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., 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 GLBTQ LEGAL ADVOCATES & DEFENDERS, NATIONAL CENTER FOR LESBIAN RIGHTS, ET AL. AS AMICI CURIAE IN SUPPORT OF THE EMPLOYEES

ALAN E. SCHOENFELD
Counsel of Record
WILMER CUTLER PICKERING HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 937-7518
alan.schoenfeld@wilmerhale.com

ADDITIONAL COUNSEL AND REPRESENTATION INFORMATION ON INSIDE COVER

MARY BONAUTO
GLBTQ LEGAL ADVOCATES
& DEFENDERS
18 Tremont St., Suite 950
Boston, MA 02108
Counsel for GLAD

CHRISTOPHER STOLL
JULIE WILENSKY
SHANNON MINTER
NATIONAL CENTER FOR
LESBIAN RIGHTS
870 Market Street, Suite 370
San Francisco, CA 94102
Counsel for NCLR

LEON T. KENWORTHY
JAMES BARTON
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006

CHRISTOPHER D. DODGE
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
Counsel for amici curiae

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INTEREST OF AMICI CURIAE[1]

Through strategic litigation, public policy advocacy, and education, GLBTQ Legal Advocates & Defenders (GLAD) works in New England and nationally to create a just society free of discrimination based on gender identity and expression, HIV status, and sexual orientation. GLAD has litigated widely in both state and federal courts in all areas of the law in order to protect and advance the rights of lesbians, gay men, bisexuals, transgender individuals, and people living with HIV and AIDS. GLAD has an enduring interest in ensuring that employees receive full and complete redress for violation of their civil rights in the workplace.

The National Center for Lesbian Rights (NCLR) is a national non-profit legal organization dedicated to protecting and advancing the civil rights of lesbian, gay, bisexual, and transgender people and their families through litigation, public policy advocacy, and public education. Since its founding in 1977, NCLR has played a leading role in securing fair and equal treatment for LGBT people and their families in cases across the country involving constitutional and civil rights. NCLR has a particular interest in promoting equal opportunity for LGBT people in the workplace through legislation, policy, and litigation, and represents LGBT people in employment and other cases in courts throughout the country.

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[1] No party authored this brief in whole or in part, and no one other than amici, their members, and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. All employers and the United States have filed blanket letters of consent to the filing of this brief. Amici obtained written consent from the employees to the filing of this brief.

Advocates for Youth (Advocates) partners with youth leaders, adult allies, and youth serving organizations that promote policies and champion programs related to young people's sexual and reproductive health and rights. Advocates works alongside thousands of young people here in the U.S. and around the globe as they fight for sexual health, rights, and justice. Advocates envision a world in which marginalized young people are not discriminated against based on their actual or perceived sexual orientation or gender identity and expression.

The Disciples LGBTQ+ Alliance is a network of congregations and individual members of the Christian Church (Disciples of Christ) called to join in God's work of transforming the Christian Church into a just and inclusive church that welcomes persons of all gender expressions and sexual identities into the full life and leadership of the church; and to work ecumenically in advocacy for LGBTQ+ people, voicing our faith position about equality and inclusion in secular/cultural issues.

Equality Arizona is a non-profit organization dedicated to building the cultural and political power of the LGBTQ community in Arizona. Since our founding in 1992, we have led the fight for LGBTQ equality in Arizona by advocating and organizing for the civil and human rights of LGBTQ individuals and families, organizing LGBTQ communities through civic education and engagement, and building the political power of the LGBTQ community through the voting LGBTQ and ally electorate. Equality Arizona has a particular interest in working for the full inclusion of LGBTQ individuals in the workplace because economic stability and equity are the foundation most necessary for activating the Arizona LGBTQ community to work for equality for all in Arizona. We work for full and equitable inclu-

sion in the workplace through legislation, policy, litigation, and education throughout Arizona.

Founded in 1999, Equality California (EQCA) is the nation's largest statewide lesbian, gay, bisexual, transgender and queer civil rights organization. Equality California brings the voices of LGBTQ people and allies to institutions of power in California and across the United States, striving to create a world that is healthy, just, and fully equal for all LGBTQ people. We advance civil rights and social justice by inspiring, advocating, and mobilizing through an inclusive movement that works tirelessly on behalf of those we serve. Equality California frequently participates in litigation in support of the rights of LGBTQ persons.

Equality Federation is the movement builder and strategic partner to state-based organizations advocating for LGBTQ people. Equality Federation works with a network of 44 member organizations in 39 states to build their leadership and organizational capacity, to advance policies that address the needs of LGBTQ people, and to increase acceptance of LGBTQ people in the communities they call home. Equality Federation and our member organizations have an ongoing interest in ensuring that LGBTQ people can live their lives free from discrimination in all aspects of their lives, including in the workplace.

Equality North Carolina is the oldest statewide organization in the country dedicated to securing rights and protections for the LGBTQ community. We are invested in ensuring that every North Carolinian can see themselves in the equality movement and helping create a safer, more equitable world for all marginalized folks. Together we strive to build a better North Carolina.

Equality Ohio advocates and educates to achieve fair treatment and equal opportunity for all Ohioans regardless of their sexual orientation or gender identity or expression. We envision an Ohio where everyone feels at home and where equality, diversity, and inclusiveness are universally valued. Equality Ohio has worked to ensure that Ohio nondiscrimination laws and policies work for everybody, including LGBTQ people.

Equality Utah is a nonprofit, public interest organization based in Salt Lake City, Utah, whose goal is to secure equal rights and protections for the LGBTQ community in Utah. It is the state's largest LGBTQ rights advocacy group, with more than ten thousand members throughout the state. Equality Utah's membership includes many LGBTQ workers who depend on the protections of federal antidiscrimination laws.

FORGE, Inc. is a 25-year-old, national transgender anti-violence organization headquartered in Milwaukee, Wisconsin. In addition to providing support and healing services to transgender and non-binary people who have experienced violence, trauma, and discrimination, we seek to identify and help prevent the conditions that lead to these life-altering experiences.

Freedom for All Americans is the bipartisan campaign to secure full nondiscrimination protections for LGBTQ people nationwide. It is a nonprofit organization that brings together Republicans and Democrats, businesses large and small, people of faith, and allies from all walks of life to make the case for comprehensive nondiscrimination protections that ensure everyone is treated fairly and equally.

Founded in 1979, Mazzoni Center is a non-profit multi-service, community-based healthcare and social service provider in Philadelphia, Pennsylvania. Maz-

zoni Center's mission is to provide quality comprehensive health and wellness services in an LGBTQ-focused environment, while preserving the dignity and improving the quality of life of the individuals it serves. Mazzoni Center's legal services program assists LGBTQ workers to understand and assert their rights to fair treatment in the workplace, and has a strong interest in the ability of LGBTQ people to live their lives and express their identities without fearing harassment or termination of their employment.

The Movement Advancement Project (MAP) works to ensure that all people have a fair chance to pursue health and happiness, earn a living, take care of the ones they love, be safe in their communities, and participate in civic life. MAP provides independent and rigorous research, insight and communications that help speed equality and opportunity for all.

National Equality Action Team (NEAT) is a national education and advocacy non-profit organization dedicated to justice for lesbian, gay, bisexual, transgender and queer people in all aspects of their lives, including employment. NEAT has worked on public policy and education initiatives across the country and is especially focused on empowering volunteers and grassroots organizations to work collaboratively to change both policy and hearts and minds around the LGBTQ+ community. Achieving comprehensive nondiscrimination protections, including in employment, is core to NEAT's mission.

The National Organization of Gay and Lesbian Scientists and Technical Professionals, Inc. (NOGLSTP) is a 501(c)(3) educational organization and professional society of gay, lesbian, bisexual, transgender, queer people, and allies employed or interested in science,

technology, engineering, or mathematics (STEM) fields. Established in 1983, NOGLSTP empowers LGBTQ+ individuals in STEM by providing education, advocacy, professional development, networking, and peer support. NOGLSTP educates all communities regarding scientific, technological, and medical concerns of LGBTQ+ people.

One Colorado is the state's leading advocacy organization for LGBTQ Coloradans and their families. The mission of the organization is to secure protections and opportunities for LGBTQ Coloradans and their families.

Out & Equal Workplace Advocates is a non-profit organization that partners with businesses and employees to create global workplaces where all people belong and thrive. Founded in 1996, the organization acts as a global convener, thought leader, and catalyst, engaging with businesses and supporting LGBTQ employees and leaders. More than 80% of Fortune 1,000 companies are represented at the organization's annual conference, which is the largest LGBTQ workplace summit in the world.

As Nevada's statewide LGBTQ civil rights organization, Silver State Equality brings the voices of LGBTQ people and allies to institutions of power in Nevada and across the United States, striving to create a world that is healthy, just, and fully equal for all LGBTQ people. Silver State Equality is a Nevada-based program affiliated with and supported and managed by Equality California and Equality California Institute, the nation's largest statewide LGBTQ civil rights organization.

INTRODUCTION

A number of courts of appeals have erroneously excluded claims alleging discrimination against a person for being lesbian, gay, or bisexual from Title VII's prohibition of sex discrimination—an approach that has proved impossible to reconcile with the plain import of Title VII's text and this Court's precedent. Courts have struggled with how to apply this exclusion in particular cases. The results have been incoherent, leading to inconsistent outcomes in factually similar cases. *See Zarda* v. *Altitude Express, Inc.*, 883 F.3d 100, 122 (2d Cir. 2018) (en banc) (noting the "pervasive confusion" caused by the prohibition on sexual orientation claims); *Hively* v. *Ivy Tech Cmty. Coll.*, 853 F.3d 339, 342 (7th Cir. 2017) (en banc) (reviewing the "'confused hodgepodge of cases'" ensuing from the bar on sexual orientation claims).

The lower courts have largely avoided this confusion in discrimination cases brought by transgender plaintiffs because they have correctly recognized that discrimination against a person for being transgender is discrimination "because of … sex." *See Glenn* v. *Brumby*, 663 F.3d 1312, 1317-1319 (11th Cir. 2011); *see also, e.g.*, *Whitaker By Whitaker* v. *Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1048 (7th Cir. 2017); *Schroer* v. *Billington*, 577 F. Supp. 2d 293, 306-308 (D.D.C. 2008). As the Sixth Circuit observed below, "it is analytically impossible to fire an employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex." *EEOC* v. *R.G. &. G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 575 (6th Cir. 2018).

The same holds true for cases brought by lesbian, gay, or bisexual plaintiffs, as some courts have come to

recognize. *See Zarda*, 883 F.3d at 121; *Hively*, 853 F.3d at 342. No sound basis exists to exclude discrimination because a person is lesbian, gay, or bisexual from Title VII's prohibition of sex discrimination. In attempting to apply this exclusionary rule, lower courts have taken a variety of inconsistent approaches to such claims. *See Zarda*, 883 F.3d at 121 (collecting cases).

Creating an exclusion where none exists in the statute is not a proper way to interpret Title VII—and it is one this Court has already repudiated in bringing consistency to Title VII's application. Before *Oncale* v. *Sundowner Offshore Services, Inc.*, lower courts had taken a "bewildering variety of stances" with respect to whether hostile work environment claims could be based on same-sex harassment. 523 U.S. 75, 79 (1998). The Court saw "no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII," and so had no difficulty concluding that "sex discrimination consisting of same-sex sexual harassment is actionable under Title VII." *Id.* at 79, 82.

The Court should adopt the same plain-text, straightforward approach here by confirming that discrimination because a person is lesbian, gay, bisexual, or transgender is prohibited sex discrimination under Title VII. That plain-text reading will provide needed guidance to the lower courts and avoid the confusion and inconsistency that would result from a contrary ruling.

ARGUMENT

I. A RULE EXCLUDING DISCRIMINATION AGAINST LESBIAN, GAY, BISEXUAL, OR TRANSGENDER PERSONS FROM TITLE VII IS UNWORKABLE AND LEADS TO INCONSISTENT RESULTS

As detailed below, courts that have attempted to apply a rule excluding discrimination against a person for being lesbian, gay, or bisexual from Title VII's sex discrimination protections have reached inconsistent outcomes in factually similar cases, as lower courts struggle to discern whether particular facts indicate discrimination based on sexual orientation or discrimination based on sex. As the Second Circuit recently concluded, that line has proved "difficult to draw because [it] does not exist save as a lingering and faulty judicial construct." *Zarda*, 883 F.3d at 122. Although courts have largely avoided such arbitrary line drawing in claims brought by transgender plaintiffs, a rule to the contrary would result in similar inconsistency and confusion.

A. Courts' Attempts To Apply A Rule Excluding Discrimination Against Lesbian, Gay, And Bisexual Plaintiffs From Title VII Have Led To Confusion And Inconsistent Outcomes

Lower courts that have attempted to apply a rule that excludes discrimination against gay, lesbian, and bisexual employees from Title VII's sex discrimination protections have struggled with how to apply that exclusion in particular cases. In some cases, courts have held that the presence of evidence of anti-gay harassment or discrimination precludes any Title VII liability, even if other evidence of sex discrimination exists. In others, courts have sought to distinguish evidence re-

lating to sexual orientation from evidence relating to sex, with the goal of determining which predominates in a particular case. Regardless of the approach taken, these decisions offer no principled basis for distinguishing discrimination because a person is lesbian, gay, or bisexual from discrimination based on sex. Rather, as the Seventh Circuit has noted, the result has been a "'confused hodge-podge of cases.'" *Hively*, 853 F.3d at 342. By attempting to draw a line that does not exist, courts have reached inconsistent results in factually similar cases and excluded claims by lesbian, gay, and bisexual plaintiffs that would be actionable if brought by heterosexual plaintiffs.

In some cases, the presence of anti-gay harassment or slurs effectively has operated as a per se bar against liability, even where the harassers expressly linked being lesbian, gay, or bisexual with nonconformity to sex stereotypes. For instance, before it held that sexual orientation claims are actionable under Title VII, the Seventh Circuit concluded that a male plaintiff could not state a Title VII claim based on insults referring to him as "bitch" and graffiti depicting him as a drag queen because the court concluded they referred to his sexual orientation rather than to his sex. *Spearman* v. *Ford Motor Co.*, 231 F.3d 1080, 1085-1086 (7th Cir. 2000). Similarly, in *Bibby* v. *Philadelphia Coca Cola Bottling Co.*, No. 00-1261, 2001 WL 919976, at *1, 6-7 (3d Cir. Aug. 1, 2001), the Third Circuit found that harassment of a man that included being called a "'sissy'" was not based on "fail[ure] to comply with societal stereotypes of how men ought to appear or behave," because coworkers also called plaintiff "'gay as a three dollar bill.'" *See also Trigg* v. *New York City Transit Auth.*, No. 99-CV-4730, 2001 WL 868336, at *5-6 (E.D.N.Y. July 26, 2001) (finding that insults that included calling plaintiff

"'sissy'" and telling him to be "'more manly'" stemmed from co-workers' "'bigoted view of homosexuals'" and not "the fact that he is a male"). In effect, these cases excluded lesbian, gay, and bisexual workers from protection under Title VII even if the same conduct would plainly be evidence of sex discrimination if directed against a heterosexual coworker.

In other cases, courts have futilely attempted to distinguish evidence of discrimination based on sexual orientation from evidence of discrimination based on sex, and to consider only the latter. Inevitably, however, judicial attempts to draw this illusory line have led to disparate results in cases with similar facts. That inconsistency is particularly clear in cases involving sex-based harassment of gay men.

In some cases, courts have rejected Title VII claims when coworkers harassed a gay plaintiff, concluding that such harassment was motivated by the person's sexual orientation rather than his sex. For example, in *Vickers* v. *Fairfield Medical Center*, 453 F.3d 757, 759-760 (6th Cir. 2006), the Sixth Circuit rejected the claim of a plaintiff whose colleagues believed he was gay, and who simulated having sex with him, made lewd remarks, asked for sexual favors, and called him "gay," "fag," and other derogatory names. The Sixth Circuit rejected the plaintiff's argument that "in the eyes of his co-workers, his sexual practices, whether real or perceived, did not conform to the traditionally masculine role" as an impermissible effort to "bootstrap[]" a claim that was "more properly viewed as harassment based on Vickers' perceived homosexuality." *Id.* at 763-764.

In contrast, in *Boh Brothers Construction Co.*, the *en banc* Fifth Circuit upheld a Title VII claim in a case that also involved simulated sexual acts, lewd remarks,

and anti-gay slurs. *EEOC* v. *Boh Bros. Const. Co.*, 731 F.3d 444, 449-450 (5th Cir. 2013). The court found that a jury could conclude that the coworker used anti-gay slurs to harass the plaintiff because he "was not a manly-enough man in [the coworker's] eyes." *Id.* at 453, 459.

Similar inconsistency is often apparent even in decisions by the same court. For example, in *Kay* v. *Independence Blue Cross*, 142 F. App'x 48 (3d Cir. 2005), a Third Circuit panel concluded that harassing statements by coworkers to the effect that a gay plaintiff would never be a "'real man'" were insufficient to allege unlawful sex-stereotyping, since the taunts also included anti-gay slights. *Id.* at 50-51. In *Prowel* v. *Wise Business Forms, Inc.*, 579 F.3d 285 (3d Cir. 2009), however, the Third Circuit found that a plaintiff had a valid sex-stereotyping claim because he was less conventionally masculine than his male coworkers (*e.g.*, he "crossed his legs and had a tendency to shake his foot 'the way a woman would sit'"), even though his coworkers' slurs similarly referred to his sexual orientation. *Id.* at 287. Even though both cases involved harassment of a gay plaintiff based on slurs disparaging the masculinity of gay men, the Third Circuit found no Title VII liability in one and potential Title VII liability in the other—with no clear basis for the differing result.

Similarly, the Second Circuit's pre-*Zarda* case law offered no clear guideposts for lower courts. While stating that "a gender stereotyping claim should not be used to 'bootstrap protection for sexual orientation into Title VII,'" the court also acknowledged that "'[s]tereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality.'" *Dawson* v. *Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005). As the Second Circuit recognized when overturning its "no bootstrapping" rule,

that rule led to "pervasive confusion" as courts "labored to distinguish between gender stereotypes that support an inference of impermissible sex discrimination and those that are indicative of sexual orientation discrimination." *Zarda*, 883 F.3d at 121-122.

In *Dawson*, for example, the plaintiff's hostile work environment claim included comments such as a coworker's statement that "he thought she 'needed to have sex with a man.'" 398 F.3d at 223. The Second Circuit sympathized with the district court's uncertainty about the relevance of such comments "because they appeared to relate to Dawson's sexual orientation and not merely to her gender," but offered no guidance as to how courts should attempt to parse such an elusive line. Rather than sort through this judicially-created morass, some courts simply ruled that a sex-stereotyping claim may be brought *only* if "the harassment consists of homophobic slurs *directed at a heterosexual*." *Estate of D.B. by Briggs* v. *Thousand Islands Cent. Sch. Dist.*, 169 F. Supp. 3d 320, 332-333 (N.D.N.Y. 2016) (emphasis added).

Rejecting such artificial restraints on the statutory language, other courts recognized that there is no principled way to distinguish discrimination based on a person's sex from discrimination based on the person's identity as lesbian, gay, or bisexual. Rather, "straightforward statutory interpretation and logic dictate that sexual orientation cannot be extricated from sex; the two are necessarily intertwined in a manner that, when viewed under the Title VII paradigm set forth by the Supreme Court, place sexual orientation discrimination within the penumbra of sex discrimination." *Boutillier* v. *Hartford Pub. Sch.*, 221 F. Supp. 3d 255, 267 (D. Conn. 2016).

That principle encompasses any type of discrimination based on a person's same-sex orientation. It is not limited—as some courts have arbitrarily sought to do—only to cases in which a gay, lesbian, or bisexual plaintiff is visibly gender nonconforming in their demeanor or appearance. "Sexual orientation harassment is often, if not always, motivated by a desire to enforce heterosexually defined gender norms. … The harasser may discriminate against an openly gay co-worker, or a co-worker that he perceives to be gay, whether effeminate or not, because he thinks, 'real men don't date men.'" *Centola* v. *Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002); *see also, e.g.*, *Heller* v. *Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1216 (D. Or. 2002) (finding Title VII liability where the employer "would not have acted as she (allegedly) did if Plaintiff were a man dating a woman, instead of a woman dating a woman").

As the Seventh Circuit has correctly held, the effort to "remove the 'sex' from 'sexual orientation,'" as many courts have done, "has led to confusing and contradictory results." *Hively*, 853 F.3d at 350. This Court should clarify for courts below that Title VII prohibits all sex-based discrimination, including discrimination based on a person's attraction to, or romantic interest in, people of the same sex, or an employer's expectations about how men and women should look and behave, including the expectation that "real" men are attracted only to women and vice versa. In the absence of such guidance, the lower courts will inevitably continue to subject factually similar claims to arbitrarily inconsistent results and to exclude lesbian, gay and bisexual plaintiffs from protection based on facts that would be actionable under Title VII if brought by heterosexual plaintiffs.

B. With Near Uniformity In The Last Twenty Years, Courts Have Refused To Draw Arbitrary Lines In Cases Brought By Transgender Plaintiffs, Avoiding The Confusion Endemic To Cases Involving Lesbian, Gay, And Bisexual Plaintiffs

The value of avoiding such arbitrary line-drawing is readily apparent from the Title VII claims brought by transgender plaintiffs, which, as the lower courts have generally appreciated, cannot be coherently disentangled from discrimination because of sex. Rather, discrimination against transgender people is sex-based because being transgender entails a difference between a person's gender identity and birth sex. *Glenn*, 663 F.3d at 1320-1321; *Schroer* v. *Billington*, 577 F. Supp. 2d 293, 306-308 (D.D.C. 2008). Such discrimination also inherently rests upon impermissible gender stereotypes about how men and women should feel, act, and look. *See Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 251 (1989).

For instance, in one district court case in Connecticut, a hospital revoked its offer of employment when the applicant informed the employer that she was a transgender woman. *See Fabian* v. *Hospital of Cent. Conn.*, 172 F. Supp. 3d 509, 512 (D. Conn. 2016). Rejecting the hospital's argument that the plaintiff's transgender identity excluded her from the protections of Title VII, the court explained that "[d]iscrimination against transgender people because they are transgender people … is quite literally discrimination 'because of sex,'" because "sex" encompasses "the distinction between male and female" and "the properties or characteristics typically manifested in sum as male and female." *Id.* at 525-527. Any contrary reading, the court reasoned, would "take a certain class of gender

nonconformity and reclassify it as a nonprotected status solely in order to exclude it." *Id.* at 523.

In *Schroer*, the court similarly held that the Congressional Research Service's refusal to hire a woman who was otherwise the most qualified candidate for the job solely because she planned to undergo a gender transition violated Title VII. *See Schroer*, 577 F. Supp. 2d at 308. CRS was "enthusiastic about hiring [the plaintiff]—until she disclosed her transsexuality," and "revoked the offer when it learned that a man named David intended to become, legally, culturally, and physically, a woman named Diane." *Id.* at 306. The court found that the employer's conduct, "whether viewed as sex stereotyping or as discrimination literally 'because of … sex,' violated Title VII." *Id.* at 300.

The logic of these cases is straightforward and avoids arbitrary and difficult-to-apply line drawing. As those and other courts have concluded, discriminating against people for being transgender constitutes sex-based discrimination because "[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes." *Glenn*, 663 F.3d at 1316. These decisions avoid arbitrary exclusions from Title VII's protections based on a false line between "sex" and "transgender" discrimination claims. This Court should avoid creating such a line, which would sow the same confusion and inconsistency in cases brought by transgender plaintiffs that have arisen in cases brought by gay, lesbian, and bisexual plaintiffs.

II. ENFORCING TITLE VII ACCORDING TO ITS TEXT AND IN ACCORDANCE WITH THIS COURT'S PRECEDENTS WILL ENSURE CONSISTENT OUTCOMES AND PROVIDE CLEAR GUIDANCE TO LOWER COURTS

As the prior section illustrates, the lower courts' disparate Title VII interpretations have resulted in a patchwork of inconsistent decisions involving gay, lesbian, and bisexual plaintiffs across the country. Under this regime, two identically situated litigants might meet with opposite results.

In similar contexts, this Court has stepped in to provide clear rules of law rooted in statutory text and precedent, ensuring that lower-court decisions are consistent and predictable. The Court did so in *Oncale*, issuing a unanimous decision confirming that Title VII does not exclude claims of same-sex harassment.

The Court should do the same here by confirming that Title VII's prohibition against sex discrimination encompasses discrimination because a plaintiff is gay, lesbian, bisexual, or transgender. To accomplish that end, the Court need only enforce Title VII's plain text—which also provides the most consistent rule. *See Zarda*, No. 17-1623, Pet. Br. 19-23.

As this Court has explained in numerous contexts, arbitrariness and unpredictability are foils for a rational system of law, as "evenhandedness and neutrality" are the "distinguishing marks of any principled system of justice." *Koon* v. *United States*, 518 U.S. 81, 113 (1996). In service of those ideals, this Court has emphasized the importance of predictable outcomes for litigants and workable legal rules for lower courts to apply. *Cf. Hertz Corp.* v. *Friend*, 559 U.S. 77, 94-95 (2010) ("Predictability is valuable to corporations making business and investment decisions"). These consid-

erations buttress "a system whose commonly held notion of law rests on a sense of fairness in dealing with one another," *Exxon Shipping Co.* v. *Baker*, 554 U.S. 471, 502 (2008), and promote the type of judicial consistency that "permits society to presume that bedrock principles are founded in law rather than in the proclivities of individuals," *Vasquez* v. *Hillery*, 474 U.S. 254, 265-266 (1986). Standards like these "contribute[] to the integrity" of our legal system, "both in appearance and in fact." *Vasquez*, 474 U.S. at 265-266.

Consistency in judicial decision-making is a necessary predicate for this type of predictability. Without "evenhanded, predictable, and consistent development of legal principles," it is difficult to "foster[] reliance on judicial decisions." *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991). Indeed, "respect for the rule of law" requires courts both to "seek consistency over time" and "to seek consistency in the interpretation of an area of law at any given time." *Arkansas Elec. Co-op. Corp.* v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 391 (1983). At bottom, the "rule of law implies equality and justice in its application." *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 171 (1972); when similarly situated litigants receive disparate decisions, those disparities weaken the foundations of our system and the public's trust in that system.

Under a rule excluding discrimination against lesbian, gay, and bisexual plaintiffs from Title VII's protections, workers and their employers have little ability to predict the outcome of their cases and little hope that cases will be adjudicated consistently from one jurisdiction to another or even within a jurisdiction. Such a rule makes litigation more likely and settlements less common because—even if there is no dispute between the parties over the underlying facts—the parties will

often be at odds over how the law applies to those particular facts.

No meaningful principle exists to distinguish between claims rooted in discrimination because of sex and discrimination because of sexual orientation. That is so because of "the common-sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex." *Hively*, 853 F.3d at 351. A person's sexual orientation can only ever be understood with "'reference to sex.'" *See Christiansen* v. *Omnicom Grp., Inc.*, 852 F.3d 195, 202-203 (2d Cir. 2017) (Katzmann, C.J., concurring) (citing *Baldwin* v. *Foxx*, E.E.O.C. Decision No. 0120133080, 2015 WL 4397641, at *5 (July 16, 2015)).

Twenty years ago, the Court was faced with a similar question about the breadth of Title VII's protections, grappling with whether same-sex (*i.e.*, male-on-male or female-on-female) sexual harassment was actionable under Title VII. *See Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998). Writing for a unanimous court, Justice Scalia observed that lower courts had taken "a bewildering variety of stances" on that question. *Id.* at 79. *Oncale* resolved this confusion by introducing a clear rule: After 1998, courts knew that same-sex harassment was sex discrimination under Title VII. *See id.* at 82 ("[W]e conclude that sex discrimination consisting of same-sex sexual harassment is actionable under Title VII.").

The Court is once again presented with a question under Title VII for which lower courts have adopted "a bewildering variety of stances," resulting in disparate results for similarly situated plaintiffs. *Oncale*, 523 U.S. at 79. In *Oncale*, the Court held that "[w]e see no justification in the statutory language or our prece-

dents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII." *Id.*

As in *Oncale*, the Court should decline to create an exclusion where none exists in the text of the statute. The Court should confirm that discrimination because a person is gay, lesbian, bisexual, or transgender is prohibited sex discrimination under Title VII. This would give lower courts the guidance they need to evenly adjudicate cases. Adopting the employees' plain-text reading of Title VII best accomplishes the fundamental goal of upholding the rule of law.

CONCLUSION

The judgments of the Second and Sixth Circuits should be affirmed, and the judgment of the Eleventh Circuit should be reversed.

Respectfully submitted.

ALAN E. SCHOENFELD
Counsel of Record
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 937-7518
alan.schoenfeld@wilmerhale.com

LEON T. KENWORTHY
JAMES BARTON
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006

CHRISTOPHER D. DODGE
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109

Counsel for amici curiae

MARY BONAUTO
GLBTQ LEGAL ADVOCATES
& DEFENDERS
18 Tremont St., Suite 950
Boston, MA 02108

Counsel for GLAD

CHRISTOPHER STOLL
JULIE WILENSKY
SHANNON MINTER
NATIONAL CENTER FOR
LESBIAN RIGHTS
870 Market Street, Suite 370
San Francisco, CA 94102

Counsel for NCLR

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