer any barrier to giving the statutory term "sex" its common meaning.

The AFL-CIO has seen a similar change with regard to the manner in which labor arbitrators treat discrimination based on sexual orientation under "just cause" discharge and discipline provisions in collective bargaining agreements. Arbitrators who previously treated discrimination and harassment based on sexual orientation as permissible "shop talk" or "sexual horseplay" now treat such conduct much more seriously—often as a basis for discipline or discharge. Although these "just cause" contractual provisions have remained consistent over time, the outcome of decisions relating to discrimination based on sexual orientation have shifted significantly in response to the change in background law and social assumptions, similar to how lower courts have begun to interpret Title VII's prohibition on sex discrimination.

ARGUMENT

1. Title VII makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). "[A]n unlawful employment practice is established when the complaining party demonstrates that . . . sex . . . was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m). An exception is provided "in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of th[e] particular business or enterprise." 42 U.S.C. § 2000e-2(e).

In the era of Title VII's enactment, Black's Law Dictionary defined "sex" to mean "[t]he sum of the peculiarities of structure and function that distinguish a male from a female organism; the character of being male or female." Black's Law Dictionary 1541 (rev. 4th ed. 1968) (citing *Webster*, *Dict.*).[3] Indeed, as suggested by Black's citation to Webster's, the term was—and still is—widely defined to refer to "all of the things which distinguish a male from a female." Webster's New World Dictionary of the American Language 1335 (college ed. 1964).[4] *See also* The American Heritage Dictionary of the English Language 1187 (1969) ("The condition or character of being male or female; the physiological, functional, and psychological differences that distinguish the male and the female."); Webster's II New College Dictionary 1012 (2001) (same).

"[T]he *character* of being male or female," Black's Law Dictionary 1541 (emphasis added), consists of "[t]he combination of emotional, intellectual, and moral qualities distinguishing one person or group from

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[3] Because "[d]ictionaries tend to lag behind linguistic realities, . . . [i]f you are seeking to ascertain the meaning of a term in an 1819 statute, it is generally quite permissible to consult an 1828 dictionary." Antonin Scalia & Bryan A. Garner, *A Note on the Use of Dictionaries*, 16 Green Bag 2D 419, 423 (2013). In any case, the previous version of Black's, the version in print when Congress enacted Title VII, defined "sex" identically to the 1968 revised fourth edition. *See* Black's Law Dictionary 1541 (4th ed. 1951).

[4] The full definition is as follows:

"**1.** either of the two divisions of organisms distinguished as male or female; males or females (especially men or women) collectively. **2.** the character of being male or female; all of the things which distinguish a male from a female. **3.** anything connected with sexual gratification or reproduction or the urge for these, especially the attraction of individuals of one sex for those of the other." Webster's New World Dictionary 1335.

another," Webster's II New College Dictionary 187 (defining "character"),[5] that are associated with being a man or woman. "Sex," in other words, means more than the mere biological distinction between male and female organisms. Rather, the term encompasses the wide range of social differences that are attributed to men and women by society.

In full accord with this definition, this Court has never interpreted Title VII's reference to "sex" as limited to physical biology. To the contrary, this Court long ago made clear that "'[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes,'" so that "employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females." *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 & n.13 (1978) (quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971)). *See, e.g.*, *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 543-44 (1971) (per curiam) (holding policy of refusing job applications from women, but not men, with preschool-age children unlawful). Title VII's coverage, therefore, clearly includes the latter half of Black's definition of "sex"—employment decisions based on "[t]he *character* of being male or female." Black's Law Dictionary 1541 (emphasis added).

In "strik[ing] at . . . disparate treatment . . . resulting from sex stereotypes," *Manhart*, 435 U.S. at 707 n.13 (citation omitted), Title VII not only forbids dis-

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[5] Black's defined "character" similarly as "[t]he aggregate of the moral qualities which belong to and distinguish an individual person; the general result of the one's distinguishing attributes." Black's Law Dictionary 294 (rev. 4th ed. 1968).

crimination predicated on "[m]yths and purely habitual assumptions about a [man's or a] woman's inability to perform certain kinds of work," *id.* at 707, but also discrimination based on an individual's *nonconformance* with characteristics stereotypically associated with being male or female. Indeed, it was nonconformity with sex stereotypes that underlay the "intolerable and impermissible catch 22" described in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)—that female employees are "out of a job if they behave aggressively and out of a job if they do not." *Id.* at 251 (plurality opinion).[6] "Title VII lifts [employees] out of this bind," *ibid.*, by making clear that both modes of sex stereotyping are unlawful—evaluating individuals based on generalized assumptions about how members of their sex behave as well as punishing individuals when they fail to conform to these sex-based stereotypes. *See ibid.* ("[W]e are beyond the day when an employer could evaluate employees by assuming *or* insisting that they matched the stereotype associated with their group . . . ." (emphasis added)).

This definition of "sex" not only squares with the common understanding of what the term meant in

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[6] The two concurring Justices agreed with the plurality that the plaintiff had proven by evidence of sex stereotyping that "gender played a motivating part in [the] employment decision." *Price Waterhouse*, 490 U.S. at 250 (plurality opinion). *See id.* at 259 (White, J., concurring in judgment) (agreeing that "finding" that plaintiff had shown that an "unlawful motive was a substantial factor in the adverse employment action" was "supported by the record" (emphasis omitted)); *id.* at 272-73 (O'Connor, J., concurring in judgment) (quoting with approval court of appeals' conclusion that "Ann Hopkins proved that Price Waterhouse 'permitt[ed] stereotypical attitudes towards women to play a significant, though unquantifiable, role in its decision not to invite her to become a partner'" (alteration in original)).

1964, it also accords with this Court's interpretive approach to Title VII more generally. Most discriminatory practices do not turn on differences actually linked to protected characteristics—*e.g.*, the comparative ability of black and white people, or of Christians and Muslims, to complete a job task based on their skin color or religious beliefs. Rather, "[p]ractices that classify employees in terms of religion, race, or sex tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals." *Manhart*, 435 U.S. at 709. For example, "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." *Price Waterhouse*, 490 U.S. at 250 (plurality opinion).

The same analysis applies when an employer acts on the basis of a belief that a person should only be attracted to, and form intimate relationships with, persons of a different sex, or that a person's identity and physical appearance should correspond with their sex assigned at birth. In each case, the employer bases its actions on traditional assumptions concerning the proper "character of being male or female." Black's Law Dictionary 1541. It need hardly be stated that both the choice of one's partner and the outward presentation of one's gender are important components of "[t]he combination of emotional, intellectual, and moral qualities," Webster's II New College Dictionary 187, associated with being male or female. Thus, when an employer makes an employment decision based on such a characteristic, the decision is made "because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1).

Ann Hopkins, the plaintiff in *Price Waterhouse*, was denied a promotion to partnership at her accounting firm based on comments from existing partners

"describ[ing] her as 'macho,'" "criticiz[ing] her use of profanity," and, in "the *coup de grace*," advising that, "in order to improve her chances for partnership, . . . Hopkins should 'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.'" 490 U.S. at 235 (plurality opinion). It cannot be that Hopkins would not have had an actionable Title VII claim if she were called "butch" instead of "macho," or advised to talk more about dating men rather than to "dress more femininely" and "wear make-up." *Cf. Franchina v. City of Providence*, 881 F.3d 32, 37 (1st Cir. 2018) (lesbian female firefighter called "[c]unt," "bitch," and "lesbo" by harassers); *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 287 (3d Cir. 2009) (male factory worker harassed for his effeminate mannerisms and style of dress and, after being publicly outed by his harassers, also targeted for his sexual orientation). The point is that the "employer [has] evaluate[d] employees by . . . insisting that they match[] the stereotype associated with their group," *Price Waterhouse*, 490 U.S. at 251 (plurality opinion), not that the employee has failed to conform to any *particular* sex-based stereotype.

Who one dates or marries, as much as how one walks, talks, or dresses, is an important component of "[t]he combination of . . . qualities," Webster's II New College Dictionary 187, that together comprise being male or female. Nothing in the statutory term "sex" provides a basis to attribute meaning to some such aspects of "[t]he character of being male or female," Black's Law Dictionary 1541, while disregarding the relevance of others on the sole basis that they are also associated with sexual orientation or transgender status.

2. None of which is to deny that "no one in the 1964 Congress that adopted Title VII intended or anticipat-

ed its application to sexual-orientation discrimination." *Hively v. Ivy Tech Cmty. College of Ind.*, 853 F.3d 339, 361 (7th Cir. 2017) (en banc) (Sykes, J., dissenting). Members of Congress simply could not imagine that the law would someday be so applied because of the criminalization and stigmatization of homosexuality that reigned at the time. But that lack of legislative foresight tells us nothing about the meaning of the statutory term "sex." It goes without saying that "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).

It is notable, in this regard, that in 1964, most forms of same-sex intimacy were still criminalized in almost every state. *See Bowers v. Hardwick*, 478 U.S. 186, 193-94 (1986) ("[U]ntil 1961, all 50 States outlawed sodomy, and today, 24 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults."(footnote omitted)). *See also Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 140 (2d Cir. 2018) (en banc) (Lynch, J., dissenting) (noting that "[o]nly three years before the passage of Title VII, Illinois . . . had become the first state to repeal laws prohibiting private consensual adult relations between members of the same sex"). And, "[w]hen the American Psychiatric Association published the first Diagnostic and Statistical Manual of Mental Disorders in 1952, homosexuality was classified as a mental disorder, a position adhered to until 1973." *Zarda*, 883 F.3d at 140 (Lynch, J., dissenting) (citation and quotation mark omitted). Needless to say, the treatment of homosexuality as a crime and mental illness served to significantly stigmatize lesbian, gay, and bisexual people in the workplace, as in most other social settings.

In the civil service, for example, a gay employee was subject to discharge "for 'immoral conduct' and for possessing personality traits which render him 'unsuitable for further Government employment.'" *Norton v. Macy*, 417 F.2d 1161, 1162 (D.C. Cir. 1969). Even sympathetic tribunals assumed that an employee's sexual orientation, if not necessarily disqualifying for employment, was something to be kept hidden. For example, in reversing the discharge of a NASA employee for off-duty "homosexual conduct" pursuant to these civil service rules, the D.C. Circuit made clear that "we do not hold that homosexual conduct may never be cause for dismissal of a protected federal employee," while noting approvingly that the employee at issue "neither openly flaunts nor carelessly displays his unorthodox sexual conduct in public." *Id.* at 1167-68. Similarly, in an early labor arbitration decision on the topic, the arbitrator reinstated a gay public employee, considering highly relevant that the grievant was "a discreet 'closet homosexual'" who "had drawn a hard line between his activities as a Customs Inspector and his behavior as a practicing homosexual," rather than an individual who "was clearly effeminate and obvious about his homosexuality." *U.S. Customs Service v. Nat'l Treasury Emps. Union, Chapter 142*, 77 Lab. Arb. (BNA) 1113, 1113-14, 1116-18 (1981).

Given prevailing social views and the background law that existed at the time, it is no surprise that, until social assumptions and laws began to shift—*e.g.*, "in 1975, . . . the American Psychological Association . . . urg[ed] all mental health professionals to work to dispel the stigma of mental illness long associated with homosexual orientation," *Zarda*, 883 F.3d at 140 (Lynch, J., dissenting) (citation and quotation mark omitted), and state laws criminalizing same-sex inti-

macy were finally held unconstitutional in *Lawrence v. Texas*, 539 U.S. 558 (2003)—the courts of appeals unanimously understood that Title VII's prohibition on sex discrimination did not encompass discrimination based on sexual orientation. As the D.C. Circuit explained, in a broadly-analogous constitutional case challenging the FBI's policy against the hiring of gays and lesbians issued during the *interregnum* between *Bowers* and *Lawrence*, "the court's reasoning in [*Bowers*] . . . forecloses appellant's efforts to gain suspect class status for practicing homosexuals," since "[i]t would be quite anomalous, on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause." *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987). *See also ibid.* ("If the Court was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.")

The fact that changing "assumptions about groups," *Manhart*, 435 U.S. at 709, have now led courts to take a fresh look at their interpretation of Title VII's prohibition on sex discrimination is neither unusual nor problematical. There is no indication, for example, that individual members of Congress, in enacting Title VII's prohibition on *race* discrimination, intended to prevent employers from refusing to hire white employees who were married to, or otherwise associated with, African-Americans in one of the many states where interracial marriage still constituted a crime in 1964. *See generally Loving v. Virginia*, 388 U.S. 1, 6 & n.5 (1967) (explaining that at least 16 states

"prohibit[ed] and punish[ed] marriages on the basis of racial classifications" and an additional 14 states had recently enforced similar laws). Yet, after *Loving* held such laws unconstitutional, the courts of appeals concluded that "[w]here a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of *his* race." *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986) (emphasis in original). *See also Deffenbaugh-Williams v. Wal-Mart Stores*, 156 F.3d 581, 588-89 (5th Cir. 1998) (collecting cases). Nothing in *Loving* changed the meaning of the statutory term "race" in Title VII. Rather, once this Court concluded that "state sponsored discrimination against" interracial marriage "[wa]s invidious," *Padula*, 822 F.2d at 103, there was no longer any bar to giving the statutory term its full meaning.

To reiterate, neither recent judicial opinions concerning the constitutional rights of lesbian, gay, and bisexual people nor changing social assumptions affect the meaning of the statutory term "sex," as that term encompassed discrimination based on sexual orientation and transgender status on the day Title VII was enacted. The transformed legal and social context in which the present cases arise serves only to explain why courts that once turned away claims of discrimination based on sexual orientation and transgender status because of the criminalization and stigmatization of homosexuality now give effect to what was always true as a statutory matter—that such claims fall squarely within Title VII's prohibition of discrimination "because of . . . sex," 42 U.S.C. § 2000e-2(a).

3. As collective bargaining representatives in workplaces in every region and industry in our nation, the

AFL-CIO's affiliate unions have seen firsthand the degree to which views about discrimination based on sexual orientation have changed in recent years. While the cases described below were mostly decided pursuant to general "just cause" provisions in collective bargaining agreements rather than under specific contractual prohibitions on sex discrimination,[7] they nevertheless provide useful insight into how changing social norms permit decision-makers to construe a legal term in accordance with its natural meaning.

Earlier arbitration decisions reflect the broader societal trend of treating harassment on the basis of sexual orientation less than seriously. In *Arizona Portland Cement Co. v. United Cement, Lime & Gypsum Workers' International Union, Local 296*, 79 Lab. Arb. (BNA) 128 (1982), for example, the arbitrator upheld the discharge of an openly gay grievant despite evidence of harassment based on sexual orientation, including that the grievant was hit by a co-worker, "result[ing] in . . . a black eye." *Id.* at 131-32. In *Coca-Cola Bottling Co. of Northern Ohio v. International Brotherhood of Teamsters, Local 20*, 106 Lab. Arb. (BNA) 776 (1996), the arbitrator reduced a discharge penalty to a suspension in a case where two grievants lured a young male employee into a darkened office, called him a "faggot," attempted to pull down his pants, and threatened him with sexual assault. *Id.* at 777, 783-84. The arbitrator reasoned that the lesser penalty was war-

[7] As the leading treatise on labor arbitration explains, "[m]ost collective bargaining agreements . . . require cause or just cause for discharge or discipline." Elkouri & Elkouri, *How Arbitration Works* 15-4 (Kenneth May ed., 8th ed. 2016). Such provisions "exclude discharge for mere whim or caprice," and are instead "intended to include those things for which employees have traditionally been fired," including "the traditional causes of discharge in the particular trade or industry." *Ibid.* (citation omitted).

ranted because it was shown that the employer had previously tolerated "sexual horseplay" in the workplace and the "sexually threatening situation . . . was not actually consummated as such." *Id.* at 783.

Starting in the late 1980s and early 1990s, labor arbitrators interpreting collective bargaining agreements began—haltingly at times—to find slurs and harassment based on real or perceived sexual orientation to constitute objectionable discrimination, rather than the mere "shop talk" or "sexual horseplay" that was previously often tolerated in the workplace.

Illustrative of these changing views is *Louisiana Pacific Graphics v. Graphics Communications, Local 747*, 88 Lab. Arb. (BNA) 597 (1986), which involved an employee who was discharged for allegedly walking off the job, but who contended that he was actually fired because his manager perceived him to be gay. *Id.* at 597-99. The arbitrator found that the manager "called the Grievant a 'queer,' a 'faggot,' [and] a 'gay caballero'" among "'other sexually offensive names.'" *Id.* at 599. Explaining that "[t]he Employer cannot excuse, much less defend, [the manager]'s use of profane and foul language aimed at the Grievant as 'normal shop talk,'" the arbitrator found that these slurs instead demonstrated the manager's "animus against the Grievant," thus undermining the employer's claimed reason for discharging the employee. *Ibid.*

A similar analysis informed the arbitrator's decision in *Philip Morris, USA v. International Association of Machinists & Aerospace Workers Lodge No. 10*, 94 Lab. Arb. (BNA) 826 (1990), which involved the discipline of two male pipefitting employees accused of harassing a male coworker as well as the coworker's wife, who also worked at the plant. *Id.* at 828. The harassers "referred to [the victim] as a 'faggot,'" "his

mannerisms [were] mocked," and "his small pick-up truck was referred to as a 'fag' or a 'faggot' truck." *Ibid.* In addition, the employees directed "'cat calls' and 'animal sounds,'" as well as more "faggot" references, towards the victim's wife. *Ibid.* In upholding the discipline of the grievants, the arbitrator explained that the "banter becomes more than 'playful shop talk' when viewed in light of the surrounding circumstances of this case." *Id.* at 829. Focusing on the harassment's impact on the victim's wife, the arbitrator concluded that "the sexual reference was . . . clear." *Ibid.* While the "[g]rievants' statements could be viewed as non-abusive, *per se*, ... such remarks, when made to the same employee over a period of more than a year, concerning the sexual preferences of her spouse, do take on a clear 'sexual connotation.'" *Ibid.*

In more recent years, reflecting quickly-changing social views, arbitrators have been much more direct in finding that similar discriminatory conduct constitutes unacceptable workplace behavior. For example, an arbitrator required little discussion to uphold the discharge of an employee for calling his manager and assistant manager "fucking fags" on the basis that it constituted "willful gross misconduct." *AT&T Mobility v. Communications Workers of America, District 3*, 129 Lab. Arb. (BNA) 1284, 1284-85 (2011). And, in a similar recent case, an arbitrator upheld the discharge of an employee who "ask[ed] [the victim] why [he] was acting as a little 'puto' (this word in Spanish means 'homosexual man whore') and that [he] needed to be corrected by the 'puño' (Spanish word for fist)." *U.S. Steel Corp. v. United Steelworkers, Local 1014*, 127 Lab. Arb. (BNA) 1127, 1129 (2010). Rejecting the claim that the language constituted "so-called mill talk," *id.* at 1131, the arbitrator explained, "[i]t cannot reasonably be disputed that an employee who directs

references in the plant to another employee using sexual language, for the purpose of demeaning and harassing the other employee, engages in serious misconduct and may properly be held accountable for creating an intimidating, hostile, or offensive working environment," *id.* at 1132.

In sum, as these cases illustrate, "sexually offensive names," "sexual language," and other forms of discrimination and harassment based on sexual orientation that was once considered socially acceptable "shop talk" or "sexual horseplay" is now understood in workplaces across the nation for what it is—unacceptable discrimination based on sex. Just as arbitrators construing the same contractual term, "just cause," changed their view of whether such conduct constituted cause for discipline or discharge, so too have the courts of appeals properly begun to change their view of whether such conduct constitutes discrimination "because of . . . sex" for purposes of Title VII.

CONCLUSION

The Court should reverse the court of appeals in No. 17-1618, and affirm in Nos. 17-1623 and 18-107.

Respectfully submitted,

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