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

In the Supreme Court of the United States

GERALD LYNN BOSTOCK,
Petitioner,
v.
CLAYTON COUNTY, GEORGIA

ALTITUDE EXPRESS, INC. AND RAY MAYNARD
Petitioner,
v.
MELISSA ZARDA AND WILLIAM MOORE, JR., AS CO-INDEPENDENT EXECUTORS OF THE ESTATE OF DONALD ZARDA

R.G. & G.R. HARRIS FUNERAL HOMES, INC.,
Petitioner,
v.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND AIMEE STEPHENS

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

BRIEF FOR THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE EMPLOYEES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Cases—Continued Page(s)

Cases—Continued Page(s)

Statutes:

Miscellaneous:

Miscellaneous—Continued: Page(s)

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INTEREST OF AMICUS CURIAE[1]

The American Bar Association (ABA) respectfully submits this brief as amicus curiae in support of the employees in *Bostock* v. *Clayton County, Georgia*, No. 17-1618, *Altitude Express, Inc.* v. *Zarda*, No. 17-1623, and *R.G. & G.R. Harris Funeral Homes, Inc.* v. *EEOC*, No. 18-107. The ABA urges the Court to recognize that the prohibition in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a) (Title VII), against employment discrimination "because of * * * sex" encompasses discrimination against persons whose sexual orientation or transgender status diverges from the characteristics society ascribes to them on the basis of sex.

Applying the straightforward, unqualified statutory text, this Court has long recognized that Title VII's ban on sex-based employment discrimination codified a "broad rule of workplace equality," *Harris* v. *Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993), which reflects "societal condemnation of invidious bias in employment decisions" based on sex, *McKennon* v. *Nashville Banner Pub. Co.*, 513 U.S. 352, 357 (1995). Recognizing sexual orientation and transgender status discrimination as forms of sex discrimination honors the plain text of Title VII's statutory prohibition against discrimination

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus curiae states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party, or any other person other than amicus curiae or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented in writing to the filing of this brief.

"because of * * * sex," consistent with this Court's long-standing interpretations.

The ABA, the largest voluntary bar association in the United States, consists of more than 400,000 attorneys in private law firms, corporations, non-profit organizations, and government agencies. In addition to practicing lawyers, the organization's membership includes judges,[2] lawyers, law professors, law students, and non-lawyer "associates" in related fields. Reflecting our diverse society, the ABA's significant membership consists of individuals of all different races, religions, national origins, genders, sexual orientations, and gender identities.

The ABA's fundamental mission focuses on serving the legal profession and the public "by defending liberty and delivering justice" through efforts designed to promote the full and equal participation in the legal profession by *all* persons, including persons of differing sexual orientations and transgender status, see ABA Goal III, to eliminate bias and enhance diversity in the legal profession and the justice system, and to advance the rule of law through work for just laws, see ABA Goal IV.[3] Consistent with that mission, the ABA has

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[2] Neither this brief nor the decision to file this brief should be interpreted to reflect the views of any judicial member of the ABA. No inference should be drawn that any members of the Judicial Division Council participated in the adoption or endorsement of the positions in this brief. No member of the Judicial Division Council received this brief prior to filing.

[3] See American Bar Association, *ABA Mission and Goals*, https://www.americanbar.org/about_the_aba/aba-mission-goals/.

long championed the elimination of sex discrimination in our society to ensure that all persons—regardless of sex, gender, sexual orientation, or transgender status—can fully and equally participate in the public and private spheres, including the legal profession, judicial system, and political, business, and social institutions.

The ABA adopted its first policy against sexual orientation discrimination in February of 1989—over thirty years ago—which urged ending discrimination on the basis of sexual orientation in employment, housing, and public accommodation.[4] Since that time, the ABA has continued to express and amplify the organization's strong opposition to *all* forms of discrimination, including sex discrimination against those whose sexual orientation and transgender status do not conform to traditional sex norms. For example, in August of 2006, the ABA expanded the policy enacted in 1989, by adopting a similar resolution with respect to discrimination based on actual or perceived gender identity.

Of particular relevance here, in February and August of 2018, the ABA adopted policies recognizing that Title VII's prohibition of sex discrimination includes discrimination against persons whose sexual orientation or gender identity does not conform to sex stereotypes and supporting an identical interpretation of the analogue prohibition set forth in Section 1557 of the Affordable Care Act, 42 U.S.C. 18116(a). Then, in January of 2019, the ABA urged Congress to pass legislation explicitly affirming that discrimination because of

[4] Only recommendations that have been presented to and adopted by the ABA's House of Delegates become ABA policy.

sexual orientation, gender identity or expression, sex stereotyping, or pregnancy, constitute forms of sex discrimination prohibited by Title VII and similar federal statutory schemes. While such affirmation would be welcome, Title VII requires no amendment to encompass all forms of discrimination in which an employee is subjected to adverse treatment because of the employee's sex.

Consistent with its longstanding policies against all forms of discrimination, the ABA has served as a leading voice before the Court in nearly every landmark discrimination case involving sex, sexual orientation, or gender identity over the past two decades. Specifically, the ABA filed amicus briefs in *Gloucester County School Board* v. *G.G. ex rel. Grimm*, 137 S. Ct. 1239 (2017); *Fisher* v. *University of Texas at Austin*, 136 S. Ct. 2198 (2016); *Obergefell* v. *Hodges*, 135 S. Ct. 2584 (2015); *United States* v. *Windsor*, 570 U.S. 744 (2013); *Christian Legal Society* v. *Martinez*, 561 U.S. 661 (2010); *Jackson* v. *Birmingham Board of Education*, 544 U.S. 167 (2005); *Lawrence* v. *Texas*, 539 U.S. 558 (2003); *Grutter* v. *Bollinger*, 539 U.S. 306 (2003); *Boy Scouts of America* v. *Dale*, 530 U.S. 640 (2000); and *Romer* v. *Evans*, 517 U.S. 620 (1996).

The ABA's work reflects the organization's recognition of the significant harms that discrimination and exclusion cause on our Nation's institutions, and in particular to the legal profession. As reflected in the ABA's policies, the ABA condemns such discrimination based on the organization's fundamental commitment to the ideal of full and equal opportunity: no person should be denied basic civil rights because of member-

ship in a minority group. Employment decisions, particularly in the legal profession, should be rooted in individualized facts and assessments, not sex-based preferences, assumptions, expectations, stereotypes, or norms, arising from an individual's sexual orientation or transgender status.

For these reasons, the ABA has a strong interest in advocating for a resolution in these cases that promotes equal treatment to ensure the full participation by all in employment, and, consequently, civic and professional settings.

SUMMARY OF THE ARGUMENT

Several of this Court's decisions reflect a developing appreciation of the injury that can be inflicted when a "disadvantage imposed is born of animosity toward the class of persons affected." *Romer* v. *Evans*, 517 U.S. 620, 634 (1996). But whereas many of those cases required the Court to consider the interplay of gender and sexual orientation discrimination as a matter of constitutional doctrine, the case at hand presents a simple question of statutory construction. The issue presented here is whether Title VII's express statutory prohibition against discrimination "because of * * * sex" encompasses discrimination against someone because that person's sexual orientation or transgender status does not conform to traditional stereotypes for persons of that ascribed sex. This Court has already answered that question, in substance, when it held in cases like *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989), and *Los Angeles Department of Water & Power* v. *Man-*

hart, 435 U.S. 702 (1978), that Title VII bars discrimination on the basis of sex stereotyping.

In passing Title VII, "Congress made the simple but momentous announcement that sex, race, religion, and national origin" have *no* relevance "to the selection, evaluation, or compensation of employees." *Price Waterhouse*, 490 U.S. at 239 (plurality opinion). Indeed, the statute facially reflects Congress' intent to bar employment decisions on the basis of sex. In now-familiar language, Title VII forbids an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment," or to "limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, *because of* such individual's * * * *sex*." 42 U.S.C. 2000e-2(a)(1)-(2) (emphases added).

This prohibition embodies a "broad rule of workplace equality," *Harris* v. *Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993), that "strike[s] at the *entire* spectrum of disparate treatment" based on sex, among other protected characteristics, *Manhart*, 435 U.S. at 707 n.13 (emphasis added), "regardless of whether the discrimination" targets "majorities or minorities," *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 71-72 (1977). Consistent with these broadly sweeping objectives, this Court has long held that sex discrimination unravels the fabric of American society by excluding people from participating in public and private life, and offends our

Nation's shared commitment to individual dignity by classifying people based on their sex rather than their individual qualities and attributes.

Reading Title VII to prohibit discrimination on the basis of the stereotypes regarding sexual orientation and transgender status that society ascribes to individuals because of sex honors the express text of the statute as construed through decades of this Court's anti-discrimination jurisprudence. "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, [the] * * * judicial inquiry is complete." *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 461-462 (2002). In accordance with the text's plain meaning, people experience discrimination "because of * * * sex" when they have been treated differently than they would have been had their sex been different. If a person is fired because he is a man who loves a man but would not have been fired if he had been a woman who loves a man, that person has been discriminated against "because of * * * sex." If a person is fired for presenting and identifying as female, because the employer ascribes that person as male, but would not have been fired if the employer ascribed that person as female, the employee has been fired "because of * * * sex."

This Court's precedent makes clear that this kind of "but for" discrimination lies at the heart of anti-discrimination protections. In the context of race, for example, the Court made clear that anti-miscegenation laws were a form of discrimination on the basis of race, notwithstanding their "equal application" to white and

black persons, because a law that "makes the color of a person's skin the test of whether his conduct is a criminal offense" is one that restricts rights "on account of race." *Loving* v. *Virginia*, 388 U.S. 1, 11-12 (1967). The Court has construed Title VII to employ a similar "but for" test. *Manhart*, 435 U.S. at 711. The acts challenged here easily qualify; they would not have been taken had the employee's sex been different from the one ascribed to them by their employers. The discrimination they experienced was therefore "because of * * * sex."

Failure to recognize these forms of discrimination would leave unchecked a significant and pervasive source of workplace discrimination, affecting a broad swath of individuals with minority sexual orientation or transgender status. More than 4% of the American workforce self-identifies as lesbian, gay, bisexual, or transgender (LGBT), and numerous studies have highlighted the severe economic disparities and workplace instability faced by LGBT persons.[5] Indeed, data collected by Gallup Inc. suggests that LGBT persons have significantly higher unemployment rates, 9%, than non-LGBT persons, 5%. The consequences borne from these discriminatory workplace disadvantages abridge LGBT persons' ability to participate fully in the larger economy and represent a deprivation of LGBT persons' entitlement under Title VII to equal treatment in employment.

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[5] See, *e.g.*, Sandy E. James et al., 2015 U.S. Transgender Survey 11, 12, 14 (2016), http://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF.

ARGUMENT

I. Discrimination Against Persons Because Of Their Minority Sexual Orientation Or Transgender Status Occurs Because Of Sex And Violates Title VII

As this Court has observed, Congress enacted Title VII for the plainly prophylactic purposes of achieving "equality of employment opportunities," removing historical barriers, *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 429-430 (1971), and making persons whole for injuries suffered from unlawful employment discrimination, see *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975).

Consistent with these broad remedial purposes, Title VII's prohibition on discrimination "because of" an individual's sex encompasses three concepts of special relevance here. *First*, Title VII forbids "treatment of a person in a manner which but for that person's sex would be different." *Los Angeles Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 711 (1978). *Second*, Title VII precludes employers from evaluating employees on the basis of stereotypes associated with their sex (or ascribed sex) or their perceived non-conformity with gender stereotypes. See *id.* at 707; accord *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 250-251 (1989) (plurality). *Third*, Title VII prohibits discrimination based on the interaction of a protected aspect of an employee's identity with the protected aspect of another person with whom the employee associates. See *Hively* v. *Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 349 (7th Cir. 2017) (en banc) (holding that Title VII prohibits

associational discrimination on the basis of race as well as color, national origin, religion, and sex); cf. *Loving* v. *Virginia*, 388 U.S. 1, 7-8 (1967) (finding that associational discrimination violates the Equal Protection Clause).

Sexual orientation and transgender status discrimination constitute classic forms of sex discrimination under the first two pillars of Title VII's protections, and discrimination on the basis of sexual orientation equally qualifies as associational discrimination.

A. Sexual Orientation And Transgender Status Discrimination Only Occur "Because Of" The Individual's "Sex"

Title VII prohibits, in straightforward fashion, discrimination "because of * * * sex." 42 U.S.C. 2000e-2(a)(1)-(2). Interpreting this plain language, this Court adopted a "simple test" for determining whether an employment practice constitutes sex discrimination: "whether the evidence shows treatment of a person in a manner which *but for* the person's sex would be different." *Manhart*, 435 U.S. at 711 (emphasis added).

"When the words of a statute are unambiguous, * * * [the] 'judicial inquiry is complete.' " *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 462 (2002). The Court's inquiry should "begin and end" with Title VII's unambiguous text. *Star Athletica* v. *Varsity Brands*, 137 S. Ct. 1002, 1010 (2017). The Court has repeatedly emphasized "the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written," *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992), and eschewed interpretations that

stray from the statutory text, see, *e.g.*, *Magwood* v. *Patterson*, 561 U.S. 320, 334 (2010) ("We cannot replace the actual text with speculation as to Congress' intent.").

Title VII's express text controls the resolution of these cases. Adherence to Title VII's "because of * * * sex" language supports only one conclusion—that Title VII encompasses discrimination because of the sex of the employee whose sexual orientation or transgender status does not conform to the employer's sex-based stereotypes.

Sexual orientation discrimination inherently involves sex-based differentiation. The employee's sex constitutes an essential—but for—element of the discrimination itself, because identifying an individual's sexual orientation requires two key considerations: the individual's sex and the sex of the individual's partners. Therefore, sexual orientation fundamentally constitutes a function of sex—both in terms of the employee's sex *and* the employee's sexual attraction to individuals of the same sex. See *Hively*, 853 F.3d at 350 ("It would require considerable calisthenics to remove the 'sex' from 'sexual orientation.'").

Discrimination on the basis of sexual orientation thus easily satisfies the Court's "but for" test for determining whether an employment practice constitutes sex discrimination. *Manhart*, 435 U.S. at 711. In the context of sexual orientation discrimination, the employee's *sex* plainly provides the impetus, at least in part, for the differential treatment. For example, a male employee terminated because of his sexual attrac-

tion to, or relationship with, another male would *not* have been terminated if he had been a woman attracted to, or in a relationship with, the same male partner—and that differential treatment only occurs because of (and would not have occurred "but for") the male employee's sex. Under the Court's own inquiry, sexual orientation discrimination qualifies as "paradigmatic sex discrimination." *Hively*, 853 F.3d at 345 (describing the same sort of hypothetical as "paradigmatic sex discrimination").

Analogously, an employer cannot fire an employee on the basis of transgender status without being motivated, at least in part, by the employee's sex. Transgender status discrimination, like discrimination on the basis of sexual orientation, presents a classic form of sex discrimination because the employee's sex assigned at birth, as opposed to the sex to which the employee identifies, necessarily affects the employment decision.

An employer that refuses to hire a transgender woman because of her gender transition subjects the woman to differential treatment because of the sex the employer ascribes to the employee. Therefore, transgender status discrimination necessarily entails treatment that would have been different "but for" the employee's sex. See *EEOC* v. *R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 575 (6th Cir. 2018) ("[I]t is analytically impossible to fire an employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex."), cert. granted, 139 S. Ct. 1599 (2019).

These "simple" conclusions remain true, regardless of whether Congress' precise intent at the time of Title VII's enactment encompassed discrimination against persons because of their minority sexual orientation or transgender status. As this Court has explained, Title VII's protections extend far beyond the "principal evil" envisioned by Congress at the time of enactment. *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).

The Court has repeatedly declined to construe Title VII's protections in a narrow, parsimonious fashion. The Court has recognized, for example, that sexual harassment, see *Meritor Sav. Bank, FSB* v. *Vinson*, 477 U.S. 57, 66-67 (1986), and a "hostile work environment" can violate Title VII, even though those specific practices nowhere "appear in the statutory text," *Burlington Indus., Inc.* v. *Ellerth*, 524 U.S. 742, 752 (1998). And, in *Oncale*, this Court found that sex discrimination encompassed same-sex harassment claims, even though recognizing "male-on-male sexual harassment in the workplace" "was assuredly not the principal evil" that concerned Congress at enactment. 523 U.S. at 79-80. Time and again, the Court has given full effect to the language Congress chose in Title VII. The present cases are as much at the core of Title VII's proscription as those other claims the Court has recognized.

The enactment of subsequent legislation that specifically list "sexual orientation" and "gender identity" as prohibited grounds of discrimination does not undermine the plain meaning of the broad language used by Congress in Title VII. To be sure, over thirty years after passage of Title VII, Congress enacted the Hate

Crimes Act, which prohibits violence because of "actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability," 18 U.S.C. 249(a)(2)(A), and amended the Violence Against Women Act to prohibit discrimination on the basis of "sexual orientation" and "gender identity," 34 U.S.C. 12291(b)(13)(A). But such belt and suspenders language in later legislation provides little insight into the meaning of the unqualified phrase used in Title VII, "because of * * * sex." The "Constitution puts Congress in the business of writing new laws, not interpreting old ones." *United States* v. *Estate of Romani*, 523 U.S. 517, 536 (1998) (Scalia, J., concurring). "[L]ater enacted laws * * * do not declare the meaning of earlier law." *Ibid.*

The absence of an amendment to Title VII to include expressly sexual orientation and transgender status similarly "lacks 'persuasive significance' because 'several equally tenable inferences' may be drawn from such inaction," including the simple understanding that the existing legislation *already* incorporated the new language. *Pension Benefit Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 650 (1990). Simply put, "Congress cannot express its will by a *failure* to legislate." *Estate of Romani*, 523 U.S. at 536 (Scalia, J., concurring).

The Court should give effect to the words of Title VII, which prohibit adverse employment "because of * * * sex." Each employee in the cases at bar suffered discrimination that would not have occurred but for the employee's sex; Title VII's plain and express language precludes precisely that.

B. Sexual Orientation And Transgender Status Discrimination Necessarily Rest On Sex Stereotypes

Discrimination against persons whose sexual orientation or transgender status diverges from the characteristics society ascribes to them on the basis of sex inherently implicates impermissible stereotyping.

Beginning in 1978, this Court described the "well recognized" notion that "employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females." *Manhart*, 435 U.S. at 707. As the Court explained, employment decisions cannot be rooted in "[m]yths and purely habitual assumptions," *ibid.*, because "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes," *id.* at 707 n.13 (citation omitted).

In 1989, a plurality of this Court built upon that precedent, by taking Title VII's proscription against discrimination "*because of* * * * sex" "to mean that gender must be *irrelevant* to employment decisions." *Price Waterhouse*, 490 U.S. at 240 (plurality opinion) (emphasis added). According to the plurality, "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender," because "we [have moved] beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group." *Id.* at 250-251.

A plurality of this Court, joined by two concurring Justices, therefore concluded that a female employee who faced an adverse employment decision because she failed to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry," *Price Waterhouse*, 490 U.S. at 235 (plurality opinion), stated a claim for sex discrimination under Title VII, even though she did not experience discrimination for being a woman *per se*, but instead for failing to be womanly *enough*, see *id.* at 250-252 (plurality opinion); see also *id.* at 259 (White, J., concurring in the judgment); *id.* at 272-273 (O'Connor, J., concurring in the judgment).

The Court's more recent cases continue to condemn reliance on outdated sex-based stereotypes, albeit in slightly different contexts. Indeed, this Court recently restated its longstanding "suspicion" of laws that rely on "overbroad generalizations about the different talents, capacities, or preferences of males and females," particularly those reliant on "fixed notions" of gender "roles and abilities." *Sessions* v. *Morales-Santana*, 137 S. Ct. 1678, 1692 (2017). "Laws according or denying benefits" based on "stereotypes" about traditional roles, this Court reasoned, create a "self-fulfilling cycle of discrimination" and prove "stunningly anachronistic." *Id.* at 1693.

Discrimination on the bases of sexual orientation and transgender status rests precisely on the sort of "[m]yths," "purely habitual assumptions," and "stunningly anachronistic" stereotyped impressions condemned in *Manhart*, *Price Waterhouse*, and *Sessions*.

Indeed, sexual orientation discrimination rests on a classical gender stereotype—the belief that men should only be attracted to women and that women should only be attracted to men. Under either scenario, the employees in question have rebuffed the stereotypical roles ascribed to their sex, and any adverse employment decision based on the fact that the employee (whether male or female) walks differently, talks differently, dresses differently, or dates or marries a same-sex partner, represents nothing more than a reaction to the individual's sex. Sexual orientation discrimination squarely falls within the purview of Title VII's proscription against sex discrimination. See *Zarda* v. *Altitude Express, Inc.*, 883 F.3d 100, 120-121 (2d Cir. 2018) ("Applying *Price Waterhouse*'s reasoning to sexual orientation, we conclude that when, for example, 'an employer * * * acts on the basis of a belief that [men] cannot be [attracted to men], or that [they] must not be,' but takes no such action against women who are attracted to men, the employer 'has acted on the basis of gender.'"), cert. granted, 139 S. Ct. 1599 (2019).

Discrimination on the basis of transgender status violates these norms in the same way. Indeed, an individual identifies as transgender precisely because his or her behavior transgresses stereotypes of gender-appropriate behavior and appearance. But just like a female employee could not be discriminated against based on long-held gender stereotypes (as in *Manhart*) or for failing to be womanly enough (as in *Price Waterhouse*), a transgender woman cannot be discriminated against for failing to be manly enough, or, alternatively, for being too feminine. See Ilona M. Turner, *Sex Stere-*

otyping Per Se: Transgender Employees and Title VII, 95 Cal. L. Rev. 561, 590 (2007) ("If we conceded that Title VII was enacted to protect women from being judged unfairly according to gender stereotypes, we must also agree that Title VII's protections should extend to transgender individuals who are discriminated against because of their perceived violation of gender norms."). In other words, Title VII proscribes discrimination against women for failing to act womanly enough, and against people perceived as men who do. *Smith* v. *City of Salem*, 378 F.3d 566, 574 (6th Cir. 2004).

Under any circumstances, this Court plainly recognizes that discrimination on the basis of stereotypical impressions about the characteristics of males or females constitutes sex discrimination, see *Manhart*, 435 U.S. at 707, and sexual orientation and transgender status discrimination cannot be disentangled from discrimination on the basis of sex stereotypes. Consequently, just like the Court's sexual harassment precedent required the conclusion that Title VII includes "sexual harassment of any kind that meets the statutory requirements," *Oncale*, 523 U.S. at 80, the Court's sex stereotyping precedent compels a holding that Title VII encompasses all forms of sex stereotyping, including those on the grounds that the employee's sexual orientation or transgender status does not conform to the employer's stereotypes for the employee's ascribed sex.

For these reasons as well, discrimination on the bases of sexual orientation and transgender status neces-

sarily fall within Title VII's proscription against sex discrimination.

C. Sexual Orientation Discrimination Constitutes Impermissible Associational Discrimination

Finally, where an employer discriminates based on sexual orientation, the employer's motivation necessarily includes opposition to romantic association between persons of particular sexes.

In 1967, this Court recognized that "restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." *Loving*, 388 U.S. at 12. In *Loving*, the Commonwealth of Virginia argued that anti-miscegenation statutes comported with the Equal Protection Clause because such laws applied equally to white and black citizens. See *id.* at 7-8. But "equal application," this Court reasoned, could not save a statute based "upon distinctions drawn according to race." *Id.* at 10-11. Accord *McLaughlin* v. *Florida*, 379 U.S. 184, 189-191 (1964) ("Judicial inquiry under the Equal Protection Clause * * * does not end with a showing of equal application among the members of the class defined by the legislation.").

The same analysis applies to the protections of Title VII. There is a widespread consensus among the courts of appeals that associational discrimination is a form of discrimination that violates Title VII. See, *e.g.*, *Holcomb* v. *Iona Coll.*, 521 F.3d 130, 139 (2d Cir. 2008); *Tetro* v. *Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc.*, 173 F.3d 988, 994-995 (6th Cir.

1999); *Deffenbaugh-Williams* v. *Wal-Mart Stores, Inc.*, 156 F.3d 581, 589 (5th Cir. 1998), vacated in part on other grounds by *Williams* v. *Wal-Mart Stores, Inc.*, 182 F.3d 333 (5th Cir. 1999) (en banc); and *Parr* v. *Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986). Although *Loving* and many of the aforementioned cases involved associations between persons of different races, many courts have recognized that the principles of associational discrimination apply equally to all of Title VII's protected classifications, including sex. See, *e.g.*, *Hively*, 853 F.3d at 345; *Barrett* v. *Whirlpool Corp.*, 556 F.3d 502, 512 (6th Cir. 2009).

In *Holcomb*, a white male sued Iona College, alleging that his former employer terminated him because of his interracial marriage. The Court of Appeals for the Second Circuit held that "an employer may violate Title VII if [the employer] takes action against an employee because of the employee's association with a person of another race." 521 F.3d at 138. In reaching that conclusion, the Court of Appeals emphasized that, where an employee suffers "adverse action because an employer disapproves of interracial association, the employee suffers discrimination" within the ambit of Title VII's proscription against discrimination "because of * * * race." *Id.* at 139.

More recently, the Court of Appeals for the Seventh Circuit extended that reasoning to *all* protected classifications under Title VII. See *Hively*, 853 F.3d at 347-349. Because the statute "draws no distinction" between discrimination based on race and that based on sex, the court found no basis to limit associational discrimination claims to discrimination because of the em-

ployee's race. *Id.* at 349. Title VII precludes, without equivocation, adverse employment action "because of [an] individual's race, color, religion, sex, *or* national origin." 42 U.S.C. 2000e-2(a)(1)-(2). Thus, to the extent Title VII prohibits discrimination on the basis of the race of an individual with whom the employee associates, Title VII necessarily encompasses discrimination on the basis of the national origin, color, religion, *or* sex of the employee's associate.

In all events, the fundamental crux of the claim remains the same: the plaintiff would not have suffered an adverse employment action if his or her sex, race, color, national origin, or religion had been different. For example, if an employer disapproves of same-sex marriage and terminates a male employee married to a man, the employee suffers associational discrimination based on his *own* sex (and the sex of those with whom he associates). Discrimination of that form strikes at the heart of Title VII's protections by impermissibly making an employee's sex a motivating factor for an adverse employment action.

For these reasons, discrimination on the basis of sexual orientation falls within Title VII's proscription against sex discrimination.

II. Sexual Orientation And Transgender Status Discrimination Impose A Considerable Detrimental Impact On Individuals And Society As A Whole

Discrimination against persons because of their minority sexual orientation or transgender status creates profoundly negative consequences that reverberate across all aspects of society, particularly in terms of access to employment opportunities and public accommodations. Indeed, numerous recent studies have quantified the particularly pronounced institutional discrimination experienced by lesbian, gay, bisexual, transgender, and queer (LBGTQ) Americans. These are precisely the types of societal costs that Congress sought to stamp out through its adoption of Title VII.

The extent of discrimination against persons on the basis of their sexual orientation is staggering. According to a recent study published by the Harvard T.H. Chan School of Public Health, at least one in five LGBTQ people report being personally discriminated against because of their sexuality or transgender status in the contexts of job applications, obtaining equal pay, and consideration for advancement. See Harvard T.H. Chan School of Public Health, *Discrimination in America: Experiences and Views of LGBTQ Americans* (Nov. 2017) (*Discrimination in America*).

That number reflects the fact that in many areas of the country LGBT people have no express protection from discrimination. The Williams Institute on Sexual Orientation Law and Public Policy at UCLA School of Law has confirmed the consistently greater discrimina-

tion confronted by LGBT people. According to their findings, an estimated 8.1 million LGBT workers live in the United States, and 51% of those workers live in states without explicit statutory protections against employment discrimination based on sexual orientation and transgender status. See UCLA School of Law Williams Institute, *LGBT People in the U.S. Not Protected by State Nondiscrimination Statutes* (Mar. 2019). The reported employment experiences of these individuals readily reflect the absence of such protection—the Williams Institute estimates that nationwide unemployment for LBGT persons rests at 9% (as compared to 5% for non-LGBT people), and that roughly 25% of LGBT people have incomes lower than $24,000 per year (as compared to 18% of non-LGBT people). See Jocelyn Samuels, *LGBT workers should be protected from discrimination. Let's hope the Supreme Court agrees*, CNN Business (Apr. 24, 2019). In one survey alone, 60% of lesbian, gay, and bisexual (LGB) people reported being fired from a job or denied employment (as compared to 40% of non-LGB respondents), and 48% of LGB people indicated that they had been denied a promotion or received a negative evaluation (as compared to 32% of Non-LGB respondents). See Ilan H. Meyer, *Experiences of Discrimination among Lesbian, Gay and Bisexual People in the US*, UCLA School of Law Williams Institute (Apr. 2019).

Research related to transgender status discrimination provides an even bleaker depiction of the economic disparities confronted by transgender people. In 2015, the National Center for Transgender Equality reported the unemployment rate of transgender people at 15%—

over three times higher than the national average. See Sandy E. James, et al., *The Report of the 2015 U.S. Transgender Survey*, National Center for Transgender Equality (Dec. 2016). In addition, the study found that 29% of transgender people live below the poverty line, more than twice the national average. *Ibid.* And, in one earlier study, 90% of transgender people reported some form of harassment or workplace mistreatment, while 47% of those individuals experienced some form of adverse workplace outcome. See Jerome Hunt, *A State-by-State Examination of Nondiscrimination Laws and Policies*, Center for American Progress Action Fund (June 2012).[6]

Even those staggering figures paint an incomplete picture, because LGBTQ Americans report significant personal experiences of discrimination in spheres beyond the workplace as well. According to the Harvard study, a majority of all LGBTQ people have *personally* experienced slurs (57%) or offensive comments (53%) about their sexual orientation or transgender status. See *Discrimination in America.* Likewise, over half of LGBTQ people report experiencing threats or non-sexual harassment, sexual harassment, or violence, because of their sexual orientation or transgender status,

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[6] The legal profession offers no immunity to these issues. See The Massachusetts Lesbian and Gay Bar Association, *The Prevalence of Sexual Orientation Discrimination in the Legal Profession in Massachusetts* (Mar. 1994) (explaining that 75% "of lesbian and gay attorneys responding to a [bar] survey have either experienced discrimination based on sexual orientation or heard anti-gay remarks by colleagues in the office or in court").

and 34% report having been harassed or questioned about their presence in a bathroom. *Ibid.*

The consequences of these far-reaching experiences of discrimination can hardly be overstated. Sexual orientation and transgender status form part of the immutable essence of an individual's being. Discrimination on that basis is destructive both of the individual and to society, especially one built upon the ideal of equal protection under the laws.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Eleventh Circuit should be reversed, and the judgments of the Courts of Appeals for the Second and Sixth Circuits should be affirmed.

Respectfully submitted,

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