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, *Respondent*, and AIMEE STEPHENS, *Respondent-Intervenor*.

On Writs of Certiorari to the United States Courts of Appeals for the Eleventh, Second, and Sixth Circuits

Brief of Institute for Faith and Family and Christian Family Coalition as *Amici Curiae* in Support of the Employers

Tami Fitzgerald
The Institute for Faith and Family
9650 Strickland Road, Suite 103-222
Raleigh, NC 27615
(980) 404-2880
tfitzgerald@ncvalues.org

Deborah J. Dewart
Counsel of Record
620 E. Sabiston Drive
Swansboro, NC
28584-9674
(910) 326-4554
debcpalaw@earthlink.net

B. Tyler Brooks
Law Office of B. Tyler Brooks, PLLC
5540 Centerview Drive, Suite 200
Raleigh, NC 27606
(919) 377-9546
btb@btylerbrookslawyer.com

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amici Curiae respectfully urge this Court to reverse the Sixth and Second Circuit decisions (*Harris* and *Zarda*) and affirm the Eleventh Circuit (*Bostock*).

Institute for Faith and Family (IFF) is a North Carolina nonprofit, tax-exempt charitable organization based in Raleigh, NC that exists to advance a culture where human life is valued, religious liberty thrives, and marriage and families flourish. *See* https://iffnc.com.

Christian Family Coalition ("CFC") is a Florida organization established to empower families at the grassroots level and give them a voice in government. CFC informs and educates citizens about candidates and pending legislation, trains Christian leaders, and defends the legal rights of Christians.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This Court's plurality opinion in *Price Waterhouse* cannot bear the weight of some recent lower court decisions. *Price Waterhouse* did not craft a new cause of action for stereotyping or disturb the objective, biological understanding of "sex" as male and female. This Court's decision was grounded in logic and reality—the female plaintiff was denied a promotion

---

[1] The parties have consented to the filing of this brief. *Amici curiae* certify that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amici*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

because she was not sufficiently feminine to comply with her employer's ideal. Stereotyping was properly introduced as evidence that the employer had acted on the basis of sex by denying a promotion to an aggressive woman that it would have readily granted to an aggressive man. Nothing in this decision warrants a sweeping redefinition of biological reality that injects sexual orientation and/or gender identity into the meaning of the word "sex." Yet some lower courts, including the Sixth and Second Circuits, jump from stereotypical ideas about the roles of men and women to conclusions that render heterosexuality—and even the very idea of biological sex—illicit stereotypes.

Some recent cases, such as the ones at issue here, have ripped the stereotyping terminology from the pages of *Price Waterhouse* and commandeered it for purposes far removed from Title VII's objectives. Title VII was enacted to ensure that men and women have equal employment opportunities. It was not designed to be a radical social engineering project that shoehorns sexual liberties into federal law.

ARGUMENT

I. *PRICE WATERHOUSE* DID NOT ESTABLISH A DISTINCT, INDEPENDENT CAUSE OF ACTION FOR STEREOTYPING.

Stereotyping is not a free-floating concept that gives rise to a distinct cause of action under Title VII. *Price Waterhouse v. Hopkins* did nothing to change that. This Court granted certiorari in that case to consider "the respective burdens of proof" in Title VII disputes involving "a mixture of legitimate and illegitimate

motives." 490 U.S. 228, 232 (1989) (plurality).[2] Stereotyping was used merely as evidence of sex-based discrimination against a female employee. Just a few years later, this Court affirmed that "[p]hysical differences between men and women" related to reproduction—the very criteria that determine sex—are not "gender-based stereotype[s]." *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 68 (2001) (citizenship of child born outside the U.S. to unwed parents required the citizen parent to be the father rather than the mother).

Price Waterhouse has recently been twisted to distort the statutory language and manufacture new and independent claims. The Seventh Circuit led the way: "*Price Waterhouse* held that . . . gender stereotyping falls within Title VII's prohibition against sex discrimination . . . ." *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 342 (7th Cir. 2017). This was a sharp departure from the circuit court's earlier understanding of the case: "[A]ccording to *Oncale* [*v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998)] and *Price Waterhouse*, we must consider . . . stereotypical statements within the context of the evidence . . . and then determine whether the evidence as a whole creates a reasonable inference that the plaintiff was discriminated against because of his sex." *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1085 (7th Cir. 2006), *overruled by Hively*, 853 F.3d 339. It is one thing to use stereotyping as evidence of discrimination,

---

[2] Unless otherwise noted, all references and citations to this Court's opinion in *Price Waterhouse*, 490 U.S. 228 (1989) are to the plurality opinion.

but quite another to say it "falls within" Title VII's restrictions.

A. Courts have hijacked *Price Waterhouse*'s stereotyping terminology to manufacture new causes of action for sexual orientation and gender identity discrimination.

The Sixth Circuit was correct when it held that recognition of claims for sexual orientation discrimination "would have the effect of *de facto* amending Title VII." *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764 (6th Cir. 2006). The *Hively* dissent agreed: "The court has arrogated to itself the power to create a new protected category under Title VII." *Hively*, 853 F.3d at 373 (Sykes, J., dissenting). Judge Sykes correctly discerned that the "confusing hodgepodge" of lower court decisions "stems from an unfortunate tendency to read *Hopkins* for more than it's worth." *Id*. at 370. *Price Waterhouse* did not create a distinct cause of action for stereotyping per se, let alone sexual orientation or gender identity.

1. Sexual Orientation. Zarda laments that appellate courts "have grappled with how to disentangle sex stereotyping claims from sexual-orientation discrimination" and argues that "the latter is a subset of the former." Zarda Br. 27-28. Bostock, similarly, claims it is "profoundly unworkable" to "distinguish between sex stereotype discrimination based on gay or lesbian 'traits' and sexual orientation discrimination." Bostock Br. 51. The Second Circuit reads *Price Waterhouse*, "in conjunction with *Oncale*," as holding "that employers may not discriminate against women or men who fail to conform to

conventional gender norms." *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 123 (2d Cir. 2018). Although such failure to conform may offer evidentiary *support* for a sex discrimination claim, *Zarda* takes it one step further by declaring that "sexual orientation discrimination is almost invariably rooted in stereotypes about men and women." *Id*. at 119. *See also* Zarda Br. 26: "The notion that men should be attracted only to women and women should be attracted only to men is a normative sex-based stereotype." This rationale renders heterosexuality itself a verboten stereotype.

Stereotyping can be *evidence* of sex discrimination for a person of either sex or any orientation. (See Section B, *infra*.) An effeminate man, or a masculine woman, may be either heterosexual or homosexual. Either may suffer discrimination as a *man* or as a *woman*. On the surface there may seem to be overlap between sex-based discrimination (as evidenced by stereotyping) and sexual orientation discrimination. *Evans v. Georgia Regional Hosp.*, 850 F.3d 1248, 1258 (11th Cir 2017), *cert denied*, 138 S. Ct. 557 (Pryor, J., concurring) ("Deviation from a particular gender stereotype may correlate disproportionately with a particular sexual orientation, and plaintiffs who allege discrimination on the basis of gender nonconformity will often also have experienced discrimination because of sexual orientation."). But "an employee's sexual orientation is irrelevant for purposes of Title VII . . . [i]t neither provides nor precludes a cause of action for sexual harassment." *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1063 (9th Cir. 2002). In *Rene*, the homosexual plaintiff stated a valid cause of action

under Title VII. *Id*. at 1064. The overlap in concepts "by no means establishes that *every* gay individual who experiences discrimination because of sexual orientation has a 'triable case of gender stereotyping discrimination.'" *Evans*, 850 F.3d at 1258 (Pryor, J., concurring), quoting *Prowel v. Wise Business Forms, Inc.*, 579 F.3d 285, 292 (3d Cir. 2009). At the same time, there is no legal basis "to support the notion that an effeminate *heterosexual* man can bring a gender stereotyping claim while an effeminate *homosexual* man may not." *Id*. (emphasis in original). In *Prowel*, a homosexual man was "harassed because he did not conform to [his employer's] vision of how a *man* should look, speak, and act." *Id*. (emphasis added). He had a "high voice," "did not curse," was "very well-groomed," wore "dressy clothes," "filed his nails instead of ripping them off with a utility knife," "crossed his legs," "talked about things like art, music, interior design, and décor." *Id*. at 287. These characteristics, not his sexual orientation, were the pertinent factors for his Title VII claim.

Sexual orientation and sex are "categorically distinct and widely recognized as such." *Hively*, 853 F.3d at 363 (Sykes, J., dissenting). An employer who declines to hire a homosexual person does not "exclud[e] gay men because they are men and lesbians because they are women." *Id*. at 365. The motivation is "unrelated to the applicant's sex." *Id*. The *Zarda* dissent makes the same point ("discriminating against them discriminates against *them*, as gay people, and does not differentially disadvantage employees or applicants of either sex"). *Zarda*, 883 F.3d at 152 (Lynch, J., dissenting). The motivation is not that

"most men are gay and therefore unsuitable" but rather that "most *gay* people (whether male or female) have some quality that makes them undesirable for the position." *Id*. at 157.

2. Transgender Claims. The Eleventh Circuit, in *Glenn v. Brumby*, appropriated *Price Waterhouse*'s stereotyping language to assert that "[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes." 663 F.3d 1312, 1316 (11th Cir. 2011). The court then found "a congruence between" gender identity discrimination and discrimination based on "gender-based behavioral norms," i.e., stereotyping. *Id*. As in the sexual orientation context, the court presupposes a distinct stereotyping claim.

At many points, courts find that newly minted claims for transgender discrimination fall within the realm of stereotyping. Other times, in a breathtaking expansion of the word "sex," courts find *two* equally viable claims—one based on conduct and the other based solely on identity:

- Glenn alleged that "Brumby discriminat[ed] against her *because of her sex*, including her female gender identity *and* her *failure to conform to the sex stereotypes* associated with the sex Defendant[] perceived her to be." *Glenn v. Brumby*, 663 F.3d at 1314 (emphasis added).

- "Smith contends . . . he was a victim of discrimination 'because of . . . sex' *both* because of his gender non-conforming conduct *and*, more generally, because of his identification as a

> transsexual. . . . Title VII's reference to 'sex' encompasses *both* the biological differences between men and women, *and* gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms." *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004) (emphasis added).

Both flaws are on full display in the Sixth Circuit. Harris Funeral Homes was charged with terminating the plaintiff's employment "on the basis of her transgender or transitioning status *and* her refusal to conform to sex-based stereotypes." *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 566-567 (6th Cir. 2018) (emphasis added). The district court permitted the stereotyping claim but found that transgender status is not a protected category. *Id.* at 569-570. The appellate court disagreed, reasoning that transgender status and stereotyping are inseparable: "[D]iscrimination because of an individual's transgender status is *always* based on gender-stereotypes: the stereotype that individuals will conform their appearance and behavior—whether their dress, the name they use, or other ways they present themselves—to the sex assigned them at birth." *Id.* at 575, quoting Appellant Br. 24. The court ultimately allowed two alternate routes to recovery: "Discrimination against employees, *either* because of their failure to conform to sex stereotypes *or* their transgender and transitioning status, is illegal under Title VII." *Id.* at 600 (emphasis added). The court attempts a tenuous connection to the statutory language by asserting that, because an employer must consider a transgender employee's biological sex in the

process of discriminating against that person, "discrimination on the basis of transgender status necessarily entails discrimination on the basis of sex—no matter what sex the employee was born or wishes to be." *Id.* at 578. This statement essentially annihilates the whole concept of sex, rendering biological sex per se a stereotype. The mere reference to a protected characteristic, e.g., race or sex, does not render an employment action "because of" that characteristic. A white employee who appears for work in black face could face discipline for inappropriate workplace conduct even though the employer must consider the employee's race in imposing that discipline. On the other hand, a black employee would likely not be disciplined for covering a scar with black face. There is no racial discrimination in treating one case differently than the other.

Harris tracks the Sixth Circuit's earlier opinion in *Smith*, which rejected the district court's finding that the employee "invoke[d] the term-of-art created by *Price Waterhouse*" (stereotyping) to do "an end run around his real claim . . . based upon his transsexuality." *Smith*, 378 F.3d at 571 (internal quotation marks omitted). The complaint had described his lack of conformity with "sex stereotypes of how a *man* should look and behave." *Id.* at 572 (emphasis added). The analysis in these cases—collapsing the claims, then finding both actionable—raises a dilemma. Suppose a court held that transgender status is not a protected category but recognized stereotyping as a distinct claim. Then, to analyze the stereotyping claim, *what is the plaintiff employee's sex?* Is the answer

determined by biological sex or the employee's self-professed gender identity?

The shocking result of *Harris* and *Smith* is that "Title VII proscribes discrimination both against women who do not wear dresses or makeup and men who do." *Harris*, 884 F.3d at 572 (internal quotations omitted); *see Smith*, 378 F.3d at 575. This puts private employers in a straight-jacket that destroys their right to determine the image they wish to present to the public. Under the Sixth Circuit's view, it is not only *discrimination* that is prohibited, but any *distinction* whatsoever between the two sexes. Indeed, it is unclear whether a biological male who is *not* transgender must be permitted to appear at work in female attire. If so, could a transgender woman file a harassment claim because of the perception that transgenderism is being mocked? To sort out such questions, an employer must necessarily consider sex, raising again the specter of discrimination "because of sex." Employers and courts are thrust into an Alice-in-Wonderland rabbit-hole that quickly spirals out of control.

3. *Oncale* does not support the expansion of Title VII to create new categories of discrimination for sexual orientation and/or gender identity. *Zarda* and *Hively* commandeered the "reasonably comparable evils" language of *Oncale* to declare sexual orientation discrimination a subset of sex discrimination. *Zarda*, 883 F.3d at 112; *Hively*, 853 F.3d at 343. But this Court carefully explained that "Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at *discrimination* . . . because of . . . sex." *Oncale*, 523 U.S.

at 80. A violation requires that one sex experience "disadvantageous terms or conditions of employment" that the other sex does not. *Id*., quoting *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring). It is not enough to show conduct "tinged with offensive sexual connection"—the conduct must actually constitute "discrimination because of sex." *Oncale*, 523 U.S. at 81. *Oncale* found that sexual harassment may, in some circumstances, impose discriminatory working conditions on one sex, e.g., "sexual favors as a condition of employment" imposed on one sex, while "members of the other sex are exempt." *Zarda*, 883 F.3d at 146 (Lynch, J., dissenting). But that conclusion does not justify "extending Title VII by judicial construction to protect an entirely different category of people." *Id*. at 145. *Oncale* did nothing to undermine the biological dichotomy between men and women.

B. Courts have restructured stereotyping as a separate species of sex discrimination instead of using it for its intended evidentiary purposes.

In *Price Waterhouse*, this Court set forth the requirement that a plaintiff "must show that the employer actually relied on her gender in making its decision." 490 U.S. at 251. In presenting the case, "stereotyped remarks can certainly be *evidence* that gender played a part." *Id*. (emphasis in original). Accordingly, *Price Waterhouse* did not create an "independent cause of action for sex stereotyping." *Id.* at 294 (Kennedy, J., dissenting); accord *Hively*, 853 F.3d at 369 (Sykes, J., dissenting) (same); *Wittmer v.*

Phillips, 915 F.3d 328, 339 (5th Cir. 2019) (Ho, J., concurring) ("under *Price Waterhouse,* sex stereotyping is only actionable to the extent it provides evidence of favoritism of one sex over the other"); *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1067 (7th Cir. 2001) (Posner, J., concurring) (see discussion, *infra*). Sexual orientation and gender identity do not fit the contours of *Price Waterhouse*. Discrimination on either basis "does not classify people according to invidious or idiosyncratic *male* or *female* stereotypes." *Hively*, 853 F.3d at 370 (Sykes, J., dissenting). Indeed, neither category "spring[s] from a sex-specific bias at all." *Id*.

Stereotyping is based on *external*, observable behaviors, mannerisms, and appearances associated with either men or women. It can be useful evidence of an employer's discrimination against female (or male) employees. In *Price Waterhouse*, the plaintiff was a female employee who exhibited "masculine" traits, but the concept is equally applicable to men. *See, e.g.*, *Doe v. City of Belleville*, 119 F.3d 563, 580 (7th Cir. 1997), *vacated on other grounds by* 523 U.S. 1001 (1998) (male employee wore an earring); *Nichols v. Azteca Restaurant Enterprises*, 256 F.3d 864, 874 (9th Cir. 2001) (male waiter carried serving tray "like a woman"); *Knussman v. Maryland*, 272 F.3d 625, 642-43 (4th Cir. 2001) (male employee denied leave under Family Medical Care Act as "primary care giver"). Sexual orientation and gender identity are based on *internal* sexual attraction or sense of gender. A person's claim to *be* the opposite sex, or to be attracted to the same sex, is not equivalent to exhibiting mannerisms or behaviors stereotypically associated with the

opposite sex (as in *Price Waterhouse*). In cases involving sexual orientation or gender identity, the "stereotype" is not merely traits associated with the opposite sex—it is heterosexuality (sexual orientation cases), or biological sex itself (gender identity cases). This is a radical extension of the evidentiary principle recognized by *Price Waterhouse*.

Years before *Hively*, Judge Posner highlighted the difference between "using *evidence*" of stereotyped behaviors—a male who wears nail polish or a female who does not—and "*creating a subtype* of sexual discrimination called 'sex stereotyping,' as if there were a federally protected right for male workers to wear nail polish and dresses and speak in falsetto and mince about in high heels, or for female ditchdiggers to strip to the waist in hot weather." *Hamm*, 332 F.3d at 1067 (Posner, J., concurring) (emphasis added). Bostock's opening brief cites Judge Posner's attempt to "record[] [his] conviction that the case law has gone off the tracks . . . distort[ing] this Court's decision in *Price Waterhouse* by trying to avoid recognizing discrimination based on sexual orientation as actionable." Bostock Br. 54, quoting *Hamm*, 332 F.3d at 1066. But Bostock seriously misconstrues Judge Posner's point. Posner did not suggest that courts had failed to stretch *Price Waterhouse* far enough. On the contrary, Posner argued for a more restrained reading of *Price Waterhouse* when he warned that stereotyping, per se, "should not be regarded as a form of sex discrimination" but rather may be "evidence of sex discrimination." *Id*. at 1068.

The Seventh Circuit turned this reasoning on its head in *Hively* when the panel described heterosexuality—"that all men should form intimate relationships only with women, and all women should form intimate relationships only with men"—as the "sine qua non of gender stereotypes." *Hively v. Ivy Tech Coll.,* 830 F.3d 698, 711 (2016). The same language was cited approvingly in the en banc opinion. *Hively*, 853 F.3d at 342. Instead of being used for evidentiary purposes, as *Price Waterhouse* intended, some courts have morphed stereotyping into a separate species of sex discrimination and a rationale for judicially amending Title VII. Judge Posner's break with his prior commonsense pronouncement in *Hamm* is admittedly "judicial interpretive updating." *Hively*, 853 F.3d at 353 (Posner, J., concurring). Such "updating" occurred without any intervening change in the text of Title VII.

C. Courts have distorted the comparative test used to analyze and detect disparate treatment of men and women.

Disparate treatment is at the heart of private lawsuits under Title VII. "Congress intended to strike at the entire spectrum of *disparate treatment of men and women* resulting from stereotypes." *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707, n. 13 (1978) (emphasis added), quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971); *Price Waterhouse*, 490 U.S. at 251. Sex stereotypes are relevant as evidence that disparate treatment has occurred.

But instead of considering the disparate treatment of *men and women*, as Title VII intended and requires, some courts faced with sexual orientation claims now consider the disparate treatment of *homosexuals and heterosexuals*. In transgender cases, plaintiffs essentially demand a form of disparate treatment. As discussed below, the analysis has been muddled by the ways courts use comparisons to reach the desired result.

Comparative test. The comparative test is an analytical tool used to detect disparate treatment of men and women. Title VII's relevant protected characteristic is sex, which in 1964 and still today means *biological* sex. Plaintiffs now demand protection for sexual orientation (*Zarda*, *Bostock*) and gender identity (*Harris*)—radically different categories.

To make the proper comparison, the first step is to identity the offending "trait" underlying the employment decision. According to the Second Circuit, disparate treatment occurs "when a trait other than sex is [used as] a proxy for (or a function of) sex." *Zarda*, 883 F.3d at 116. To decide whether a trait fits this description, the court must "compare[] a female and a male employee who both exhibit the trait at issue." *Id*. at 116-117.

In *Price Waterhouse*, the relevant "trait" was aggressiveness. The accounting firm treated aggressiveness as a proxy for masculinity. *The firm was not concerned about all aggressive employees. That trait was acceptable for male employees but not female employees*. In *Harris*, the trait at issue is transgenderism. In *Hively*, *Zarda*, and similar cases,

the trait at issue is attraction to the same sex. *Hively* injects a classic red herring and confuses the issue by treating attraction to *women* as the relevant "trait," rather than attraction to persons of the *same sex*:

> [J]ust as *Price Waterhouse* compared a gender non-conforming woman to a gender conforming man, both of whom were aggressive and did not wear makeup or jewelry, the *Hively* court properly determined that sexual orientation is sex dependent by comparing a woman and a man with two different sexual orientations, *both of whom were attracted to women.*

Zarda, 883 F.3d at 118 (emphasis added). *Zarda* framed the question as "whether sex is a 'motivating factor' in sexual orientation discrimination" and then declared that "this question cannot be answered by comparing two people with the same sexual orientation." *Id*. at 117-118. *Hively* is similar: "The fundamental question is not whether a lesbian is being treated better or worse than gay men, bisexuals, or transsexuals, because such a comparison shifts too many pieces at once." 853 F.3d at 345. This incorrectly frames the issue, because sexual orientation is not a proxy for either femininity or masculinity. Neither is gender identity. Courts attempt to import these additional categories into Title VII. The comparison test warrants a closer look.

Sexual Orientation Cases. There are four possible combinations of sex and sexual orientation:

- Homosexual woman
- Heterosexual woman
- Homosexual man
- Heterosexual man

The plaintiff seeking relief for sex discrimination will be one of these four. In *Hively*, it was a homosexual woman. There are three possible comparisons:

- Homosexual woman v. homosexual man
- Homosexual woman v. heterosexual woman
- Homosexual woman v. heterosexual man

In *Hively*, the Seventh Circuit short-circuits the analysis by examining *only* the third option, a misleading combination that cannot isolate sex as the employer's motive. By "opportunistically framing the comparison," the court "load[s] the dice by changing *two* variables—the plaintiff's sex *and* sexual orientation." *Hively*, 853 F.3d at 366 (Sykes, J., dissenting). The plaintiff alleged that "if she had been a man married to a woman (or living with a woman, or dating a woman)," the employer would have treated her differently. *Id*. at 345. The Seventh Circuit considers this "paradigmatic sex discrimination" that disadvantages her "*because she is a woman*." *Id*. This truncated analysis fails to evaluate all of the options in order to properly isolate the role of sex in the employer's decision. First, the court failed to consider the first combination, where sexual orientation remains constant. If the employer would hire the male homosexual but not the female homosexual, there

would be discrimination based on biological sex. Second, the court never considered how the employer would have treated a *heterosexual* woman (equally qualified and identical in all other respects).[3] If the employer would hire the heterosexual woman but not the homosexual woman, this comparison (where sex remains constant) would reveal that the discrimination is *not* "because she is a woman." Instead, the distinguishing factor is sexual orientation, which is not a protected category under Title VII.

As concurring Judge Jacobs observed in *Zarda*, "the comparator test is an evidentiary technique, not a tool for textual interpretation." *Zarda*, 883 F.3d at 134 (Jacobs, J., concurring). The Second Circuit improperly "builds on the concept of homosexuality as a subset of sex, and this analysis thus merges in a fuzzy way with the definitional analysis." *Id*. Judge Jacobs touches on the explosive implications: "[W]hen the comparator test is used for textual interpretation, it carries in train ramifications that are sweeping and unpredictable: think fitness tests for different characteristics of men and women, not to mention restrooms." *Id*.

---

[3] The purpose of this simple example is to emphasize the need to distinguish between sex and sexual orientation as distinct factors in a particular employment decision. The analysis assumes that all other factors remain constant, i.e., this is not a case such as *Phillips v. Martin Marietta Corp*., 400 U.S. 542 (1971) where an employer maintains "one hiring policy for *women* and another for *men*." *Id*. at 545 (emphasis added). In *Phillips*, the employer denied employment to women (but not men) with pre-school age children. Employment was open to women who did not have young children and to men regardless of children in the home.

A slightly expanded comparative test could be used to distinguish the allegedly "futile exercise of trying to distinguish between sexual orientation and sex-stereotyping claims" (Zarda Br. 29). There are eight possible combinations when adding the factor of whether a person presents primarily feminine or masculine traits:

- Heterosexual woman – feminine traits
- Heterosexual woman – masculine traits
- Homosexual woman – feminine traits
- Homosexual woman – masculine traits

- Heterosexual man – masculine traits
- Heterosexual man – feminine traits
- Homosexual man – masculine traits
- Homosexual man – feminine traits

Note that both heterosexual and homosexual women may exhibit masculine traits (or feminine traits); both heterosexual and homosexual men may exhibit feminine traits (or masculine traits). Either orientation may experience discrimination, based on biological sex, that is demonstrated by stereotyping evidence. In *Evans*, where the lesbian plaintiff lacked sufficient evidence of discrimination based on sex, Judge Pryor wrote separately to explain the error of asserting "that a person who experiences discrimination because of sexual orientation necessarily experiences discrimination for deviating from gender stereotypes." *Evans*, 850 F.3d at 1258 (Pryor, J., concurring). "[T]he two concepts are legally distinct." *Id*. Indeed they are, and with a careful examination of the evidence it is possible to distinguish them.

Gender Identity. When sex and gender identity are considered together, these four combinations are possible:

- Biological male who identifies as a woman (transgender)
- Biological female who identifies as a man (transgender)
- Biological woman who identifies as a woman
- Biological man who identifies as a man

The plaintiff seeking relief for sex discrimination will be one of these four. In *Harris*, it was a biological male who identifies as a woman. Three comparisons are possible:

- Biological male who identifies as a woman v. biological female who identifies as a man (both transgender)
- Biological male who identifies as a woman (transgender) v. biological man who identifies as a man
- Biological male who identifies as a woman (transgender) v. biological woman who identifies as a woman

The first comparison is the only option that yields information about sex discrimination, i.e., whether one sex or the other is treated differently. The Sixth Circuit expressly rejects that comparison, because its earlier holding in *Smith* "did not ask whether transgender persons transitioning from *male to female* were treated differently than transgender persons transitioning from *female to male*." *Harris*, 884 F.3d at 574 (emphasis added). The second comparison reveals the

disparate, preferential treatment the plaintiff demands—the plaintiff is a biological male who demands a right (to dress as a woman) not granted to other biologically male employees. The Sixth Circuit chose the third option, which substitutes gender identity for sex in Title VII, rewriting the statutory text and redefining the reality of plaintiff's sex.

D. Gender identity claims solidify stereotypes rather than stamping them out.

Stereotyping is an inherently subjective process. Who decides what is or is not a "stereotype"? There is considerable overlap between men and women in their interests and talents. Men can cook, and women can be professional athletes. Even in outward appearance, intersection is undeniable; men have long hair, women wear pants. The standard for defining stereotypes is reminiscent of the way one Justice described this Court's attempt to define obscenity: "I know it when I see it." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

A deposition excerpt in the Joint Appendix illustrates the point. When asked whether an employer should be required to acknowledge a male funeral director who wishes to present as a woman, Plaintiff Stephens said yes, "[i]f that individual is willing to adhere to the female dress code." But the response was "no" if a male with a "bald and neatly trimmed beard and mustache" appeared at work in "a professionally female dress and high heels." J.A. 113. That person "[t]ypically doesn't meet the expectations of a female." J.A. 114. In other words, this hypothetical male employee must fit the *female stereotype* in order to be

recognized as a woman. This approach encourages conforming one's life—and even the physical body—to match a stereotype. If an individual looks and acts like a female, that person *is* a female. Gender identity theory thus cements stereotypes in stone rather than eradicating them from the law. It reduces what it means to be male or female to a collection of stereotypes that many people—especially women—have spent many years trying to overcome and that many people reject.

II. *PRICE WATERHOUSE* DID NOT ALTER THE BINARY UNDERSTANDING OF SEX AS IMMUTABLY MALE AND FEMALE.

The word "sex" in Title VII is an *objective* term determined by reproductive anatomy. Sexual orientation is *subjectively* determined by individual's preference in sexual partners. Gender identity is *subjectively* determined by a person's internal sense of being male or female. These subjective categories represent a radical departure from the text of Title VII and the underpinnings of *Price Waterhouse*. In *Price Waterhouse*, the employer acted "on the basis of sex" when it based an adverse decision on its belief that a *woman* cannot (or should not) be aggressive. *Price Waterhouse*, 490 U.S. at 250. Specifically, one of the partners advised Hopkins to "walk [and] talk more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* at 272 (O'Connell, J., concurring) (internal quotation marks and citation omitted). *Price Waterhouse* was about a *woman* who was denied a promotion because she was not sufficiently

feminine—not because of a claim to *be* the opposite sex or because of her sexual attractions.

Oncale also remained faithful to Title VII's text and did not alter this result. *Oncale* considered "whether workplace harassment can violate Title VII's prohibition against 'discrimination . . . because of . . . sex,' 42 U.S.C. § 2000e-2(a)(1), when the harasser and the harassed employee are of the same sex." *Oncale*, 523 U.S. at 76. This Court found that the person who perpetrates offending discriminatory conduct may be a member of the same protected category as the individual who suffers discrimination. The decision was built on previous precedent holding that Title VII is violated when "discriminatory intimidation, ridicule, and insult" is "severe and pervasive" enough to create "an abusive working environment." *Harris v. Forklift Systems, Inc.*, 510 U.S. at 21. The Court reasoned that although "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII," such harassment is a "reasonably comparable evil[]" covered by the statute. *Oncale*, 523 U.S. at 79. *Oncale* provided a step-by-step logical analysis that never strayed from the text and did not expand or redefine the basic terminology.

A. Blurring the binary concept of male and female distorts the concept of stereotyping.

In recent cases, like the ones at issue here, definitions swim in a sea of subjectivity. The Sixth Circuit asserts that "*Smith* [378 F.3d 566] and *Price Waterhouse* preclude an interpretation of Title VII that reads sex to mean only individuals' chromosomally

driven physiology and reproductive function." *Harris*, 884 F.3d at 578 (internal quotation marks and citations omitted). But that is precisely the definition of "sex" in Title VII and many other laws. The circuit courts attempt to redefine reality and infuse this Court's precedent with meanings that are simply not there. Laws cannot be enforced or rightly interpreted if word definitions can be shifted at will to mean whatever someone wants them to mean.

Some recent cases not only deny the reality of biological sex, but also inject absurd new "stereotypes" into the *Price Waterhouse* framework. In transgender cases, "the very idea of sex" has become an "illicit stereotype." Pet. 18-107 at 11. In sexual orientation cases, heterosexuality is the stereotype. Both blur the male-female distinction at the heart of Title VII's protection against discrimination *because of sex*.

Sexual orientation cases. Just two years ago, the Second Circuit affirmed that "being gay, lesbian, or bisexual, standing alone, does not constitute nonconformity with a gender stereotype that can give rise to a cognizable gender stereotyping claim." *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 201 (2d Cir. 2017) (per curiam). Decades of case law confirms this observation.[4] But *Zarda* turns this simple

---

[4] *See, e.g., Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979); *DeSantis v. Pac. Telephone and Telegraph Co., Inc.*, 608 F.2d 327 (9th Cir. 1979); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) (per curiam); *U.S. Dep't of Hous. & Urban Dev., Washington, D.C. v. Fed. Labor Relations Auth.*, 964 F.2d 1, 2 (D.C. Cir. 1992); *Wrightson v. Pizza Hut of Am.*, 99 F.3d 138, 143 (4th Cir. 1996), *abrogated on other grounds by Oncale v.*

truth on its head, declaring that "sexual orientation discrimination is predicated on assumptions about how persons of a certain sex can or should be, which is an impermissible basis for adverse employment actions." 883 F.3d at 112. Even the concurring judge, who defined stereotypes as "generalizations that are usually unfair or defective," admitted that the court conceives of heterosexuality as "just another sexual convention, bias, or stereotype—like pants and skirts, or hairdos." *Id*. at 134 (Jacobs, J., concurring). The Seventh Circuit, similarly, transformed heterosexuality into a forbidden stereotype. *Hively*, 853 F.3d at 346 ("the ultimate case of failure to conform . . . in a place such as modern America, which views heterosexuality as the norm").

Transgender cases. Both *Harris* and *Smith* define a transgender individual as one who "fails to act and/or identify with his or her gender." *Harris*, 884 F.3d at 576, quoting *Smith*, 378 F.3d at 575. Discrimination allegedly occurs where an employer "impos[es] its stereotypical notions of how sexual organs and gender identity ought to align." *Harris*, 884 F.3d at

---

Sundowner Offshore Servs., 523 U.S. 75 (1998); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Simonton v. Runyon*, 232 F.3d 33, 36 (2d Cir. 2000); *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 704 (7th Cir. 2000); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001); *Rene*, 305 F.3d at 1063-64 (holding that "an employee's sexual orientation is irrelevant for purposes of Title VII" and "neither provides nor precludes a cause of action for sexual harassment"); *Medina v. Income Support Div.,* 413 F.3d 1131, 1135 (10th Cir. 2005); *Vickers*, 453 F.3d 757; *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285; *Evans v. Georgia Regional Hosp.*, 850 F.3d at 1256–57.

576. Thus the very alignment of a person's anatomy with his or her internal sense of being male or female—sex itself—becomes a stereotype. The *Harris* court used its convoluted definitions to conclude that "transgender or transitioning status constitutes an inherently gender non-conforming trait" protected by Title VII. *Harris*, 884 F.3d at 577.

B. Blurring the binary concept of male and female detracts from the fundamental purpose of both Title VII and *Price Waterhouse*—to ensure that male and female employees have equal employment opportunities.

"Physical differences between men and women . . . are enduring." *United States v. Virginia*, 518 U.S. 515, 533 (1996). These differences "remain cause for celebration . . . not for denigration of the members of either sex or for artificial constraints on an individual's opportunity." *Id*. "The two sexes are not fungible . . . ." *Ballard v. United States*, 329 U.S. 187, 193 (1946). Sex classifications may "promote equal employment opportunity" (*California Fed. Sav. & Loan Assn. v. Guerre*, 479 U.S. 272, 289 (1987)) but "may not be used . . . to create or perpetuate the legal, social, and economic inferiority of *women*." *United States v. Virginia*, 518 U.S. at 534 (emphasis added).

Male and female are both human beings, but they are not interchangeable in every respect. When the line is blurred, there is no assurance that women will have equal opportunities vis-a-vis men—as *Price Waterhouse* so aptly illustrates—or men vis-à-vis women. *Oncale* supports this purpose by objectively considering

"reasonably comparable evils" consistent with the statutory language. Unlike *Harris*, *Zarda*, *Hively*, and similar cases, *Oncale* did not redefine the words in the statute.

CONCLUSION

This Court should reverse the Sixth and Second Circuit decisions (*Harris* and *Zarda*), and affirm the Eleventh Circuit (*Bostock*).

Respectfully submitted,

Deborah J. Dewart
Counsel of Record
620 E. Sabiston Drive
Swansboro, NC 28584-9674
(910) 326-4554
debcpalaw@earthlink.net

Tami Fitzgerald
The Institute for Faith and Family
9650 Strickland Road, Suite 103-222
Raleigh, NC 27615
(980) 404-2880
tfitzgerald@ncvalues.org

B. Tyler Brooks
Law Office of B. Tyler Brooks, PLLC
5540 Centerview Drive, Suite 200
Raleigh, NC 27606
(919) 377-9546
btb@btylerbrookslawyer.com

Counsel for Amici Curiae