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., et al.,

Petitioners,

v.

MELISSA ZARDA, et al.,

Respondents.

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

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, et al.,

Respondents.

On Writs Of Certiorari To The United States Courts Of Appeals For The Eleventh, Second, And Sixth Circuits

BRIEF OF THE H.T. HACKNEY CO. AS *AMICUS CURIAE* IN SUPPORT OF EMPLOYERS

EDWARD H. TRENT, ESQ.
(*Counsel of Record*)
G. GERARD JABALEY, ESQ.
WIMBERLY LAWSON WRIGHT
DAVES & JONES, PLLC
550 Main Ave., Suite 900
Knoxville, TN 37902
(865) 546-1000
etrent@wimberlylawson.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus, The H.T. Hackney Co. ("Hackney") is one of the largest wholesale distributors in the United States, servicing over 20,000 retail locations and stocking over 30,000 products. Through strategically located distribution centers, Hackney provides products to retail locations throughout 22 states.

Hackney's interest in the outcome of this case is directly related to litigation pending against Hackney in the United States District Court for the Western District of North Carolina that has been stayed awaiting this Court's decision in these cases. That litigation concerns a pre-2016 health insurance plan that for purposes of eligibility for spousal health insurance benefits defined spouse as "a person of the opposite sex to whom you are legally married." The policy was amended effective January 1, 2016, to cover all lawfully married persons. The plaintiff in Hackney's case claims that the pre-2016 policy violated Title VII by discriminating against employees based on sexual orientation. The trial court has declined to rule on the merits of a motion to dismiss filed in 2017 and motion for summary judgment filed in 2018 in spite of controlling Fourth Circuit case law and the uniform court

[1] Parties to these cases have consented to the filing of this brief, and letters indicating their consent are on file with the Clerk. *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than the *amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

decisions from around the country that Title VII does not cover a claim of discrimination based on sexual orientation.

This Court's ability to effectively change the law more than 55 years after its passage would severely prejudice businesses such as Hackney who reasonably relied on consistent court interpretation and application of Title VII's provision prohibiting discrimination "because of . . . sex" in establishing policies for their businesses. Should the Court hold that Title VII's prohibition of discrimination "because of . . . sex" includes claims based on sexual orientation and gender identity, policies established years ago and consistent with unanimous court interpretations of Title VII will now be deemed unlawful and subject companies, and Hackney in particular, to liability. Such a fundamental change in the law should be the responsibility of Congress and not the courts. Accordingly, Hackney files this brief in support of Respondent, Clayton County, Georgia, and Petitions, Altitude Express, Inc. and R.G. & G.R. Harris Funeral Homes, Inc. (collectively "Employers") and in opposition to the relief requested by Petitioner Gerald Lynn Bostock and Respondents Melissa Zarda, Aimee Stephens, and the United States Equal Employment Opportunity Commission (collectively "Employees").

SUMMARY OF ARGUMENT

This Court has made it clear that Title VII's prohibition on discrimination "because of . . . sex" concerns

whether employees are subject to materially adverse terms and conditions of employment to which members of the opposite sex have not been subjected. As such, the employee's sex as either male or female must be a motivating factor in the adverse employment decision. An inference of discrimination is almost always demonstrated by showing that a similarly situated person of the opposite sex was treated more favorably than the complaining employee. Absent such proof, there is insufficient evidence to infer that sex as opposed to some other factor motivated the employer in a particular situation. Here, sexual orientation and gender identity are not dependent on an employee being male or female and decisions based on sexual orientation and gender identity do not disadvantage one sex over the other or an individual because that individual is male or female. Rather, sexual orientation and gender identity are characteristics other than sex and fall outside the purview of Title VII.

The United States Courts of Appeals for the Second Circuit and Sixth Circuit both relied on the notion of sex stereotyping to find a violation of Title VII when an employee's sexual orientation or gender identity were potentially factors in an employment decision. Yet, this Court has never held that the application of a sex stereotype created an independent claim under Title VII. Further, the entire notion of sex stereotyping is vague and impossible to apply. While this Court has made it clear that Title VII does not eliminate all differences between men and women in the workplace or require employers to consider the workplace asexual

or androgynous, the Second and Sixth Circuits' views of Title VII would mandate just such a result. Any employment decision based on behavior could be deemed a sex stereotype, whether it concerned sexual activity, confidence, dress, restroom access, or the firmness of a handshake. The better course of action is to uphold the current state of the law which requires a plaintiff to prove in virtually all cases that there was a similarly situated employee of the opposite sex who received more favorable treatment.

Finally, should the Court hold that sexual orientation and gender identity discrimination are forms of sex discrimination under Title VII, then Hackney and any number of other businesses who established policies (such as Hackney's pre-2016 health care plan) or practices such as sex specific dress codes, not to mention sex designated restroom and changing room facilities, would face liability for such policies. Yet, Hackney and every other business should have been permitted to justifiably rely on the consistent interpretation of federal courts across the country that Title VII does not cover claims of sexual orientation or gender identity when establishing such policies. For this Court to now hold that over 50 years of consistent application and interpretation of Title VII was wrong and any company that relied on those holdings is now subject to liability would rightfully undermine confidence in the judicial system, creating a system where a court can change its mind on what the law means at any time to the detriment of all parties involved.

ARGUMENT

Prior to January 1, 2016, the first open enrollment period following this Court's decision in *Obergefell v. Hodges*, ___ U.S. ___, 135 S. Ct. 2584, 192 L.Ed.2d 609 (2015), Hackney maintained a policy providing spousal health insurance benefits defining spouse as "a member of the opposite sex to whom you are legally married."[2] Based on consistent interpretations of Title VII by federal courts across the country, Hackney's policy was legal at the time it was in place and consistent with the laws on marriage throughout the country. In spite of this, Hackney was sued for alleged violations of Title VII and the Equal Pay Act in a lawsuit filed on February 17, 2017,[3] where the plaintiff asserts that Hackney's pre-2016 policy discriminated against her on the basis of sexual orientation because her same-sex spouse did not qualify for spousal health insurance benefits. Although the controlling authority in the United States Court of Appeals in the Fourth Circuit is that claims of discrimination on the basis of sexual orientation are not actionable under Title VII, the District Court has delayed ruling on Hackney's motions for over 30 months and has now *sua sponte* stayed the case pending the outcome of these cases.

Here, as in Hackney's case, Employees assert that Title VII's prohibition on discrimination "because of

---

[2] Hackney modified its policy effective January 1, 2016, to provide that a spouse was "anyone to whom you are lawfully married."

[3] The legal dispute began with a charge of discrimination filed with the EEOC in July 2015.

. . . sex" should be read to include sexual orientation and gender identity as forms of sex discrimination. Should the Court rule in favor of Employees, it would represent a fundamental and material change in the interpretation and application of Title VII. Such a fundamental change in the law after 50 years of consistent contrary holdings by courts across the country would prejudice Hackney in its pending lawsuit and undermine the trust any litigant can place in clear judicial precedent. Any such change should come from Congress and not the courts. Furthermore, such a holding would be inconsistent with this Court's prior precedent that the issue under Title VII "is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 80 (1998) (quoting *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)). Accordingly, the Court should find that Title VII's prohibition on discrimination "because of . . . sex" does not cover discrimination based on sexual orientation or gender identity because neither status is a proxy for the sex of an individual as male or female. Further, a broad application of "sex stereotyping" as suggested by the Employees would render Title VII impossible to interpret as there is no clear criteria on what constitutes a "sex stereotype," thus turning Title VII into a general civility code, and the courts into super personnel departments questioning every adverse employment decision, seeking to find invidious discrimination when there is none.

I. TITLE VII CONCERNS DISCRIMINATORY TREATMENT BETWEEN MEN AND WOMEN.

Title VII's prohibition on discrimination "because of . . . sex" should be viewed consistent with its clear terms, specifically, whether a person is discriminated against because the individual is male or female. Sexual orientation and gender identity, including transgender status, are not equivalent to or proxies for sex discrimination and, therefore, have properly been found to be insufficient to support a claim under Title VII.

A. This Court's Jurisprudence is Clear that Title VII's Prohibition on Discrimination Because of Sex Refers to the Biological Reality of Male or Female.

"The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Oncale*, 523 U.S. at 80 (quoting *Harris*, 510 U.S. at 25 (Ginsburg, J., concurring)). As this Court has consistently held, claims under Title VII asserting sex discrimination must show the alleged discrimination was because of the person's sex, i.e., because the plaintiff is either male or female. Absent such a showing, there is no violation of Title VII's prohibition on discrimination because of sex.

In *Oncale*, this Court cautioned that while the sex of an alleged harasser, whether the same or opposite of

the complaining employee, was not determinative of whether the plaintiff can make out a claim under Title VII, the complaining employee "must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted '*discrimination* . . . because of . . . sex.'" *Oncale*, 523 U.S. at 81 (emphasis in original). Indeed, the Court made it clear that not all differences between men and women are actionable under Title VII, but only discriminatory terms and conditions of employment that are based on the individual's sex as male or female. *Id.* at 80-81. Even the plurality decision in *Price Waterhouse v. Hopkins*, 4901 U.S. 228 (1989) made it clear that "[t]he plaintiff must show that the employer actually relied on her gender in making its decision." *Id.* at 251.

B. The Elements of a Claim of Discrimination Require an Employee to Prove Discriminatory Treatment Between Men and Women.

Under this Court's *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) burden shifting paradigm for evaluating claims of discrimination under Title VII, a complaining employee must demonstrate that similarly situated employees of the opposite sex were treated more favorably.

1. A *Prima Facie* Case of Discrimination Under Title VII Requires A Complaining Employee To Demonstrate that the Employee's Sex was a Motivating Factor in the Employment Decision by Showing that Similarly Situated Members of the Opposite Sex were Treated More Favorably.

Depending on the nature of the claim, e.g., failure to hire, failure to promote, unlawful termination, etc., the basic elements of a plaintiff's *prima facie* case of sex discrimination under Title VII where there is not "direct evidence" of discriminatory intent are: "(1) that [the plaintiff] is within the protected class; (2) that she [or he] was qualified to perform her [or his] job; (3) that she [or he] suffered an adverse employment action; and (4) that ***nonmembers of her [or his] class (persons . . . of the opposite gender in the Title VII sex discrimination context) were not treated the same***." *Breeding v. Arthur J. Gallagher & Co.*, 164 F.3d 1151, 1156 (8th Cir. 1999) (emphasis added); *see also Wheeler v. BL Dev. Corp.*, 415 F.3d 399, 405-06 (5th Cir. 2005). To establish even an inference of discrimination, a Title VII plaintiff in a sex discrimination claim must be able to show that his or her sex was a motivating factor in the employment decision, an inference that generally must consist of evidence that a person of the opposite sex was awarded the position in question or was treated more favorably than the plaintiff. *Miles v. Dell,*

Inc., 429 F.3d 480, 488 (4th Cir. 2005).[4] Indeed, this basic threshold requirement has resulted in numerous courts granting summary judgment when there is no such evidence, rulings typically affirmed without comment. *Id.* at 486; *see also e.g.*, *Jackson v. Richards Medical Co.*, 961 F.2d 575, 587 (6th Cir. 1992); *Willingham v. Mabus*, 2018 U.S. Dist. LEXIS 85211 at *9 (E.D.N.C. May 22, 2018); *Wilber v. Tharaldson Emp. Mgmt. Co.*, 2005 U.S. Dist. LEXIS 27435 at *47-49 (N.D. Tex. Nov. 10, 2005) (granting summary judgment because female plaintiff was not replaced by a male or "treated differently than similarly situated male employees"); *Powell v. Bank of Am., N.A.*, 2005 U.S. Dist. LEXIS 44511 at *20 (W.D.N.C. Sept. 23, 2005) (granting summary judgment when plaintiff unable to produce any evidence that members of other races were treated more favorably); *Hill v. Wal-Mart Stores*, 2000 U.S. Dist. LEXIS 20559 at *13-14 (E.D.N.C. Sept. 26, 2000) (holding "Where, as here, a male plaintiff is replaced by another man, a defendant's motion for summary

[4] Exceptions to the fourth element of a *prima facie* case include (1) an age discrimination case where the plaintiff is replaced by a significantly younger employee who is not outside the protected class; (2) a significant lapse of time between the adverse employment action and a replacement being hired; (3) "the employer's hiring of another person within the protected class is calculated to disguise its act of discrimination toward the plaintiff," *Johnson v. Merchs. Terminal Corp.*, 2017 U.S. Dist. LEXIS 64603 at * 28-29 (D. Md. April 27, 2017) (quoting *Brown v. McLean*, 159 F.3d 898, 905 (4th Cir. 1998)); and (4) the "firing and replacement hiring decisions were made by different decisionmakers." *Jenkins v. MV Transp., Inc.*, 2018 U.S. Dist. LEXIS 11971 at *8 (D. Md. Jan. 25, 2018) (quoting *Miles*, 429 F.3d at 485). None of these criteria are applicable to the cases before the Court.

judgment should be allowed in a gender discrimination case").

2. To Establish a *Prima Facie* Case, the Employee Must Generally Identify a Similarly Situated Comparator of the Opposite Sex to Create an Inference of Discrimination.

When it comes to identifying a comparator of the opposite sex, the fourth element of the *prima facie* case "necessarily implies that the nonmembers of the plaintiff's class who 'were not treated the same' were 'similarly situated,' or the *prima facie* case would not serve its purpose." *Mercer v. City of Cedar Rapids*, 104 F. Supp. 2d 1130, 1158 (N.D. Iowa 2000). When a female plaintiff compares herself to a male "who never engaged in the same or comparable conduct, [it] simply would not give rise to an inference of discrimination, because any of the differences between [the plaintiff] and those [comparators], besides her gender, could be the cause of the disparate treatment. Rather, an inference of discrimination on the basis of a protected characteristic only arises when similarly situated persons, lacking the plaintiff's protected characteristic (in this case persons of the opposite gender), are treated differently." *Id.* When the comparable employee is "not similarly situated, either in fact or in contemplation of law," then the comparison is not evidence of discriminatory treatment. *Post v. Harper*, 980 F.2d 491, 495 (8th Cir. 1993).

To be comparable, the "similarly situated employees must be 'directly comparable' to the plaintiff 'in all material respects.' " *Skiba v. Ill. Cent. R.R. Co.*, 884 F.3d 708, 723 (7th Cir. 2018) (quoting *Coleman v. Donahoe*, 667 F.3d 835, 846 (7th Cir. 2012)); *see also Mercer*, 104 F. Supp. 2d at 1143. That means the comparator "was treated more favorably under nearly identical circumstances." *Davis v. Ampco Sys. Parking*, 748 F. Supp. 2d 683, 694 (S.D. Tex. 2010) (finding other employees who may have engaged in similar conduct but had not been previously warned and were in lower positions were not similarly situated); *see also David v. Bd. of Trs. of Cmty. Coll. Dist. No. 508*, 846 F.3d 216, 225-27 (7th Cir. 2017) (finding that comparators who performed different job duties were not similarly situated). The purpose is "because the similarly situated inquiry is meant to establish whether all things are in fact equal. The purpose of the inquiry is to eliminate other possible explanatory variables, such as differing roles, performance histories, or decision-making personnel, which helps isolate the critical independent variable – discriminatory animus." *Skiba*, 884 F.3d at 723 (citations and internal quotation marks omitted). Accordingly, to determine if an employee is discriminated against because of sex, a male employee must be compared to a similarly situated female employee and vice versa.

C. Sexual Orientation and Gender Identity are not Proxies for Discrimination Because of Sex.

When evaluating claims of discrimination based on sexual orientation or gender identity, men and women are treated the same because sexual orientation and gender identity are not equivalent with a person's sex or a proxy to treat women adversely in comparison to men or vice versa.

1. Men and Women are treated the same when sexual orientation and/or gender identity, including transgender status, is considered.

Like the Employers before the Court, Hackney denies that it discriminated against any employee due to that employee's sexual orientation. However, even if an employee suffers an adverse employment action due to sexual orientation or gender identity, such action does not equate with men and women being subjected to materially different terms and conditions of employment. For example, under Hackney's pre-2016 health insurance plan, both men and women were able to add a spouse to their policy so long as their spouse was someone of the opposite sex. This criterion applied equally to men as well as women. Both men and women qualified for spousal health insurance benefits under the same standard, specifically that they were lawfully married to a person of the opposite sex. In short, male and female co-workers are treated the same, which is all Title VII requires. *See Harris v.*

Forklift Systems, Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring).

In evaluating claims of sexual orientation and/or gender identity discrimination it is critical to ensure the comparators are similarly situated in all material respects, particularly in sexual orientation. The comparators are not similarly situated when a homosexual female is compared to a heterosexual male, for example. In his concurring opinion in *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248 (11th Cir. 2017), Judge Pryor explained: "The dissent compares gay females to heterosexual males . . . but it does not follow that an employer who treats one differently from the other does so 'because of . . . sex' instead of 'because of sexual orientation.'" *Id.* at 1258-59 (Pryor, J., concurring). The issue is whether "males and females [are held] to different standards of behavior." *Id.* at 1260 (Pryor, J., concurring); *see also Wittmer v. Phillips 66 Co.*, 915 F.3d 328, 334 (5th Cir. 2019) (Ho, J., concurring). When men and women are treated the same, there is no violation of Title VII's prohibition on discrimination because of sex.

Because sexual orientation and gender identity are "qualities and characteristics" other than sex, they are not prohibited under Title VII. *See Price Waterhouse*, 490 U.S. at 239 ("the statute does not purport to limit the other qualities and characteristics that employers may take into account in making employment decisions") and *id.* at 244 ("To discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment

or favor which are prohibited by section 704 are those which are based on any five of the forbidden criteria: race, color, religion, sex, and national origin. *Any* other criterion or qualification for employment is not affected by this title") (quoting 110 Cong. Rec. 7213 (1964) (emphasis in original)). Title VII's prohibition on discrimination because of sex simply does not reach claims based on sexual orientation and/or gender identity.

2. The United States Court of Appeals for the Second Circuit Applied the Wrong Comparison.

The Court of Appeals in *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (en banc) relied heavily on *Hively v. Ivy Tech Cmty. College of Ind.*, 853 F.3d 339 (7th Cir. 2017) (en banc), which "compared Hively, a female professor attracted to women (who was denied a promotion), with a hypothetical scenario in which Hively was a male who was attracted to women (and received a promotion)." *Zarda*, 883 F.3d at 116. Such a comparison is misplaced as it does not compare two similarly situated individuals who are identical in all relevant respects.

The *Zarda* court began to frame the comparison somewhat correctly before going "astray and getting off on the wrong foot." *Zarda*, 883 F.3d at 123 fn. 23. The court notes, "we understand that its [the comparison test] purpose is to determine when a trait other than sex is, in fact, a proxy for (or a function of) sex. To

determine whether a trait is such a proxy, the test compares a female and a male employee who both exhibit the trait at issue." *Id.* at 116-17. Had the court stopped here, it would be clear that the trait at issue, same-sex attraction, when shared by both men and women does not result in discriminatory treatment. The court, however, then proceeded to compare two people that did not both exhibit same-sex attraction.

The *Zarda* court's error is highlighted with its misapplication of this Court's holding in *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978). In *Manhart*, the City required women to contribute a larger sum to the pension plan because women have a longer life expectancy than men, a policy this Court found to be in violation of Title VII.[5] The *Zarda* court notes, "because life expectancy is a ***sex-dependent trait***, changing the sex of the employee (the independent variable) necessarily affected the employee's life expectancy and thereby changed how they were impacted by the pension policy (the dependent variable)." 883 F.3d at 117 (emphasis added). Sexual orientation, however, is not "a sex-dependent trait." Both men and women may experience same-sex attraction and the treatment of that characteristic (sexual orientation) is

[5] This Court did not have the advantage of the disparate impact analysis added to Title VII by the Civil Rights Act of 1991. Pub. L. No. 102-166, Title I, § 105(a), 105 Stat. 1074-1076 (1991); 42 U.S.C. § 2000e-2(k). While the *Manhart* policy disadvantaged women in comparison to men, such a situation is not present in Hackney's case because men and women were both held to the same standard under Hackney's pre-2016 health insurance plan's definition of spouse.

independent of the individual's sex as either male or female. By comparing a homosexual male to a heterosexual female, the *Zarda* court made the wrong comparison and thereby reached the wrong conclusion under Title VII.[6]

When men and women are treated equally there is no violation of Title VII. In Hackney's case, the controlling criteria under Hackney's pre-2016 plan is whether the spouse is of the opposite sex in order to qualify for health insurance benefits. This criterion applied equally to both male and female employees and did not disadvantage the plaintiff when compared to similarly situated male employees. That is all Title VII requires under the clear text of the statute.

While the legal landscape with regard to gay rights may have changed over the last several years, Title VII has not. The issue here is the scope of Title VII, not the legal definition of marriage or societal views on same-sex relationships or the concept of gender in the abstract. Under the plain reading of the statute and as consistently interpreted by courts for the first 53 years after its passage, Employees are unable to prove a claim of sex discrimination by claiming they

---

[6] While the United States Court of Appeals for the Sixth Circuit did not explicitly identify a comparator for Stephens, it nonetheless based its holding on the fact that women were permitted to wear skirts and, therefore, Title VII must allow Stephens, a biological male, to wear skirts as well. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 573 (6th Cir. 2018). The fallacy of this holding and the implication for employers such as Hackney is addressed in Section II, *infra.*

were discriminated against because of their sexual orientation and/or gender identity.

II. SEXUAL STEREOTYPING SHOULD NOT BE AN INDEPENDENT BASIS FOR A CLAIM UNDER TITLE VII ABSENT EVIDENCE OF DISCRIMINATORY TREATMENT OF WOMEN COMPARED TO MEN.

Claims of sexual stereotyping were never intended to create an independent cause of action under Title VII. Although the *Zarda* court asserts that *Price Waterhouse* and *Oncale* support "the proposition that employers may not discriminate against women or men who fail to conform to conventional gender norms," 883 F.3d at 123, this Court did not so hold in either case. *Price Waterhouse*, 490 U.S. at 251 (plurality) and 294 (Kennedy, J., dissenting). The *Price Waterhouse* Court did not set out to establish the parameters of what constitutes a sex stereotype or that any stereotypical notions on appropriate behaviors of men and women ran afoul of Title VII. Further, *Oncale* does not even reference *Price Waterhouse* and is very clear that to establish a claim under Title VII for sex discrimination, the plaintiff must prove that the discriminatory conduct was "because of sex" and not some other reason. 510 U.S. at 81. Rather, "[t]he doctrine of gender nonconformity is not an independent vehicle for relief; it is instead a proxy a plaintiff uses to help support [a plaintiff's] argument that an employer discriminated on the basis of the enumerated sex category by holding

males and females to different standards of behavior." *Evans*, 850 F.3d at 1260 (Prior, J., concurring).

The comments in question in *Price Waterhouse* demonstrated that the decision-makers were influenced by the fact Hopkins was a woman when making their decision to put her promotion on hold. *Price Waterhouse*, 490 U.S. at 251 (noting that the comments in question "did not simply consist of stray remarks"). Such statements would today be evaluated as to whether they constitute "direct evidence" of discriminatory intent. *See*, *e.g.*, *Willingham*, 2018 U.S. Dist. LEXIS 85211 at *7-8. If there is "direct evidence" of discrimination, the case would be evaluated under the mixed-motive analysis established in *Price Waterhouse* and adopted in part in the Civil Rights Act of 1991 (42 U.S.C. § 2000e-2(m)), and if the case only has circumstantial evidence (as is often the case), the matter would proceed under the burden-shifting analysis of *McDonnell Douglas*. *Davis*, 748 F. Supp. 2d at 692; *Wilber*, 2005 U.S. Dist. LEXIS 27435 at 19-20.[7] Of course,

[7] "Direct evidence must be 'evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision.' " *Johnson*, 2017 U.S. Dist. LEXIS 64603 at *24 (quoting *Warch v. Ohio Casualty Ins. Co.*, 435 F.3d 510, 520 (4th Cir. 2006)). " 'Direct evidence' is 'evidence which, if believed, proves the fact [in question] without inference or presumption.' " *Wilber*, 2005 U.S. Dist. LEXIS 27435 at *19 (quoting *Fabela v. Socorro Indep. Sch. Dist.*, 329 F.3d 409, 415 (5th Cir. 2003)). Such evidence may include "any statement [from someone with decision-making authority in the adverse decision in question] or document which shows on its face that an improper criterion served as a basis, though not

because statements or actions based on sexual orientation or gender identity are based on characteristics other than sex, they would not constitute direct evidence of discrimination under Title VII.

Creating an independent claim based on sex stereotypes (a term not defined in *Price Waterhouse, Zarda*, or *R.G. & G.R. Harris Funeral Homes*) to avoid the responsibility of proving that the employee's sex was a motivating factor in the challenged employment decision would undermine Title VII's balanced scheme. There is no clear definition of what constitutes a sex stereotype. Turning sexual behavior or self-identification of one's sex into a substitute for the statutory prohibition on sex discrimination eviscerates the limitation set out in the statute itself. To adopt a sex stereotype standard would be impossible to implement and would result in this Court turning Title VII into a "general civility code" and the courts reexamining every adverse employment decision to determine if some conscious, unconscious, or implicit bias influenced the decision. The Court should reject such a standard.

A. The Notion of Sex Stereotyping is a Vague Standard that should be Rejected.

Title VII should be clear for employers and employees alike. Title VII was not meant to create "asexuality [or] androgyny in the workplace," or to "reach

---

necessarily *the* basis for the adverse employment action." *Id.* at *19-20.

genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex." *Oncale*, 523 U.S. at 81. It was designed to eliminate discrimination because of sex, which this Court has clearly stated is to prevent members of one sex from being "exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Id.* at 80 (quoting *Harris*, 510 U.S. at 25 (Ginsburg, J., concurring)). The notion of sex stereotyping as an independent basis for establishing a Title VII violation would create a vague and impossible standard of compliance.

There is no definition or criteria for determining what constitutes a sex stereotype. For example, one court opined: "The concept of 'stereotyping' includes not only simple beliefs such as 'women are not aggressive' but also a host of more subtle cognitive phenomena which can skew perceptions and judgments." *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 61 (1st Cir. 1999). Another court applying *Price Waterhouse* has observed, "Title VII barred not only discrimination because [a plaintiff] was a woman, but also for 'sex stereotyping' because she failed to act according to the gender stereotype of a woman." *M.A.B. v. Bd. of Educ.*, 2018 U.S. Dist. LEXIS 40346 at *15 (D. Md. Mar. 12, 2018). In *Zarda*, the court concluded that "generalizations about members of their sex, or 'as a result of their employer's animus toward their exhibition of behavior considered to be stereotypically inappropriate for their gender may have a claim under Title VII.'" 883 F.3d at

120 (quoting *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005)). Yet, such circular and vague concepts are impossible to administer and leave to each individual, court, or jury the ability to decide for himself, herself, or itself whether any characteristic that may have been considered by an employer is a mere stereotype and thus evidence of discriminatory intent. In spite of many courts commenting on sex stereotypes, no court has given any guidance on what would constitute an impermissible sex stereotype under Title VII, which leaves open the question of whether any conduct disapproved of by a supervisor or co-worker will be deemed nothing more than a stereotype.[8]

---

[8] Indeed, Congress's efforts have been equally futile when proposing legislation to add sexual orientation and gender identity to the scope of Title VII. For example, in H.R. 5 (the Equality Act) introduced and passed by the House of Representatives in 2019, Congress does not provide a definition of what constitutes a sex stereotype and defines gender identity as "the gender-related identity, appearance, mannerisms, or other gender-related characteristics of an individual regardless of the individual's designated sex at birth." H.R. 5, 116th Cong. § 9 (2019) (proposing to amend 42 U.S.C. § 11101(a)(2) & (4)). Such vague terms are themselves dependent on stereotypes to give them any meaning whatsoever, leaving employers, managers, and co-workers in fear that any comment about another would be considered evidence of discriminatory animus. Indeed, such legislation only makes matters worse. It is no wonder so many spoke against the proposed legislation, including numerous individuals and groups representing the interests of women. H. Rept. No. 116-56 at 100-149 (May 10, 2019); *see also* Natasha Chart & Penny Nance, *Feminists, Conservatives Join Forces to Oppose "Equality Act*," Real Clear Politics (May 6, 2019), https://www.realclearpolitics.com/articles/

This Court's references to sex stereotypes have been no clearer when it comes to defining just what constitutes a sex stereotype. In *Manhart*, the Court observed, "It is now well recognized that employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females. Myths and purely habitual assumptions about a woman's inability to perform certain kinds of work are no longer acceptable reasons for refusing to employ qualified individuals, or for paying them less." 435 U.S. at 707. Attributes and beliefs about sexual behavior, dress, or behavior in general are not assumptions about whether men or women are unable "to perform certain kinds of work" and do not disadvantage women in comparison to men and vice versa.

Consistent with *Price Waterhouse* and *Oncale*, an allegation of sex stereotyping would be relevant only if it tended to show that the plaintiff was treated differently than a similarly situated person of the opposite sex. The courts already engage in that analysis under the *McDonnell Douglas* framework as addressed *supra*. Accordingly, there is no need to articulate some special consideration for alleged sex stereotypes. To hold otherwise would only create confusion as to what constitutes an impermissible stereotype in violation of Title VII.

2019/05/06/feminists_conservatives_join_forces_to_oppose_equality_act_140261.html.

B. Sexual Orientation and Gender Identity are not Sex Stereotypes that Create Discriminatory Treatment between Men and Women.

As noted above, sexual orientation is not a characteristic unique to one sex and the same is true for transgender status or questions of gender identity. *R.G. & G.R. Harris Funeral Homes*, 884 F.3d at 578; *Witter*, 915 F.3d at 334 (Ho., J., concurring). Yet, even though actions that were allegedly taken based on sexual orientation and/or gender identity necessarily constitute factors other than sex, the Second and Sixth Circuits both held that what they termed as stereotypical attitudes about sexual behavior or the "notion of [someone's] sex" still created an independent cause of action under Title VII. The Court should reject such a contention for in doing so, any disagreement with a person's behavior, even when the behavior is disapproved in both men and women, now creates the basis of a claim of sex discrimination, from sexual behavior to dress to attitudes to the firmness of a handshake, as all of it could be classified as nothing more than a sex based stereotype.

Zarda flippantly relegates all views that do not embrace homosexual behavior as the application of outdated stereotypes. In following *Hively*, the *Zarda* court concluded that "same-sex orientation 'represents the ultimate case of failure to conform' to gender stereotypes and aligns with numerous district courts' observation that 'stereotypes about homosexuality are directly related to our stereotypes about the proper

roles of men and women. . . . The gender stereotype at work here is that "real" men should date women, and not other men.'" 883 F.3d at 121 (citations omitted). In finding this sufficient to support a claim under Title VII, the court concluded, "For purposes of Title VII, any belief that depends even in part, on sex, is an impermissible basis for employment decisions. This is true irrespective of whether the belief is grounded in fact or lacks a 'malevolent motive.'" *Id.* at 122 (citations omitted).

The Sixth Circuit took a similarly broad view of impermissible sex stereotyping by holding that any "gender non-conforming" behavior is necessarily protected under Title VII. Such a holding makes a person's actual sex irrelevant, substituting behavior when viewed in light of an undefined "stereotypical notion" on how people should behave. As the court held, "an employer cannot discriminate on the basis of transgender status without imposing its stereotypical notions of how sexual organs and gender identity ought to align. There is no way to disaggregate discrimination on the basis of transgender status from discrimination on the basis of gender non-conformity." *R.G. & G.R. Harris Funeral Homes*, 884 F.3d at 576-77.

Such a holding means any cultural expectations on behavior are now unlawful under Title VII, from dress codes, appropriate use of language, or even basic politeness. This Court's recognition in *Price Waterhouse* that interpersonal skills and treatment of coworkers are legitimate criteria for an employer to consider would be obliterated. *See* 490 U.S. at 234-37.

The critical question under Title VII's text of whether men and women were subjected to materially adverse terms and conditions of employment would no longer be relevant, but only whether an employer had a vague notion that an individual did not comply with some unspecified "stereotype" of how men and women should behave. Indeed, an employer may not have any behavioral expectations, even for both men and women for if those expectations in any way resemble an employee's or a court's idea of what a sex stereotype may be, then the employer unwittingly has violated Title VII. Surely Title VII does not go so far.

C. Applying a Standard Based on Sex Stereotyping would Require a Court to Second Guess Every Employment Decision to Determine if it was Tainted by a Sex Stereotype.

Title VII was never meant to be a "general civility code." *Oncale*, 523 U.S. at 81; *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998). The issue is whether the employee can prove he or she was discriminated against based on his or her sex. *Oncale*, 523 U.S. at 81. As such, courts have properly held that sexual behavior, including sexual orientation, are not covered under Title VII.

In *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745 (4th Cir. 1996), the Fourth Circuit looked at the scope of Title VII in a post-*Price Waterhouse* world. In his concurring opinion, Judge Niemeyer noted that

Title VII does not cover every difference based on sex. "It follows that in prohibiting sex discrimination solely on the basis of whether the employee is a man or a woman, Title VII does not reach discrimination based on other reasons, such as the employee's sexual behavior, prudery, or vulnerability. Title VII does not prohibit conduct based on the employee's sexual orientation, whether homosexual, bisexual, or heterosexual. Such conduct is aimed at the employee's sexual orientation and not at the fact that the employee is a man or a woman." *Id.* at 751 (Niemeyer, J., concurring) (citations omitted); *see also Zarda*, 883 F.3d at 107 and cases cited therein; *Bystry v. Verizon Servs. Corp.*, 2005 U.S. Dist. LEXIS 5634 *30 (D. Md. Mar. 31, 2005) (sexual behavior not protected by Title VII). Indeed, *Price Waterhouse* held that decisions that are adverse to a female employee are permissible so long as they are not because she is female, but rather are "for other reasons." *Price Waterhouse*, 490 U.S. at 239 & 244.

The logical conclusion of the Second and Sixth Circuit approaches becomes that an employer must create "asexuality [or] androgyny in the workplace" contrary to this Court's admonition. *Oncale*, 523 U.S. at 81. Indeed, the Sixth Circuit determined that Stephens's actual sex was "immaterial" for purposes of Title VII and a matter the court need not decide. The court's reasoning: Stephens's sex cannot be irrelevant to the employment decision "if an employee's attempt or desire to change his or her sex leads to an adverse employment decision." *R.G. & G.R. Harris Funeral Homes*, 884 F.3d at 576.

Employers have the right to operate their workplaces so long as they do not make discriminatory employment decisions motivated by the specific characteristics outlined in Title VII. *Price Waterhouse*, 490 U.S. at 239. Sexual orientation and gender identity are not characteristics that create a situation where men and women are subject to adverse terms and conditions of employment with respect to the opposite sex. They are not assumptions to exclude one sex from performing certain work. Accordingly, sex stereotyping, and specifically notions of sexual orientation and gender identity, should not form the basis of determining whether an individual was the victim of discrimination because of sex.

Relying on a vague notion of sex stereotypes as an independent basis for claims under Title VII would mean every employer loses the right to establish a culture or certain expectations for its workforce. Courts would be forced to question every adverse employment decision to determine if some characteristic of the plaintiff motivated the employer's decision, and if so, if that characteristic constitutes a sex stereotype, all without any guiding principle to apply. Employers would be at the whim of any employee who suffered an adverse employment action. Proof that the employee's sex was a motivating factor in the decision would not be required; instead the only proof required would be that the employer took notice of an action, attitude or attribute the employee claims is a mere stereotype of human behavior. The use of gender specific language, gender specific restrooms, dress codes, or any

acknowledgement of a person's actual sex would lend itself to liability under Title VII based on the holdings of *Zarda* and *R.G. & G.R. Harris Funeral Homes*, a conclusion at odds with the clear text of Title VII and this Court's prior holdings. *Wittmer*, 915 F3d at 337-38 (Ho, J., concurring).

III. ANY CHANGE TO THE SCOPE OF TITLE VII TO INCLUDE SEXUAL ORIENTATION AND/OR GENDER IDENTITY SHOULD COME FROM CONGRESS AND NOT THE COURTS.

Prior to January 1, 2016, Hackney provided spousal health insurance benefits to any spouse of the opposite sex from the employee. After this Court's June 2015 decision in *Obergefell*, Hackney amended its plan to include all legally married individuals. There is no question that consistent with the universal interpretation of Title VII, Hackney's pre-2016 plan complied with Title VII. Should this Court decide that Title VII as written prohibits discrimination on the basis of sexual orientation and/or gender identity as part of its prohibition on discrimination because of sex, Hackney would likely be liable to judgment for acting consistent with the law as announced by every circuit court in the country at the time. *See Zarda*, 883 F.3d at 107 (and cases cited therein); *Wittmer*, 915 F.3d at 333 (Ho, J., concurring). It was not until *Hively* in 2017, well over a year after Hackney amended its policy that any circuit court of appeals chose to reverse prior consistent precedent regarding the scope of Title VII. *Hively*, 853

F.3d at 340-41. To subject Hackney and companies like it to liability for policies or actions universally found to be consistent with Title VII would do a grave injustice. Such a fundamental change to Title VII should come from Congress, not the courts.

A. The Courts have Consistently Held that Title VII does not Prohibit Discrimination on the Basis of Sexual Orientation and Companies such as Hackney Properly Relied on Those Holdings When Establishing Policies, Including Policies Regarding Spousal Health Benefits.

In Hackney's case, the plaintiff's claim is that she was being discriminated against based on her sexual orientation because her same-sex spouse was not eligible for spousal health insurance coverage prior to January 1, 2016. Yet, as previously noted, prior to 2017, every circuit court of appeals to have considered the issue, both before and after *Price Waterhouse*, held that sexual orientation was not covered under Title VII. This Court's decision in *Obergefell* did not alter the scope of Title VII when it declared that state marriage laws must grant marriage rights to couples of the same sex. Indeed, many courts continue to hold that Title VII does not prohibit discrimination on the basis of sexual orientation even after *Obergefell*.

The United States Court of Appeals for the Fourth Circuit, where Hackney's case is pending, has consistently held that Title VII does not create a cause of action for discrimination based on sexual orientation.

Wrightson v. Pizza Hut of Am., Inc., 99 F.3d 138, 143 (4th Cir. 1996); *see also Hopkins*, 77 F.3d at 751-52 (Neimer, J., concurring). Six weeks *after Obergefell*, the Fourth Circuit reaffirmed the holding in *Wrightson*. *Murray v. N. Carolina Dep't of Public Safety*, 611 F. App'x 166, fn. * (4th Cir. 2015). Following suit, several United States District Courts within the Fourth Circuit have recently reaffirmed this holding. *Snyder v. Ohio Elec. Motors, Inc.*, 2018 U.S. Dist. LEXIS 42719 (W.D.N.C. Mar. 15, 2018) (granting the defendant's motion to dismiss on a claim of sexual orientation discrimination); *Hinton v. Va. Union Univ.*, 185 F. Supp. 3d 807 (E.D. Va. 2016) (granting a motion to dismiss claim of discrimination based on sexual orientation). Other district courts have held the same. *See Jones v. District of Columbia*, 2018 U.S. Dist. LEXIS 93189, *62-63, 2018 WL 2538992 (D.D.C. June 4, 2018). To now hold that Hackney's policy, which was consistent with clear case precedent, is now and always was illegal[9] would unfairly subject Hackney and potentially countless other large and small businesses to liability for policies clearly lawful at the time they were implemented.

---

[9] Although Hackney voluntarily chose to amend its health insurance policy to cover all lawfully married individuals beginning January 1, 2016, Hackney does not concede that its prior policy would be illegal today. While not protected by Title VII, nothing prohibits an employer from establishing policies and practices to protect employees based on sexual orientation and gender identity. Indeed, Hackney has always hired employees without regard to such classifications, focusing exclusively on the applicant and employee's abilities with respect to the job.

B. The Court Should Hold that Title VII's Limitations on Discrimination Because of Sex Do Not Extend to Sexual Orientation or Gender Identity Because to Change the Application of the Statute by Judicial Fiat More than 55 Years After the Statute was Enacted Would Unfairly Prejudice Companies such as Hackney and Deprive Them of Due Process.

Hackney reasonably relied on clear and unanimous decisions both within and outside the Fourth Circuit that sexual orientation was not a protected class under Title VII and that its health insurance plan that defined spouse consistent with the universal definition of marriage as between a male and a female was lawful during the time period the policy was in place prior to January 1, 2016. For this Court to change the law now, four years after the policy changed and over 30 months after Hackney first requested the District Court to dismiss the case based on clear and binding precedent would be an injustice to Hackney and a windfall to the plaintiff.

Prior to 1993, this Court and the Fourth Circuit Court of Appeals both recognized that certain judicial interpretations of statutes should not be applied retroactively due to an "overriding equitable consideration." *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971); *Lester v. McFaddon*, 415 F.2d 1101, 1106-07 (4th Cir. 1969); *Sargent v. Sullivan*, 1991 U.S. App. LEXIS 19457 at *12 (4th Cir. Aug. 22, 1991).

> The law does change, and man relies upon it at the time of action, as he must. The law need not, it should not leave him naked and defenseless against the biting winds of new discovery which, after his action, removes what had been the clear basis of his reliance. When necessary to avoid such harm, judicial decisions introducing new rules may be given prospective application as new statutory rules usually are.

Lester, 415 F.2d at 1107.

Such a rule of equity was necessary to protect the integrity of court decisions and the citizens and companies who justifiably rely on those decisions, especially when there is such consistency over so long a period of time, as is the case here. "When parties have substantially relied on prior legal interpretations, it may be manifestly unjust to apply the current interpretation retroactively even if that interpretation does represent the 'correct' statement of law." *Cash v. Califano*, 621 F.2d 626, 628-29 (4th Cir. 1980).

In 1993, the Supreme Court abandoned these equitable considerations holding: "When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97, 113 S. Ct. 2510, 2517-18 (1993). Accordingly, should the Court reverse over 50 years of

consistent interpretation of Title VII, Hackney and every other employer facing pending claims of discrimination on the basis for sexual orientation and/or gender identity would face liability even when the circumstances at issue in the pending actions are years or decades old.

In Hackney's case, even with clear case law dispositive of the issues, the trial court imposed a stay two years after Hackney originally moved for dismissal of the plaintiff's claims and a year after Hackney renewed its arguments on summary judgment. Should this Court announce a new principle of law reversing 55 years of consistent interpretation of Title VII, Hackney and companies like it will be severely prejudiced. It would be particularly unjust and deprive Hackney of due process if its health insurance plan's definition of spouse, which was consistent with the universally accepted definition of marriage and reach of Title VII, would be declared unlawful, thus subjecting Hackney to liability. In such a case, no employer can rely on courts fashioning the outer limits of legislation, but must assume what may be beyond the imagination in fashioning policies for its workplace, hoping that at some point years or decades or, as here, half a century later a court does not change the standard for what is or was ever permissible.

Such a fundamental change in the law should come from Congress, not the courts. Indeed, Congress knows how to amend a statute when it is dissatisfied with the Court's interpretation of the law as written.

> Title VII is a creation of Congress and, if Congress is so inclined, it can either amend Title VII to provide a claim for sexual orientation discrimination or leave Title VII as presently written. It is not the province of unelected jurists to effect such an amendment.

Hinton, 185 F. Supp. 3d at 817.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the United States Court of Appeals for the Eleventh Circuit in *Bostock v. Clayton County, Ga.*, Case No. 17-1618 and reverse the decisions of the United States Court of Appeals for the Second Circuit in *Allied Express, Inc. v. Zarda*, Case No. 17-1623, and the United States Court of Appeals for the Sixth Circuit in *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, Case No. 18-107.

Respectfully submitted,

EDWARD H. TRENT, ESQ.
(*Counsel of Record*)
G. GERARD JABALEY, ESQ.
WIMBERLY LAWSON WRIGHT
DAVES & JONES, PLLC
550 W. Main Ave., Suite 900
Knoxville, TN 37902
(865) 546-1000
etrent@wimberlylawson.com

Counsel for Amicus Curiae

August 2019