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. & RAY MAYNARD, *Petitioners,*
v.
MELISSA ZARDA and WILLIAM MOORE, JR.,
Co-Independent Executors of 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 U.S. COURTS OF APPEALS FOR THE ELEVENTH, SECOND, AND SIXTH CIRCUITS

BRIEF OF EMPLOYMENT DISCRIMINATION LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF THE EMPLOYEES

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INTEREST OF *AMICI CURIAE*[1]

The *amici* are law professors who teach and research American employment discrimination law, and thus have a professional interest in accurate and valid inferences about the text, purpose, history, and interpretation of Title VII of the Civil Rights Act of 1964. They are: Catherine Archibald, University of Detroit Mercy School of Law; Erin Buzuvis, Western New England University School of Law; Bennett Capers, Brooklyn Law School; David S. Cohen, Drexel University Thomas R. Kline School of Law; Jennifer Ann Drobac, Indiana University Robert H. McKinney School of Law; Jack B. Harrison, Northern Kentucky University Chase College of Law; Jennifer S. Hendricks, University of Colorado Law School; Michael J. Higdon, University of Tennessee School of Law; Jeremiah Ho, University of Massachusetts School of Law; Anthony Michael Kreis, Illinois Institute of Technology, Chicago-Kent College of Law; Shirley Lin, New York University School of Law; Jean C. Love, Santa Clara University School of Law; Suzette Malveaux, University of Colorado Law School; Marcia L. McCormick, Saint Louis University School of Law; Ryan H. Nelson, New York Law School; Sachin S. Pandya, University of Connecticut School of Law; Nicole Buonocore Porter, University of Toledo College of Law; Susan E. Provenzano, Northwestern University Pritzker School of Law; Michael Selmi,

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[1] No counsel for a party authored this brief in whole or in part. No person other than *amici curiae* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have provided consent to the filing of this brief.

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SUMMARY OF ARGUMENT

The employees contend in these cases that, when their employers fired them for being gay or transgender, the employers relied on sex stereotypes in violation of Title VII. To argue otherwise, their employers and the United States read Title VII to bar only sex stereotyping practices that disadvantage female employees as a group relative to men, or vice versa. Thus, they argue that Title VII lets an employer fire a gay man for being attracted to or having a relationship with another man, so long as it would have also fired a lesbian for being attracted to or being in a relationship with another woman; or Title VII lets an employer fire a transgender woman for being transgender if that employer would have similarly fired a transgender man for that reason.

The employers and the United States are wrong. Title VII protects *individuals* from sex discrimination, including discrimination based on sex stereotypes. Congress declared it unlawful for an employer to fire,

not hire, or otherwise discriminate against "any individual . . . because of such individual's . . . sex," 42 U.S.C. § 2000e-2(a)(1), including where "sex" was only "a motivating factor," *id.* § 2000e-2(m). By its plain language, Title VII bars an employer from firing any individual based at least in part on stereotypes about "such individual's . . . sex," *i.e.*, beliefs about how men or women can, will, or should act. Thus, "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

Despite Title VII's textual focus on the protection of individuals, the employers and the United States argue that Title VII only bars employers from relying on sex stereotypes to take employment actions that adversely affect predominantly women or predominantly men. They assert that Title VII does not bar employment actions that harm both men and women who do not conform to an employers' sex stereotypes. Lacking any textual foundation for this position, they rely mostly on the ground that *Price Waterhouse* did not say otherwise. *Price Waterhouse*, however, did not create Title VII's anti-stereotyping principle, and so that principle is not limited to the stereotypes at issue in *Price Waterhouse* itself. Courts and agencies have recognized and applied the anti-stereotyping principle, albeit sometimes imperfectly, since Title VII's enactment. *Price Waterhouse* simply recognized and articulated a principle that long predated it. And both federal and state courts have applied that principle, before and after *Price Waterhouse*, to a wide variety of situations. This Court thus should reject the employers' and the United

States' efforts to narrowly apply Title VII's anti-stereotyping principle here.

ARGUMENT

I. IT IS WELL-SETTLED THAT TITLE VII'S ANTI-STEREOTYPING PRINCIPLE PROTECTS INDIVIDUALS.

A. Title VII's Anti-Stereotyping Principle Is Required by Title VII's Text, Which Focuses on Individuals.

Title VII's anti-stereotyping principle derives from statutory text that expressly focuses on the individual, not groups. Title VII declares it unlawful for an employer to fail or refuse to hire or to "discharge *any individual* . . . or otherwise to discriminate against *any individual* . . . because of *such individual's* . . . sex," 42 U.S.C. § 2000e-2(a)(1) (emphasis added). The phrase "any individual" is the direct object of the operative verbs ("fail or refuse to hire," "discharge," "discriminate"), and the referent for the pronoun "his" and the singular possessive "such individual's" in that section.[2] Thus, in any Title VII sex-discrimination claim under section 703(a)(1), the question is whether *an individual* has suffered discrimination because of *that* individual's sex,

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[2] The meaning of "his" in section 703(a) also includes "her." *See* 1 U.S.C. § 1 ("words importing the masculine gender include the feminine as well").

regardless of whether other individuals of the same or other sex face comparable discrimination or hardship.

This focus on the individual runs throughout the relevant text of section 703 of the Civil Rights Act. The terms "any individual," "his," and "such individual's" each function similarly in section 703(a)(2), *see id.* § 2000e-2(a)(2). Congress similarly used "any individual" and close variants in the parallel provisions for employment agencies, *see id.* § 2000e-2(b); labor organizations, *id.* § 2000e-2(c)(1) ("any individual"); *id.* § 2000e-2(c)(2) ("any individual," "such individual's"); *id.* § 2000e-2(c)(3) ("an individual"); training programs, see id. § 2000e-2(d) ("any individual"), among other provisions, *see*, *e.g.*, *id.* § 2000e-2(f) (exemption for actions "with respect to an individual who is a member of the Communist Party of the United States"). By contrast, Congress used the term "group" in section 703 in the few instances when it intended to refer to groups. *See id.* § 2000e-2(j) (not requiring employer to grant "preferential treatment to any individual or to any *group*") (emphasis added); *id.* § 2000e-2(n)(2)(B) ("members of a group").

Based on this text, this Court held—long before *Price Waterhouse*—that Title VII's "focus on the individual is unambiguous." *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 708 (1978). That is, Title VII "precludes treatment of individuals as simply components of a racial, religious, sexual, or national class. . . . Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply." *Id.* Accordingly, this

Court concluded that "the absence of a discriminatory effect on women as a class" could not justify an employer's policy that, on its face, required any individual employee to pay more into the employer's pension fund because she was a woman. *Id.* at 716.

Similarly, in *Connecticut v. Teal*, 457 U.S. 440 (1982), this Court held that African-American employees could challenge a component of the promotion process that had a disparate impact based on race even though the hiring process as a whole had no such disparate impact. It reasoned that "[t]he principal focus of [section 703(a)(2)] is the protection of the individual employee, rather than the protection of the minority group as a whole. Indeed, the entire statute and its legislative history are replete with references to protection for the individual employee." *Id.* at 453-54 (citations omitted).

Thus, it is well-established that, in applying Title VII, courts must focus on "fairness to individuals rather than fairness to classes. Practices 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; *see also Dothard v. Rawlinson*, 433 U.S. 321, 333 (1977) ("[T]he federal courts have agreed that it is impermissible under Title VII to refuse to hire an *individual* woman or man on the basis of stereotyped characterizations of the sexes") (footnote omitted and emphasis added); *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 681 (1983) ("Congress had always intended to protect *all individuals* from sex discrimination in employment . . . .") (emphasis added).

Given this precedent as well as the statutory text, the employers and the United States are in error when they argue that Title VII lets employers engage in sex stereotyping against individual employees so long as they do not favor one sex as a group over another.[3] Rather, the anti-stereotyping principle derives from the individual-protecting text of section 703(a) and naturally applies to individuals just as in that text's other applications. An employer may not adversely treat "any individual" (in the ways section 703(a) delineates) because that employer took "such" individual to belong to one or more groups (as denoted by "race, color, religion, sex, or national origin") and then evaluated that individual based on beliefs about how that group's members can, will, or should act. Both Title VII's text and this Court's precedents make clear that, if an individual is disfavored in this manner, it is simply immaterial "whether one sex is favored over the other," Pet. for a Writ of Certiorari in *Harris Funeral Homes* at 23 ("Harris Pet.").

B. Claims Based on Sex Stereotypes, Which Long Pre-Dated *Price Waterhouse*, Are a Core Part of Title VII's Protections.

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[3] *See* Pet. for a Writ of Certiorari in *Harris Funeral Homes,* at 23 ("Harris Pet.") (asserting that there is no "free-standing claim of sex stereotyping that treats as irrelevant whether one sex is favored over the other"); Br. for Federal Respondent in Opp. to Pet. For a Writ of Certiorari in *Harris Funeral Homes, Inc. v. EEOC* at 18 ("Br. for Federal Respondent") (asserting that "the statute is not properly construed to proscribe employment practices that take account of the sex of employees but do not impose different burdens on similarly situated members of each sex").

Ignoring Title VII's text, the employers and the United States imply that *Price Waterhouse* created the anti-sex-stereotyping doctrine out of whole cloth, such that Title VII claims based on sex stereotypes can be limited by reference to those that the defendant in *Price Waterhouse* itself deployed. *See* Br. for Federal Respondent in Opp. to Pet. For a Writ of Certiorari in *Harris Funeral Homes, Inc. v. EEOC* at 20 ("Br. for Federal Respondent"). This misunderstands the history of Title VII sex-stereotyping claims and the role that *Price Waterhouse* plays in that history.

Since Title VII's enactment, courts and agencies have recognized and applied the law's anti-stereotyping principle to sex discrimination cases. In 1965, the year after Title VII's passage, the Equal Employment Opportunity Commission (EEOC) explained that Title VII's bona fide occupational qualification (BFOQ) exception for sex, *see* § 2000e-2(e), does *not* let an employer refuse to hire:

> an individual based on *stereotyped characterizations of the sexes*. Such stereotypes include, for example, that men are less capable of assembling intricate equipment; that women are less capable of aggressive salesmanship. The principle of non-discrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group.

EEOC Guidelines on Discrimination Because of Sex, 30 Fed. Reg. 14926, 14927 (Dec. 2, 1965) (codified as amended at 29 C.F.R. § 1604.2(a)(1)(ii)) (emphasis added). Moreover, it did not matter *who* held the stereotyped beliefs: Title VII does not excuse sex discrimination "because of the preferences of coworkers, the employer, clients or customers," *id.* § 1604.2(a)(1)(iii), absent an employer's bona fide need to do so for "authenticity or genuineness, . . . e.g., an actor or actress." *Id.* § 1604.2(a)(2).

These principles quickly became deeply embedded in the definition of sex discrimination in both federal and state employment discrimination law. Federal courts swiftly adopted these principles. *See, e.g., Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971) (stating, in formulation later quoted by *Price Waterhouse*: "In 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."); *see Price Waterhouse*, 490 U.S. at 251. And, in the decades that followed Title VII's enactment, some state agencies wrote regulations with close variants of these EEOC provisions to exclude sex stereotypes from the BFOQ exceptions to their own state bans on employer sex discrimination. *See* Haw. Code R. § 12-46-102(d)(2)-(3); Ill. Adm. Code tit. 56, § 5210.70(b)(2)-(3); Iowa Admin. Code r. 161-8.47(216)(1)(b)-(c); Kan. Admin. Regs. 21-32-1(a)(2)-(3); 94-348-3 Me. Code. R. § 18(1)(B)(1)-(2); 804 Mass. Code Regs. § 3.01(3)(b)(1)-(2); Mo. Code Regs. Ann. tit. 8, § 60-3.040(2)(A)(2)-(3); Ohio Admin. Code 4112-5-05(B)(1); Okla. Admin. Code § 335:15-3-2(a)(1)(B)-(C); Or. Admin. R. 839-005-0013(2)(a)-(b); 16 Pa. Code

§ 41.71(e)(2)-(3); S.D. Admin R. 20:03:09:02; *see also* Cal. Code Regs. tit. 2, § 11031(a)(3),(5); *id.* § 11304(e)(4); *cf.* N.J. Admin. Code § 13:11–1.4(d)(2)-(3) (similar for job advertising).[4] A few state agencies have expressly adopted the EEOC Guidelines on Sex Discrimination in their entirety. *See* Mont. Admin. R. 24.9.1407(1); Tenn. Comp. R. & Regs. 1500-01-01-.04(2); *see also* D.C. Mun. Regs. tit. 4, § 517.1.

Moreover, in the 1970s and 1980s, courts and the EEOC applied Title VII's anti-stereotyping principle to decide Title VII sex discrimination claims where the employer relied on sex stereotypes not only about what men or women *could* do, *see Dothard*, 433 U.S. at 333, but also what men or women *should* do. This included cases where the employer assumed how an individual *could* act based on what it expected others (e.g., customers, clients, co-workers) to believe about how men and women *should* act. These cases covered a wide variety of circumstances, but in each case the focus was on ensuring that an *individual* did not suffer employment discrimination as a result of sex stereotypes. Some of the sex stereotypes they addressed were:

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[4] Most State agencies adopted these regulations by or before the mid-1980s. *See,* e.g., 9 Ill. Reg. 18494 (Dec. 2, 1985); Kan. Admin. Regs. § E-73-5 (filed Nov. 16, 1972); Ohio Monthly Rec. 3-702 (Nov. 1972); 16 Okla. Gaz. 190, 193 (Feb. 15, 1977); 839-05-0025 Substantive Rules: Introduction, 9 Or. Bull. 1982 (June 11, 1982); 4 Pa. Bull. 1406 (July 13, 1974); *see also* 80 Cal. Admin. Reg. 144, 146 (June 21, 1980) (adopting predecessors: Cal. Code Regs. tit. 2, §§ 7290.8(a)(3),(5) and § 7291.1(e)(4)).

1. *Men should only work in jobs "appropriate" for men, and women in "women's" jobs ("men's work" and "women's work").* *E.g.*, *Fadhl v. City and County of San Francisco*, 741 F.2d 1163, 1165 (9th Cir. 1984) (opinion of Kennedy, J.) (reciting evidence that, but for an erroneous finding, would have supported Title VII liability, including training officer's description of plaintiff, a police trainee, as "being 'too much like a woman'"; statement in "evaluation form that, '[a]fter work she can become feminine again"; and other training officer who described plaintiff "as 'very ladylike at all times, which in the future may cause problems,' and . . . instructed [her] not to look 'too much like a lady.'"); EEOC Dec. No. 76-94, 1976 WL 5005 (Feb. 6, 1976) (employer violated Title VII by refusing to hire female job applicant based on "stereotypical opinion[ ]" that "because the Vocational Education Course was to be taught in a trailer far from other teachers and students a male who would project a stronger image, would be better suited for the job."); EEOC Dec. No. 76-85, 1976 WL 4998 (Jan. 14, 1976) ("Respondent's stereotypical view of women does not allow for the concept of an acceptable female administrator. Relying on the traditional concept of women any woman 'hard-nosed' enough for the job is too 'abrasive,' and any woman who is not 'hard-nosed' is too 'soft spoken.'"); EEOC Dec. No. 71-2338, 1971 WL 3892 (June 2, 1971) (rejecting refusal to promote women to branch manager as justified because that position requires taking customers on plant tours, football games, hunting trips, and to dinner, but that "customers would not go on hunting trips with female managers unless they were 'built like Raquel Welch.'"); EEOC Dec. No. AL68-3-243E (June 4, 1969) (Title VII sex discrimination where supervisor

assigned clerical duties to a female editor-writer, because "'that sort of work (clerical) is woman's work. You wouldn't ask or expect one of the men to be willing to do it.'"); *see also Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971) (airline could not justify categorical refusal to hire men as flight attendants on basis of customers' preference for women; "it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid.").

2. *Women should not work in close physical proximity to men, nor men in close proximity to women*. E.g., EEOC Dec. No. 76-122, 1976 WL 5018 (July 19, 1976) (in case where female job applicant was denied deputy sheriff position in violation of Title VII, "[t]he Sheriff also stated that he did not plan to hire women as road patrolmen because he will not have 'the wives of his men scratching their eyes out' because their husbands have been working in a patrol car with women and because women will not work out in the road patrol because of the 'male-female makeup.'"); *Margules v. Dep't of Agric.*, EEOC DOC B01780180, 1978 WL 215657 (EEOC Jan. 1, 1978) (sufficient evidence of sex discrimination included an expressed concern "about male and female technicians going on field assignments together or about the wives of male employees objecting to females working with their husbands.").

3. *Women, especially if married, should stay in the home and tend to their husbands and children, while men should focus on being the breadwinners and not on childcare. E.g.*, *Margules*, 1978 WL 215657

(sufficient evidence of sex discrimination included proof of "stereotyped thinking about the role of females," including: "Women were told they should stay at home. . . . Women were called 'girls' or [referred] to as 'dumb blondes,' 'women's libber,' or 'old bags'. . . . One female (married to a physician) had been told she should not work because it deprived other people of jobs"); *Sprogis*, 444 F.2d at 1199 (rejecting airline policy requiring female stewardesses to be unmarried as unjustified by "complaints from husbands about their wives' working schedules and the irregularity of their working hours."); EEOC Dec. No. 71-2613, 1971 WL 3867 (June 22, 1971) ("based upon a stereotyped view of the family responsibilities of females, [employer]'s officials permitted the illness of Charging Party's husband to influence their decision not to hire her, but that they would not have disqualified a male with a sick wife."). As this Court noted years later, "[s]tereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men" that led employers to deny parental leave to fathers. *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721, 736 (2003).

4. *Women should conform to norms of "feminine" appearance and demeanor, while men should be "masculine" and not have "feminine" traits, like having long hair. E.g.*, *EEOC v. FLC & Brothers Rebel, Inc.*, 663 F. Supp. 864, 869 (W.D. Va. 1987) (employer violated Title VII for firing woman bartender because of her "'unladylike' language" where testimony indicated employer's "view that ladies are held to a somewhat higher standard than men, since it is clear that foul language was tolerated

by him at FLC."); EEOC Dec. No. 71-2343, 1970 WL 3559 (June 3, 1970) (employer's policy prohibiting males from having shoulder-length hair violated Title VII ban on sex discrimination, based in part on finding that employer's "suspension without pay was on the basis of commonly held stereotypes as to the 'proper' appearance of males, and was unrelated to the work to be performed"); *Donohue v. Shoe Corp. of Am.*, 337 F. Supp. 1357, 1359 (C.D. Cal. 1972); *see also* EEOC Dec. No. 71-1529, 1971 WL 3867 (April 2, 1971) ("[H]ad Charging Party been female, long hair would not have been a factor in the refusal to hire Charging Party.").[5]

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The anti-stereotyping principle was so foundational that state agencies and courts made similar decisions under state statutes prohibiting

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[5] Some courts later rejected Title VII challenges to employer rules on hair length for men, reasoning in part that Title VII only covers discrimination based on what those courts considered to be "immutable" characteristics. *See, e.g.*, *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084, 1091-92 (5th Cir. 1975) (en banc); *Baker v. Cal. Land Title Co.*, 507 F.2d 895, 897 (9th Cir. 1974); *Fagan v. Nat'l Cash Register Co.*, 481 F.2d 1115, 1124-25 (D.C. Cir. 1973). Such reasoning does not survive *Price Waterhouse*. *See infra* at 17. Such courts also relied on legislative history to ignore the full sweep of Title VII's statutory text, *see, e.g.*, *Willingham*, 507 F.2d at 1090; *Baker*, 507 F.2d at 896 & n. 2. Such reasoning cannot survive this Court's decision in *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998). *See id.* at 79 ("it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.").

employer sex discrimination. *E.g.*, *Mass. Elec. Co. v. Mass. Comm'n Against Discrimination*, 375 N.E.2d 1192, 1199 (Mass. 1978) (excluding "pregnancy-related disabilities" from employer disability plan is "sex" discrimination under state law, in part because "pregnancy exclusions reflect and perpetuate the stereotype that women belong at home raising a family rather than at a job as permanent members of the work force."); *Cuyahoga Falls Eagles v. Ohio Civil Rights Comm'n*, No. 12657, 1986 WL 13875 (Ohio Ct. App. Nov. 26, 1986) (affirming agency ruling that employer fired two female bartenders in violation of state sex discrimination statute, based in part on finding that employer trustee, who testified that "he wanted a man behind the bar to 'do all the ordering and stuff' . . . held stereotypical bias"); *see also Pfister v. Niobrara Cty.*, 557 P.2d 735, 737 (Wyo. 1976) (affirming reversal of agency decision on other grounds where agency found, and lower court affirmed, sex discrimination where male sheriff refused to hire female applicant as deputy for, among other stated reasons: "'what would you think if I came in the middle of the night and picked up your wife to go patrolling in the boondocks?'; . . . 'his wife wouldn't like it'; 'the citizens of Niobrara County would consider it improper to patrol with a woman at night in the country . . . . '").

C. *Price Waterhouse* and Its Progeny Have Continued to Protect *Individuals* From Sex Stereotyping.

By 1989, when this Court decided *Price Waterhouse*, Title VII's anti-stereotyping principle—though sometimes imperfectly applied—was well-

settled. This Court did not purport to break new ground, but expressly relied on prior precedent, when it stated: "[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, for '[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.'" *Price Waterhouse*, 490 U.S. at 251 (quoting *Manhart*, 435 U.S. at 707 n. 13 (quoting *Sprogis*, 444 F.2d at 1198)).

In *Price Waterhouse*, the trial court found that the defendant-employer had let sex stereotypes "play a part" in Ms. Hopkins's partnership evaluation, and thus that employer had violated Title VII. *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1120 (D.D.C. 1985). The evidence supporting this finding included a partner's comment that Ms. Hopkins "needed to take a 'course at charm school'"; that at least two other women candidates had been rejected "because partners believed that they were curt, brusque and abrasive, acted like 'Ma Barker' or tried to be 'one of the boys'"; and a partner's advice to Ms. Hopkins that she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* at 1117 (internal quotation marks and footnote omitted).

This Court focused mostly not on whether any of this counted as proof of sex discrimination under Title VII—a proposition already cemented in the law—but on how much Title VII required it to have affected the employer's adverse action. Although this Court's

Justices disagreed over the causation standard in section 703(a)(1), those Justices *all* agreed that evidence of employer reliance on sex stereotypes (there, about how women should act) is relevant to a Title VII sex discrimination claim. *See Price Waterhouse*, 490 U.S. at 250 (plurality) ("In the specific context of sex stereotyping, 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."); *id.* at 256 ("It takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring 'a course at charm school.'"); *id.* (it was "plausible" and "inevitable" to infer that employer took "into account all of the partners' comments, including the comments that were motivated by stereotypical notions about women's proper deportment") (footnote omitted); *id.* at 259 (White, J., concurring in the judgment) (district court found that Hopkins proved "the unlawful motive was a *substantial* factor in the adverse employment action," and record supported this finding"); *id.* at 266 (O'Connor, J., concurring in the judgment) ("There has been a strong showing that the employer has done exactly what Title VII forbids . . . ."); *id.* at 277 (Hopkins showed the required "direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision"); *id.* at 294-95 (Kennedy, J., dissenting) ("Evidence of use by decisionmakers of sex stereotypes is, of course, quite relevant to the question of discriminatory intent. . . . Hopkins plainly presented a strong case both of her own professional qualifications and of the presence of discrimination in Price Waterhouse's partnership process.").

Price Waterhouse also confirmed—contrary to the reasoning of some earlier courts, *see supra* n. 5—that Title VII's anti-stereotyping principle covers sex stereotypes about more mutable characteristics such as how an employee should look at work. *See Price Waterhouse*, 490 U.S. at 256 ("Nor, turning to [the partner's] memorable advice to Hopkins, does it require expertise in psychology to know that, if an employee's flawed 'interpersonal skills' can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee's sex and not her interpersonal skills that has drawn the criticism.") (footnote omitted).

No Justice held or would have held, as the employers and the United States now contend, that Title VII permits an employer to take an adverse action based on sex stereotypes unless that policy unevenly affects similarly situated men and women. Although the employers suggest otherwise, *see* Harris Pet. at 22, when Justice Kennedy wrote that "Title VII creates no independent cause of action for sex stereotyping," *Price Waterhouse*, 490 U.S. at 294 (Kennedy, J., dissenting), he simply meant that such sex stereotyping, to be actionable, must cause an adverse employment action, and not manifest only in the employer's head. Indeed, had Price Waterhouse simultaneously denied partnership to a *male* colleague of Ann Hopkins because of his nonconformity to *male* stereotypes, *both* he *and* Ms. Hopkins would have stated independent Title VII sex discrimination claims against their employer. Their claims would not cancel each other out, as the logic of the employers' and United States' position suggests.

The United States, meanwhile, incorrectly argues that *Price Waterhouse*'s plurality opinion did "not call into question that a Title VII plaintiff must show that the employer treated employees disparately because of sex." Br. for Federal Respondent at 20. There was no need for that opinion to "call into question" a proposition that never existed. Rather, *Price Waterhouse* confirmed the viability of sex stereotyping claims without unsettling the core Title VII principle that sex discrimination runs against an *individual* and so does not require a showing that the "employer treated *employees* disparately because of sex."

The United States also errs by asserting that *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998)—a case that does not cite *Price Waterhouse* or mention sex stereotyping claims—somehow "erases any doubt" that an employment action motivated by sex stereotypes can only violate Title VII if it "disadvantage[s] members of one sex" over the other. Br. for Federal Respondent at 21. With respect to Title VII sex harassment claims, *Oncale* holds that a plaintiff must demonstrate that his or her sex played a motivating role in the challenged conduct. *See Oncale*, 523 U.S. at 80-81. Nothing in *Oncale* suggests that, for Title VII claims based on sex stereotypes, a plaintiff must show that one sex or the other was subject to greater hardship. Indeed, because the plaintiff in *Oncale* worked in an all-male environment, it was particularly irrelevant in that case how a woman would have been treated. But it is inarguable that if a female coworker had also been sexually harassed in the same workplace, *both* of them could seek relief under Title VII, rather than *neither* of them. Far from reducing the scope of Title

VII's anti-stereotyping principle in the manner that the United States suggests, *Oncale* corrected the earlier view of some courts that only women harassed by men could raise sexual harassment claims, holding instead that Title VII protects *any* individual sexually harassed at work (regardless of the sex of that individual or the harasser).

Over the last several decades, the anti-stereotyping principle has only become more deeply embedded in employment discrimination law. Federal and state courts and agencies have cited or discussed *Price Waterhouse,* not only in support of Title VII's anti-stereotyping principle, *e.g.*, *Lewis v. Heartland Inn of Am., LLC*, 591 F.3d 1033, 1038-42 (8th Cir. 2010), but also for reading state sex discrimination laws to bar employers from relying on stereotypes about how men or women should act, *see*, *e.g.*, *Nelson v. James H. Knight DDS, P.C.*, 834 N.W.2d 64, 71 (Iowa 2013); *Lie v. Sky Publ'g Corp.*, No. 013117J, 2002 WL 31492397, at *3-4 (Mass. Super. Ct., Oct. 7, 2002); *Lampley v. Mo. Comm'n on Human Rights*, 570 S.W.3d 16, 24, 26-27 (Mo. 2019) (en banc); *Behrmann v. Phototron Corp.*, 795 P.2d 1015, 1018 (N.M. 1990); *Enriquez v. W. Jersey Health Sys.*, 777 A.2d 365, 512, 514 (N.J. Super. Ct. App. Div. 2001); *Arcuri v. Kirkland*, 113 A.D.3d 912, 915 (N.Y. App. Div. 2014); *Graff v. Eaton*, 598 A.2d 1383, 1386 (Vt. 1991); *Gray v. Morgan Stanley DW Inc.*, No. 54347-4-I, 2005 WL 3462783, at *4 & n.26 (Wash. Ct. App. Dec. 19, 2005); *see also Montana Rail Link v. Byard*, 860 P.2d 121, 127 (Mont. 1993) (no abuse of discretion in allowing expert testimony on gender stereotyping). In fact, state agencies have relied on *Price Waterhouse*'s progeny to find that employment actions that took

into account an employee's sexual orientation or that an employee is transgender are actionable discrimination because of sex under state law. *See* Mich. Civil Rights Comm'n, *Interpretative Statement 2018-1* 1 (May 21, 2018) (citing federal gender stereotyping case law); Pa. Human Relations Comm'n, *Guidance on Discrimination on the Basis of Sex Under the Pa. Human Relations Act* 2 (Aug. 2, 2018) (acknowledging Pennsylvania law is "interpreted consistently with federal anti-discrimination law").

Courts have also applied Title VII's anti-stereotyping principle in Title VII sexual harassment cases to decide whether an individual was harassed "because of such individual's . . . sex." They have appropriately declined to limit such claims to cases in which people of one sex are disadvantaged as against members of the other sex, and instead have focused on whether the *individual* has suffered harassment because of that individual's sex (including, *inter alia*, for conforming or not conforming to stereotypes about their sex). *See*, *e.g.*, *EEOC v. Boh Bros. Constr. Co., LLC*, 731 F.3d 444, 457 (5th Cir. 2013) (en banc) (harassment motivated by view that victim was "not a manly-enough man"); *Doe v. City of Belleville*, 119 F.3d 563, 575 (7th Cir. 1997) ("[I]t can be inferred from the harassers' evident belief that in wearing an earring, [plaintiff, a young man] did not conform to male standards"), *vacated on other grounds, City of Belleville v. Doe*, 523 U.S. 1001 (1998); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002) (reasonable for jury to find that "Cagle repeatedly harassed (and ultimately discharged) Heller because Heller did not conform to Cagle's stereotype of how a woman ought to behave.");

Nichols v. Azteca Restaurant Enter., 256 F.3d 864, 874-75 (9th Cir. 2001) ("the systematic abuse directed at Sanchez reflected a belief that Sanchez did not act as a man should act," such as calling him names in female terms and with "she" and "her," attacking him for walking and carrying his tray "like a woman," and deriding him for not having sex with a waitress who was a friend); *Ellingsworth v. Hartford Fire Ins. Co.*, 247 F. Supp. 3d 546, 553-54 (E.D. Pa. 2017) (supervisor harassed employee because the supervisor considered her manner of dress and tattoo too masculine, "harbor[ing] such a strong prejudice and animus as to how women should look, dress, and act, that [she] actually mischaracterized another person's sexual orientation because of this prejudice.").

Thus, Title VII's anti-stereotyping principle is well-established in decades of judicial and agency precedent that long predate *Price Waterhouse* and continue long thereafter. Contrary to the employers' contention, this precedent has never required a showing that an employer's reliance on sex stereotypes disadvantages women vis-à-vis men or the reverse. Rather, it has always focused (as required by Title VII's text) on whether an *individual* is subjected to sex stereotypes to that individual's disadvantage.

To be sure, if an employer's policy burdens one sex and not the other, that policy may violate Title VII regardless of whether the policy *also* constitutes impermissible sex stereotyping that disadvantages the affected individual. But these are independent theories supporting a Title VII claim; a Title VII violation does not require *both* to be true.

II. TITLE VII'S ANTI-STEREOTYPING PRINCIPLE APPLIES TO EMPLOYMENT DISCRIMINATION DIRECTED AT LGBT EMPLOYEES, LIKE ANY OTHER EMPLOYEES.

Title VII's anti-stereotyping principle, as described above, readily applies to cases, such as these, in which an employer fires a lesbian, gay, bisexual, or transgender (LGBT) individual for not acting in accord with sex stereotypes, *i.e.*, beliefs about how men or women *should* act.

For example, in *Harris Funeral Homes*, the employer fired plaintiff Aimee Stephens, a transgender woman, because (in the employer's words) Stephens was "no longer going to represent himself as a man" and "wanted to dress as a woman." *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 572 (6th Cir. 2018). Ms. Stephens did not conform to her employer's sex stereotypes about men (the sex assigned to Stephens at birth) and was fired as a result. Indeed, in adversely treating Ms. Stephens for failing to present, act, and dress in a sex-stereotypical way, the employer acted like the employer in *Price Waterhouse* itself. *See* 618 F. Supp. at 1117 (employer advised Ms. Hopkins to "dress more femininely, wear make-up, have her hair styled, and wear jewelry."). Where, as here, *Price Waterhouse* is directly apposite, there is no plausible reason to read an exception into *Price Waterhouse*'s holding just because the individual subjected to discriminatory sex stereotyping is transgender.

Similarly, if an employer fires or otherwise discriminates against a man for being gay (as alleged in *Zarda* and *Bostock*) or bisexual, that employer relies on at least one sex stereotype, *i.e.*, men should be attracted to and in relationships only with women, and that employer often relies as well on other sex stereotypes about how a "real man" should act. Title VII bars firing heterosexual men based on sex stereotypes about men, and there is no principled reason why gay and bisexual men should be denied those protections.

For example, in *Prowel v. Wise Business Forms, Inc.*, 579 F.3d 285, 287 (3d Cir. 2009), a man who described himself as effeminate alleged that he was harassed, and ultimately terminated, because he failed to conform to sex stereotypes about men at his workplace. Unlike the other men at the company, who Prowel described as "[b]lue jeans, t-shirt, blue collar worker, very rough around the edges," he "had a high voice and did not curse; was very well-groomed;" "crossed his legs . . . 'the way a woman would sit'"; "talked about things like art, music, interior design, and decor; and pushed the buttons on [his machine] with 'pizzazz.'" Prowel also was gay. The court of appeals correctly held that his sexual orientation did not foreclose his Title VII claim and that he could proceed to a jury on a sex stereotyping theory. *Id.* at 291-92. Prowel presented sufficient evidence that his coworkers reacted to his effeminacy in sex-based terms, calling him "Princess" and "Rosebud," commenting on how he walked and sat, and putting a pink tiara at his workstation. *Id. at* 287, 291.

This result is unremarkable for courts that properly apply Title VII's anti-stereotyping principle, because sex stereotypes (including the ones in *Prowel* about how men should act) are forbidden motivation for employment actions, even for Title VII claims brought by gay, lesbian, or bisexual plaintiffs. *E.g. Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1254-55 (11th Cir. 2017); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1063 (9th Cir. 2002); *Nichols v. Azteca Restaurant Enters., Inc.*, 256 F.3d 864, 874-75 (9th Cir. 2001); *Centola v. Potter*, 183 F. Supp. 2d 403, 409-10 (D. Mass. 2002).

To conclude otherwise, the employers and the United States here (and some judges below) heavily rely on arguments that incorrectly assume that Title VII protects only *groups* rather than *individuals* from being disadvantaged in the workplace by sex stereotyping. *See, e.g.*, Harris Pet. 27 ("employers only 'discriminate . . . because of . . . sex' when they treat one sex better than the other"). For example, in his dissent in *Zarda*, Judge Lynch asserted that sex-stereotyping protections apply only where, as in *Price Waterhouse* itself, they impose different conditions of employment on women than on men: "The key element here is that one sex is systematically disadvantaged in a particular workplace. In that circumstance, sexual stereotyping is sex discrimination." *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 151 (2d Cir. 2018) (en banc) (Lynch, J., dissenting). Based on that premise, he reasoned that a "homophobic employer" does not "deploy[ ] a stereotype about men or about women to the disadvantage of either sex"; rather, that employer

relies on "a belief about what *all* people ought to be or do—to be heterosexual." *Id.* at 158.

This premise is wrong. Title VII protects "any individual" from discrimination based on sex stereotyping. It does not apply only when one sex is "systemically disadvantaged" as a result. Thus, if an employer fires a woman in part because she does not match up with a stereotype about how some or all women should act, it does not matter whether or not that employer holds parallel beliefs about some or all men. After all, this Court found it sufficient in *Price Waterhouse* that the employer let sex stereotypes influence Ms. Hopkins's partnership evaluation, without regard to whether the employer relied on parallel sex stereotypes about men when evaluating any male candidates for partnership. Indeed, it is often the case that men and women alike are both among those harmed—albeit sometimes in different ways—by an employer's insistence on rigid conformity to sex stereotypes. That does not absolve the employer of liability; that makes it worse.

If an employer fires a man because he is gay or bisexual, it does so because of a belief that men should only be attracted to or have romantic relationships with women. The employer may *also* believe that women should only be attracted to or want relationships with men, or it may not; either way, the man subjected to such sex stereotyping has a Title VII claim, because he has been fired based on his employer's stereotypes about how men should act. And the same logic applies in reverse for lesbian and bisexual women.

Likewise, if an employer fires a transgender woman because she does not conform to sex stereotypes about men, that violates Title VII regardless of whether that employer would also fire a transgender man for not conforming to sex stereotypes about women. Title VII protects each transgender individual (like any other individual) from discrimination based on sex stereotypes.

This Court has never held—in *Price Waterhouse* or otherwise—that Title VII *permits* an employer to discriminate against "any individual" based on sex stereotypes unless doing so predominantly disadvantages one sex over another. To draw that line would contravene Title VII's focus on individuals, not groups, and would greatly weaken Title VII's anti-stereotyping principle, which this Court affirmed in *Price Waterhouse* but which long predated that case.

Title VII's venerable anti-stereotyping principle thus readily applies here, and there is no principled reason for carving LGBT people out from its protections. Congress did not include the phrases "sexual orientation" or "gender identity" in section 703(a), but neither did it enact a "sexual orientation" or "gender identity" *exception* to Title VII's anti-stereotyping principle. Even if Congress did not have in mind individuals like Mr. Zarda, Mr. Bostock, and Ms. Stephens when it enacted or amended Title VII, its anti-stereotyping principle (required by Title VII's statutory text) protects such individuals nonetheless. *See Oncale*, 523 U.S. at 79 ("But 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.")

CONCLUSION

This Court should decide the questions presented in favor of the employees in *Zarda*, *Bostock*, and *Harris Funeral Homes*; should affirm the judgments of the Second and Sixth Circuits; and should reverse the judgment of the Eleventh Circuit.

Respectfully submitted,

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