

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 WOMEN CEOs AND OTHER
C-SUITE EXECUTIVES AS *AMICAE CURIAE*
IN SUPPORT OF PETITIONER BOSTOCK AND
RESPONDENTS ZARDA, MOORE, AND STEPHENS**

—◆—
RICHARD M. SEGAL
PILLSBURY WINTHROP
SHAW PITTMAN LLP
501 West Broadway, Suite 1100
San Diego, CA 92101

CYNTHIA COOK ROBERTSON
ROBERT C. K. BOYD
PILLSBURY WINTHROP
SHAW PITTMAN LLP
1200 Seventeenth Street NW
Washington, DC 20036

SUZANNE B. GOLDBERG
Counsel of Record
SEXUALITY AND
GENDER LAW CLINIC
COLUMBIA LAW SCHOOL
435 West 116th Street
New York, NY 10027
(212) 854-0411
sgoldberg@columbia.edu

Counsel for Amicae Curiae

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
INTEREST OF <i>AMICAE CURIAE</i>	1
SUMMARY OF ARGUMENT	6
ARGUMENT.....	9
I. Courts Have Repeatedly Identified—and Rejected—Sex Stereotypes that Impede Women’s Opportunities in the Workforce	9
A. Employers’ Use of Stereotypes About Women’s “Looks,” Personal Style, and Family Life Have Been Repeatedly Found to be Discriminatory Under <i>Price Waterhouse</i>	10
1. “Looks”	11
2. Aggressiveness and Leadership.....	13
3. Stereotypes About Sexual Interactions and Merit	17
4. Family Priorities and Dependency	19
B. Constitutional Jurisprudence Has Also Long Rejected Reliance on Sex Stereotypes by Government Actors	23
II. Sex Stereotypes Continue to Limit Women’s Workplace Opportunities, as Extensive Research Demonstrates	27
A. Expectations About Who Women and Men Are—and Who They Should Be—Contribute to These Disparities.....	28

TABLE OF CONTENTS—Continued

	Page
B. Stark Differences Continue in Earnings and Leadership Roles for Women and Men	33
CONCLUSION	36

APPENDIX

<i>Amicae Curiae</i> —Additional Background and Experience.....	App. 1
--	--------

TABLE OF AUTHORITIES

	Page
CASES	
<i>Back v. Hastings on Hudson Union Free Sch. Dist.</i> , 365 F.3d 107 (2d Cir. 2004).....	20, 21
<i>Burns v. Johnson</i> , 829 F.3d 1 (1st Cir. 2016).....	15, 16
<i>Chadwick v. WellPoint</i> , 561 F.3d 38 (1st Cir. 2009)	19, 20, 21
<i>Cleveland v. LaFleur</i> , 414 U.S. 632 (1974)	24, 25
<i>Craig v. Boren</i> , 429 U.S. 190 (1976).....	25
<i>Ellingsworth v. Hartford Fire Ins. Co.</i> , 247 F. Supp. 3d 546 (E.D. Pa. 2017).....	12, 13
<i>Frontiero v. Richardson</i> , 411 U.S. 677 (1973).....	26
<i>Gen. Elec. Co. v. Gilbert</i> , 429 U.S. 125 (1976), <i>superseded on other grounds by statute in Shaw v. Delta Air Lines, Inc.</i> , 463 U.S. 85 (1983).....	23
<i>Greenbaum v. Handelsbanken</i> , 67 F. Supp. 2d 228 (S.D.N.Y. 1999)	14, 15
<i>Hussain v. Fed. Express Corp.</i> , 657 F. App'x 591 (7th Cir. 2016).....	13
<i>J.E.B. v. Alabama ex rel. T.B.</i> , 511 U.S. 127 (1994).....	25, 26
<i>Lewis v. Heartland Inns of Am., L.L.C.</i> , 591 F.3d 1033 (8th Cir. 2010).....	11, 12
<i>Margolis v. Tektronix, Inc.</i> , 44 F. App'x 138 (9th Cir. 2002)	14

TABLE OF AUTHORITIES – Continued

	Page
<i>Miss. Univ. for Women v. Hogan</i> , 458 U.S. 718 (1982).....	25, 26
<i>Nevada Dep’t of Human Res. v. Hibbs</i> , 538 U.S. 721 (2003).....	23
<i>Parker v. Reema Consulting Servs., Inc.</i> , 915 F.3d 297 (4th Cir. 2019).....	17, 18
<i>Phillips v. Martin Marietta Corp.</i> , 400 U.S. 542 (1971).....	22, 23
<i>Pivrotto v. Innovative Sys., Inc.</i> , 191 F.3d 344 (3d Cir. 1999).....	15
<i>Price Waterhouse v. Hopkins</i> , 490 U.S. 228 (1989).....	<i>passim</i>
<i>Prowel v. Wise Bus. Forms, Inc.</i> , 579 F.3d 285 (3d Cir. 2009).....	13
<i>Quigg v. Thomas Cty. Sch. Dist.</i> , 814 F.3d 1227 (11th Cir. 2016).....	17
<i>Roberts v. U.S. Jaycees</i> , 468 U.S. 609 (1984).....	26
<i>Santiago-Ramos v. Centennial P.R. Wireless Corp.</i> , 217 F.3d 46 (1st Cir. 2000).....	21
<i>Sassaman v. Gamache</i> , 566 F.3d 307 (2d Cir. 2009).....	18
<i>Schlesinger v. Ballard</i> , 419 U.S. 498 (1975).....	26
<i>Sessions v. Morales-Santana</i> , 137 S. Ct. 1678 (2017).....	26
<i>Sheehan v. Donlen Corp.</i> , 173 F.3d 1039 (7th Cir. 1999).....	22

TABLE OF AUTHORITIES – Continued

	Page
<i>United States v. Virginia</i> , 518 U.S. 515 (1996).....	24
<i>Weinberger v. Wiesenfeld</i> , 420 U.S. 636 (1975)	25, 26
STATUTE	
Title VII, 42 U.S.C. § 2000(e)(2).....	<i>passim</i>
REGULATIONS	
U.S. Equal Emp. Opportunity Comm’n, Guide- lines on Discrimination Because of Sex, 29 C.F.R. § 1604.1(a)(i)(ii).....	22
OTHER AUTHORITIES	
Alice Eagly & Linda L. Carli, <i>Women and the Labyrinth of Leadership</i> , Harv. Bus. Rev. (Sept. 2007).....	29, 35
Amy J.C. Cuddy et al., <i>When Professionals Be- come Mothers, Warmth Doesn’t Cut the Ice</i> , 60 J. Soc. Issues 701 (2004).....	31
Annie Pancak, <i>Glass Ceiling Slow to Break for Female Attorneys in 2018</i> , LAW360 (May 27, 2019).....	35
Drew Desilver, <i>Women Scarce at Top of U.S. Busi- ness—And in the Jobs That Lead There</i> , PEW RES. CTR. (Apr. 30, 2018)	35

TABLE OF AUTHORITIES – Continued

	Page
Elizabeth H. Gorman & Julie A. Kmec, <i>Hierarchical Rank and Women’s Organizational Mobility: Glass Ceilings in Corporate Law Firms</i> , 114 Am. J. of Soc. 1428 (2009)	29
Hannah Riley Bowles, Linda Babcock, & Lei Lai, <i>Social Incentives for Gender Differences in the Propensity to Initiate Negotiations: Sometimes it Does Hurt to Ask</i> , Org. Behav. & Hum. Decision Processes 84 (2007)	30
INSTITUTE FOR WOMEN’S POL’Y RES., <i>Pay Equity and Discrimination</i> (2019).....	33
Joan C. Williams, <i>Beyond the Glass Ceiling: The Maternal Wall as a Barrier to Gender Equality</i> , 26 T. Jefferson L. Rev. 1 (2003).....	30
Joanna Barsh & Lereina Yee, MCKINSEY & CO., <i>WOMEN IN THE WORKPLACE</i> 5 (2018).....	34
Madeline E. Heilman & Tyler G. Okimoto, <i>Why are Women Penalized for Success at Male Tasks?: The Implied Communality Deficit</i> , 92 J. of Applied Psychol. 81 (2007)	31
Madeline E. Heilman, <i>Description and Prescription: How Gender Stereotypes Prevent Women’s Ascent Up the Organizational Ladder</i> , 57 J. Soc. Issues 657 (2001)	28
Marie A. Chisholm-Burns et al., <i>Women in Leadership and the Bewildering Glass Ceiling</i> , 74 Am. J. of Health-Sys. Pharmacy 312 (2017).....	28, 29

TABLE OF AUTHORITIES – Continued

	Page
Merida L. Johns, <i>Breaking the Glass Ceiling: Structural, Cultural, and Organizational Barriers Preventing Women from Achieving Senior and Executive Positions</i> , 10 <i>Persp. in Health Info. Mgmt.</i> 6 (Winter 2013).....	32
<i>Quick Take: Women in Management</i> , Catalyst (Jul. 30, 2018).....	28, 35
Rhea E. Steinpreis, Katie A. Anders, & Dawn Ritzke, <i>The Impact of Gender on the Review of Curricula Vitae of Job Applicants and Tenure Candidates: A National Empirical Study</i> , 41 <i>Sex Roles</i> 509 (1999).....	32
Stephanie Bornstein, <i>Unifying Antidiscrimination Law Through Stereotype Theory</i> , 20 <i>Lewis & Clark L. Rev.</i> 919 (2016).....	30
Stephen Benard et al., <i>Cognitive Bias and the Motherhood Penalty</i> , 59 <i>Hastings L.J.</i> 1359 (2008).....	30
U.S. BUREAU OF LAB. AND STAT., <i>Highlights of Women’s Earnings in 2017</i> (Aug. 2018).....	33
U.S. DEP’T OF LAB. WOMEN’S BUREAU, <i>Data and Statistics–Earnings</i>	34
U.S. Glass Ceiling Commission, <i>A Solid Investment: Making Full Use of the Nation’s Human Capital</i> (Full Report of the Commission, 1995).....	7
WORLD ECONOMIC FORUM, <i>THE GLOBAL GENDER GAP REPORT 9</i> (2018).....	36

INTEREST OF *AMICAE CURIAE*¹

The thirty women who join this brief are current and former chief executive officers and senior executives of companies and organizations across the United States. They lead and have led Fortune 500 companies, mid-size businesses, small firms, and national and regional not-for-profit organizations, and serve on Boards of Directors of public and private companies and charitable organizations.

Each of the *amicae curiae* has an extensive record of accomplishments and contributions in business, not-for-profit arenas, or both. And each recognizes that when employers make decisions based on sex stereotypes—that is, on expectations about how women, or men, should look and act—they impermissibly limit opportunities for all women, and all people, to advance in the workplace, including for employees who are lesbian, gay, bisexual and transgender.

The women joining this brief are listed below, and again with additional biographical information in the attached Appendix. All corporate and other institutional affiliations are provided for identification purposes only.

¹ No counsel for a party authored this brief in whole or in part. No person other than *amicae curiae* or their 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.

- **Jehan Agrama** is the Chief Executive Officer and President of Harmony Gold, a television and film production and distribution company.
- **Amelia Alverson** is the Executive Vice President for University Development and Alumni Relations at Columbia University.
- **Bela Bajarria** is the Vice President for International Originals at Netflix, the world's leading subscription-based internet video streaming service.
- **Lynda Clarizio** is the former President of US Media for Nielsen and the former President of AOL's consolidated advertising businesses.
- **Susan Danziger** is the founder and Chief Executive Officer of Ziggeo, an award-winning cloud-based video technology company.
- **Nancy Dubuc** is the Chief Executive Officer of Vice Media, a global digital media and broadcasting company.
- **Samantha Ettus** is the founder and Chief Executive Officer of Park Place Payments, a women-owned payment processing company.
- **Aria Finger** is the Chief Executive Officer of DoSomething.org, a global non-profit organization that motivates young people to make positive change both online and offline through campaigns that make an impact.

- **Vanessa Flaherty** is the Executive Vice President of Management and a partner at Digital Brand Architects, a management company that represents social media-oriented personalities, creators, and publishers.
- **Ann Fudge** is the former chairman and Chief Executive Officer of Young & Rubicam Brands, a global network of marketing communications companies.
- **Patricia Giggans** is the Chief Executive Officer and Executive Director of Peace Over Violence, a non-profit organization dedicated to building healthy relationships, families, and communities.
- **Annie Goto** is the President of AKGC General Construction Company and Vice President of KPL Select Property Management.
- **Loretta M. Hennessey** founded and manages two private companies: S2S+ Advisors LLC, providing financial advisory services to early stage growth companies, and L Hennessey Associates LLC, providing risk management advisory services to financial institutions.
- **Lorri L. Jean** is the Chief Executive Officer of the Los Angeles LGBT Center, the world's largest LGBT organization of any kind.
- **Reesa Lake** is the Executive Vice President of Brand Partnerships and a Partner at Digital Brand Architects, a management company that represents social media-oriented personalities, creators, and publishers.

- **Hannah Linkenhoker** is the Senior Political Strategist at ICM Partners, one of the world's leading talent and literary agencies, where she is also founder of ICM Politics.
- **Patricia Loret de Mola** is the founder, Chairman, and Chief Executive Officer of HashLynx Inc., a blockchain technology provider specializing in syndicated bank loans and other credit products.
- **Nancy Lublin** is the Chief Executive Officer of Crisis Text Line, a nationwide texting service available to individuals experiencing a personal crisis.
- **Tela Gallagher Mathias** is the Chief Operations Officer at Phoenix Team, a consulting firm specializing in mortgage technology and process, and daughter of Ann Hopkins, the plaintiff in *Price Waterhouse v. Hopkins*.
- **Judy McGrath** is the former Chairman and Chief Executive Officer of MTV Networks.
- **Susan McPherson** is the founder and Chief Executive Officer of McPherson Strategies, a communications consultancy firm focused on improving the social impact of companies while strengthening their brand.
- **Michele Coleman Mayes** is the Vice President, General Counsel and Secretary for the New York Public Library.

- **Janet Carol Norton** is a Board Member, Partner, and Co-head of the Television Production Department at ICM Partners, a leading talent and literary agency.
- **Ramona M. Ortega** is the founder and Chief Executive Officer of My Money My Future Inc., a financial-tech company that offers plans and tools to help multicultural millennials to manage their money.
- **Raina Penchansky** is the Chief Executive Officer of Digital Brand Architects, a management company that represents social media-oriented personalities, creators, and publishers.
- **Jeanne Pinder** is the founder and Chief Executive Officer of ClearHealthCosts, a journalism company dedicated to revealing healthcare costs to consumers.
- **Shonda Rhimes** is the founder of Shondaland, the pioneering storytelling company that has produced numerous award-winning television series and now produces content exclusively for Netflix.
- **Hilary Rosen** is the former Chairman and Chief Executive Officer of the Recording Industry Association of America and is currently a partner at and owner of SKDKnickerbocker, a public affairs and political consulting firm.
- **Sheryl K. Sandberg** is the Chief Operating Officer of Facebook.

- **Ty Stiklorius** is the founder and Chief Executive Officer of Friends at Work, a music management company dedicated to supporting the social justice initiatives advanced by individual artists.



SUMMARY OF ARGUMENT

Traditional ideas and expectations about how women are expected to look and act may seem like a thing of the past—and, in some workplaces, they are. Yet, as the cases and research presented here show, nearly two decades into the twenty-first century these ideas and expectations remain powerful and continue to operate as barriers to women’s workplace advancement and success, including women of all sexual orientations and those who are transgender. Among these are that women:

- will have a feminine “look” and style
- will not be aggressive or tough
- will not have strong leadership skills
- might use sexual relationships to advance at work
- will be financially dependent on a spouse and take care of the home, and
- will have primary responsibility for childcare in ways that preclude advancement at work.

Each of these views, and others like them, has the potential to limit women’s opportunities at work—sometimes at the hiring stage and, often, at the point of promotion to leadership positions.

Put another way, these views contribute to what is often called the “glass ceiling,” which the United States Federal Glass Ceiling Commission defined as “the unseen, yet unbreachable barrier that keeps minorities and women from rising to the upper rungs of the corporate ladder, regardless of their qualifications or achievements.” U.S. Glass Ceiling Commission, *A Solid Investment: Making Full Use of the Nation’s Human Capital* 4 (Full Report of the Commission, 1995). More than two decades later, the phrase “glass ceiling” remains in use and, as data and case law show, the barrier it identifies continues to limit women’s achievements both in and outside of corporate settings.

This Court’s ruling in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), recognized that employers’ reliance on sex stereotypes limits workplace opportunities for individuals who conform to traditional expectations about men and women—and for those who do not. Further, it affirmed that Title VII’s prohibition on sex discrimination reaches these situations. As the Court explained, “An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.” *Id.* at 251.

In the three decades since *Price Waterhouse* was decided, numerous lower courts have applied its sex-stereotyping analysis. These rulings, many of which are discussed below, repeatedly identify the ways that women, as well as some men, are denied promotions or even lose their jobs based on employers' expectations of how women, and men, should look and act.

Extensive social science research discussed below also affirms that sex stereotyping in workplaces remains a significant barrier to women's opportunities to advance and explains why the glass ceiling persists in many sectors, particularly in senior management and other leadership positions.

In short, *Price Waterhouse* recognized that employers sometimes do rely on sex stereotypes to make workplace decisions. And it confirmed that this reliance can limit workplace opportunities for women and men in defiance of Title VII for those who match views of how women and men should look, act, and conduct their personal and family lives, and those who do not. As the cases and data discussed here show, even thirty years after the Court analyzed Ann Hopkins's claim that she had been discriminated against for not fitting Price Waterhouse's view of how a female partner should present herself, employment discrimination based on sex stereotypes continues, including when employers limit individuals' opportunities because of their sexual orientation or gender identity. *Price Waterhouse's* analysis continues to be essential in identifying and addressing these forms of discrimination.



ARGUMENT

I. Courts Have Repeatedly Identified—and Rejected—Sex Stereotypes that Impede Women’s Opportunities in the Workforce

In a matter well known to this Court, Ann Hopkins presented evidence that she was denied partnership at Price Waterhouse—not because of her work ethic or her management-consulting skills—but because some of the partners thought she was “macho” and “overcompensated for being a woman.” *Price Waterhouse*, 490 U.S. at 235. Another partner who reviewed her for promotion noted that he originally saw her as “tough talking” and “somewhat masculine.” *Id.* And one partner advised, in an oft-cited comment, that she take “a course at charm school.” *Id.*

Interestingly, not all who evaluated her saw Hopkins’s qualities in such a negative light. Other partners in her office described Hopkins as having “strong character, independence and integrity.” *Id.* at 234. Her clients agreed; one described Hopkins as “extremely competent, intelligent” and “strong and forthright, very productive, energetic and creative,” and another praised her for “decisiveness, broadmindedness, and ‘intellectual clarity.’” *Id.* That is, the very qualities that some partners found inappropriate or off-putting *for a woman* in this position, others viewed as positive attributes *for anyone* in leadership.

Perhaps most tellingly, a partner who originally saw her as “somewhat masculine” explained that he became a supporter because Hopkins “ha[d] matured”

into someone who was “authoritative, formidable, but much more appealing.” *Id.* at 235. In other words, even for someone who ultimately became a supporter, Hopkins’s “somewhat masculine” qualities were a barrier to her success.

In finding that Price Waterhouse had violated Title VII, 42 U.S.C. § 2000(e)(2), by relying on these views in deciding not to promote Hopkins, this Court gave effect to Congress’s “inten[t] to forbid employers to take gender into account in making employment decisions.” *Id.* at 239 (internal citations omitted). And although *Price Waterhouse* was not the first time this Court recognized that sex-role expectations could stymie women’s opportunities in the workplace, the Court’s recognition of the concrete effects of sex stereotypes in the Title VII context had special importance. It meant that a legal remedy was available for individuals around the country whose employers penalized them for living or presenting themselves in a way that did not match traditional views or stereotypes of how women and men should be, either at work or in family life.

A. Employers’ Use of Stereotypes About Women’s “Looks,” Personal Style, and Family Life Have Been Repeatedly Found to be Discriminatory Under *Price Waterhouse*

Since *Price Waterhouse*, numerous cases have recognized discrimination claims by women who faced

harassment or termination for looking and acting in ways that are not traditionally feminine.

1. “Looks”

Women who do not have a stereotypically feminine “look” are among those who face discriminatory limitations on their workplace opportunities. *Cf. Price Waterhouse*, 490 U.S. at 235 (citing record evidence of a partner telling Ann Hopkins that if she wanted to advance at work, she should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry”).

The underlying facts in *Lewis v. Heartland Inns of Am., L.L.C.*, 591 F.3d 1033, 1036 (8th Cir. 2010), are illustrative. Brenna Lewis was a successful, well-regarded hotel employee whose trajectory in the company was going well—until the company’s director of operations saw her and concluded that Lewis was not a “good fit” for the front-desk role, notwithstanding that Lewis was reportedly well-liked by customers and otherwise effective at her job. *Id.*

The concern was not about Lewis’s competence—to the contrary, she was “valued by her direct supervisors,” had previously received two merit raises, and had been supported for the promotion by her supervisor. *Id.* at 1035-36.

Instead, the operations director’s concern was that “Lewis lacked the ‘Midwestern girl look.’” *Id.* at 1036. This was not the first time that a female employee’s

appearance had affected her career opportunities at Heartland Inns. Record evidence indicated that the same operations director

was heard to boast about the appearance of women staff members and had indicated that Heartland staff should be “pretty,” a quality she considered especially important for women working at the front desk. [She] also had advised a hotel manager not to hire a particular applicant because she was not pretty enough.

Id.

The Eighth Circuit reversed the grant of summary judgment to the employer, holding that “[c]ompanies may not base employment decisions for jobs such as Lewis’ on sex stereotypes, just as Southwest Airlines could not lawfully hire as flight attendants only young, attractive, ‘charming’ women ‘dressed in high boots and hot-pants[.]’” *Id.* at 1042 (citation omitted). Quoting *Price Waterhouse*, the court added: “[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group[.]” *Id.* (quoting 490 U.S. at 251) (second alteration in original).

In another recent example, a federal district court found that a woman who worked in customer service for an insurance company stated a claim based on harassment and constructive discharge related to her non-feminine appearance. *Ellingsworth v. Hartford Fire Ins. Co.*, 247 F. Supp. 3d 546, 549 (E.D. Pa. 2017). Ellingsworth’s complaint alleged that her supervisor,

also a woman, “ridicul[ed] her publicly for ‘dressing like a dyke,’ and forc[ed] her to peel back her clothing to show her coworkers her ‘lesbian tattoo.’” *Id.* at 553. The court found that her complaint “clearly conveys that Ms. Ellingsworth did not conform to [her supervisor’s] idea of how a woman should look, act, or dress.” *Id.* at 554.

The court added: “The fact that Ms. Ellingsworth is not gay simply reveals that [her supervisor] harbored such a strong prejudice and animus as to how women should look, dress, and act, that [she] actually mischaracterized another person’s sexual orientation because of this prejudice.” *Id.* Invoking *Price Waterhouse*, the court observed that “[t]he alleged harassment and discrimination in this case is analogous to the harassment recognized in other viable gender stereotyping cases.” *Id.* See also *id.* at 551 (“Title VII’s ‘because of sex’ language prohibits discrimination based upon employers’ subjectively held gender stereotypes.”) (citing *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 286-87 (3d Cir. 2009) (citing *Price Waterhouse*)).

2. Aggressiveness and Leadership

Like this Court in *Price Waterhouse*, lower courts have also found that employers have impermissibly limited workplace opportunities for women perceived as too aggressive. In *Hussain v. Fed. Express Corp.*, 657 F. App’x 591, 594 (7th Cir. 2016), for example, the Seventh Circuit examined an employer’s reasons for denying a promotion to a longtime female employee. The

supervisor in the case had told this employee that she was not promoted because she was “‘overly aggressive,’ ‘too emotional,’ and showed too much facial expression.” *Id.* Against the backdrop of other decisions at the company, the court found impermissible sex stereotypes might have motivated the promotion denial and reversed the district court’s grant of summary judgment. *Id.* at 596.

The Ninth Circuit similarly determined that a supervisor’s comments about the female software engineer whom he laid off—that she was “pushy” and “aggressive”—was “evidence of sex stereotyping and discriminatory treatment.” *Margolis v. Tektronix, Inc.*, 44 F. App’x 138, 142 (9th Cir. 2002). These comments, along with evidence of the supervisor’s treatment of the plaintiff and other women in the business, led the court to reverse the lower court’s grant of summary judgment and allow the case to go to trial. *Id.*

And in an illustrative case from the banking sector, then-Chief Judge Sotomayor reviewed extensive evidence regarding a woman who had repeatedly been denied a promotion to vice president. *Greenbaum v. Handelsbanken*, 67 F. Supp. 2d 228 (S.D.N.Y. 1999) (Sotomayor, C.J., sitting by designation). The documents and testimony presented at trial showed that Greenbaum, the plaintiff, had consistently met criteria for promotion, yet was denied precisely because she possessed the same trait—aggressiveness—that was highly valued in her male colleagues: “[T]he word ‘aggressive’ was used by . . . officials to describe a form of excellence when describing male traders . . . but was

viewed as a ground for disqualification when considering a woman like Greenbaum.” *Id.* at 253. *See also id.* (“A reasonable juror could have inferred from this evidence that Greenbaum was denied the title of vice president in part because [the bank] applied standards for promotion that were inappropriately stereotypical and gender-biased.”).

Indeed, as the Third Circuit recognized in a related context, the risk to advancement for women who do not fit the employer’s view of how women should act may persist even when the employer continues to hire women. It would be impermissible, the court wrote, for “[a]n employer [to] act on gender-based stereotypes, firing women it perceives as not feminine enough (or as too feminine), or discharging women who are too aggressive while not doing the same to male employees,” even if the employer replaced the fired employees with other women. *Pivrotto v. Innovative Sys., Inc.*, 191 F.3d 344, 355 (3d Cir. 1999) (citing *Price Waterhouse*).

More generally, numerous courts have also recognized that the stereotype that women are not strong leaders has the effect of narrowing women’s opportunities for professional advancement and is an impermissible reason under Title VII for decision-making about employees. The First Circuit confronted this issue in a case brought by a woman who spent ten years as an “excellent employee” for the Transportation Security Administration working with the Federal Air Marshals Service. *Burns v. Johnson*, 829 F.3d 1, 5 (1st Cir. 2016).

The employee alleged that a new supervisor had transferred her flight assignment responsibilities to a group of male employees, despite her consistently high performance evaluations and her development of a best practice in her field of international flight-scheduling. *Id.* The employee ultimately left and filed suit. The First Circuit reversed an award of summary judgment for the government, observing that “[t]he idea that discrimination consists only of blatantly sexist acts and remarks was long ago rejected by the Supreme Court.” *Id.* at 13 (citing *Price Waterhouse*, 490 U.S. at 250-51). Applying the *Price Waterhouse* stereotyping framework, the court recognized that “the idea that men are better suited than women for positions of importance or leadership in the workplace, particularly where the task concerns national security or defense,” is an impermissible stereotype. *Id.* The court then concluded that “[a] reasonable jury could find that a sex-based stereotype was behind [the plaintiff’s supervisor’s] questioning of why ‘she’ was in that role. . . .” It reached the same conclusion about the supervisor’s “belief that ‘leadership’ should instead be given to the group of male [supervisory marshals],” finding that “these biased beliefs precipitated the decision to give Burns’ duties to a group of men.” *Id.* at 14.

Similarly, the Eleventh Circuit observed that sex-stereotyping prompted a school district’s decision not to renew the contract of the woman who was District Superintendent, pointing to the school board’s repeated efforts to convince her to hire a male assistant superintendent, along with comments that she should

have a “tough ‘hatchet man’” to assist her and that she “needed a strong male to work under her to handle problems, someone who could get tough.” *Quigg v. Thomas Cty. Sch. Dist.*, 814 F.3d 1227, 1241-42 (11th Cir. 2016). As the court observed, “[t]hese statements indicate that [the Board leadership] preferred men—or, at the least, individuals with masculine characteristics—for positions within the office of the superintendent. As such, the statements are circumstantial evidence of discrimination.” *Id.* (citing, inter alia, *Price Waterhouse*).

3. Stereotypes About Sexual Interactions and Merit

Courts have also applied *Price Waterhouse* to recognize that stereotypes about women’s use of sexual relationships at work—as a strategy for obtaining promotions—can be a barrier to equal employment opportunity for women.

In a recent Fourth Circuit case, for example, the plaintiff was a woman who had been highly successful at work, having been promoted six times within 18 months, from a low-level clerk to assistant operations manager. Yet just weeks after beginning her managerial role, “she learned that ‘certain male employees were circulating within RCSI’ ‘an unfounded, sexually-explicit rumor about her’ that ‘falsely and maliciously portrayed her as having [had] a sexual relationship’ with a higher-ranking manager . . . in order to obtain her management position.” *Parker v. Reema*

Consulting Servs., Inc., 915 F.3d 297, 300 (4th Cir. 2019). She was eventually terminated based on what she alleged were unfounded warnings. *Id.* at 301. The Fourth Circuit, citing *Price Waterhouse* and related lower-court rulings, observed that “[a]s alleged, the rumor was that Parker, a female subordinate, had sex with her male superior to obtain promotion, implying that Parker used her womanhood, rather than her merit, to obtain from a man, so seduced, a promotion.” *Id.* at 303. The court added:

She plausibly invokes a deeply rooted perception—one that unfortunately still persists—that generally women, not men, use sex to achieve success. And with this double standard, women, but not men, are susceptible to being labelled as “sluts” or worse, prostitutes selling their bodies for gain.

Id.

Stereotyping related to men’s sexual conduct at work looks different from the stereotyping imposed on women—but it has also been found to impermissibly limit workplace opportunities under *Price Waterhouse*. In *Sassaman v. Gamache*, 566 F.3d 307, 309 (2d Cir. 2009), for example, a male employee “allege[d] that defendants pressured him to resign because of a sex stereotype regarding the propensity of men to sexually harass their female co-workers.” On appeal, Judge Cabranes relied on *Price Waterhouse* to reverse a grant of summary judgment to the employer, writing that the supervisor’s comment to the employee—“you probably did what [the complainant] said you did because you’re

male”—could reasonably be construed as an invidious sex stereotype. *Id.* at 312.

4. Family Priorities and Dependency

Women also face impediments to equity and advancement at work based on stereotypes about the appropriate roles of women in their relationships and as parents. In cases addressing these stereotypes, too, *Price Waterhouse* has played a critical role. Relied on regularly by lower courts, this Court’s ruling reinforces that negative treatment in employment based on expectations about who women should be and how they should act vis-à-vis their spouses and children violates Title VII’s prohibition against sex discrimination.

In *Chadwick v. WellPoint*, for example, the employer had denied Laurie Chadwick a promotion to a managerial position for which she was highly qualified. 561 F.3d 38, 41 (1st Cir. 2009) (noting Chadwick’s excellent reviews and her supervisor’s support for the promotion). In explaining why Chadwick did not get the promotion, her supervisor pointed to Chadwick’s responsibility for parenting several children, among other reasons. The court observed:

Given what we know about societal stereotypes regarding working women with children, we conclude that a jury could reasonably determine that a sex-based stereotype was behind Miller’s explanation to Chadwick that, “It was nothing you did or didn’t do. It was just that you’re going to school, you have the kids and you just have a lot on your plate right

now.” Particularly telling is Miller’s comment that, “It was nothing you did or didn’t do.” After all, *the essence of employment discrimination is penalizing a worker not for something she did but for something she simply is.*

Id. at 46-47 (emphasis added). Relying on *Price Waterhouse* and related cases, the First Circuit added: “In the simplest terms, these cases stand for the proposition that unlawful sex discrimination occurs when an employer takes an adverse job action on the assumption that a woman, because she is a woman, will neglect her job responsibilities in favor of her presumed childcare responsibilities. *Id.* at 44-45; *see also* at 47 (“A reasonable jury could infer from [the supervisor’s] explanation that Chadwick wasn’t denied the promotion because of her work performance or her interview performance but because [her supervisor] and others assumed that as a *woman* with four young children, Chadwick would not give her all to her job.”) (emphasis in original); *id.* at 48 (“[W]e believe that a reasonable jury could find that WellPoint would not have denied a promotion to a similarly qualified man because he had ‘too much on his plate’ and would be ‘overwhelmed’ by the new job, given ‘the kids’ and his schooling.”) (citation omitted).

Other courts have likewise relied on *Price Waterhouse* to find discrimination where women’s work options were limited by sex-based assumptions about how they were (or should be) conducting their lives vis-à-vis spouses and children. In *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 113 (2d

Cir. 2004) (Calabresi, J.), for example, a school psychologist was denied tenure and terminated when she finished her three-year probationary period. Despite receiving excellent evaluations from the school district, both before and after the three-month maternity leave she took during her second year, the school district fired her shortly before her tenure determination, stating that her organizational and interpersonal skills were inadequate. *Id.* at 113-14. Using the lens of *Price Waterhouse*, the Second Circuit saw sufficient evidence of discrimination based on Back's status as a mother to allow the case to go to trial.

Just as “[i]t takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring ‘a course at charm school,’” *Price Waterhouse*, 490 U.S. at 256, so it takes no special training to discern stereotyping in the view that a woman cannot “be a good mother” and have a job that requires long hours, or in the statement that a mother who received tenure “would not show the same level of commitment [she] had shown because [she] had little ones at home.”

Id. at 120.

Even cases that do not rely directly on *Price Waterhouse* incorporate its analysis of the ways in which sex stereotyping impedes women's employment opportunities. *See, e.g., Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 50 (1st Cir. 2000) (finding that an employer's repeatedly expressed concerns

about whether a female employee could “handle simultaneously her job, child care, and marital responsibilities” including questions about “how her husband was managing, considering she was not home to cook for him,” provided evidence of impermissible sex stereotyping); *Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1044-45 (7th Cir. 1999) (observing that “[a] reasonable jury might conclude that a supervisor’s statement to a woman known to be pregnant that she was being fired so that she could ‘spend more time at home with her children’ reflected unlawful motivations because it invoked widely understood stereotypes the meaning of which is hard to mistake.”).

Almost fifty years ago, this Court also invoked Title VII when it reviewed an employer policy that denied an employment opportunity to women with small children while offering that same opportunity to similarly situated men. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (per curiam). The Court wrote simply that “Section 703(a) of the Civil Rights Act of 1964 requires that persons of like qualifications be given employment opportunities irrespective of their sex.” *Id.* Concurring, Justice Marshall observed that “[b]y adding the prohibition against job discrimination based on sex to the 1964 Civil Rights Act Congress intended to prevent employers from refusing ‘to hire an individual based on stereotyped characterizations of the sexes.’” *Id.* at 545 (Marshall, J., concurring) (quoting U.S. Equal Emp. Opportunity Comm’n, Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.1(a)(i)(ii)) (footnote and additional citations omitted). He added:

“Even characterizations of the proper domestic roles of the sexes were not to serve as predicates for restricting employment opportunity.” *Id.*

More recently, recognition of the limiting effect of sex stereotypes on women’s work opportunities was at the heart of this Court’s 2003 decision in *Nevada Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003), upholding the Family Medical Leave Act (FMLA). As the Court wrote, “[t]he impact of the discrimination targeted by the FMLA, which is based on mutually reinforcing stereotypes that only women are responsible for family caregiving and that men lack domestic responsibilities, is significant.” *Id.* at 722. Even further, this Court observed, these “stereotype-based beliefs about the allocation of family duties remained firmly rooted, and employers’ reliance on them in establishing discriminatory leave policies remained widespread.” *Id.* at 730.

B. Constitutional Jurisprudence Has Also Long Rejected Reliance on Sex Stereotypes by Government Actors

Sex discrimination jurisprudence under the U.S. Constitution’s equal protection and due process guarantees has also long rejected policies that rest on claims that all women (or men) have similar desires, interests or physical capacities.²

² Courts routinely look to cases examining Title VII and other federal sex-discrimination laws when examining discrimination claims under the Equal Protection Clause and vice versa because the same principles inform both. *See, e.g., Gen. Elec. Co.*

More than two decades ago, for example, this Court held in *United States v. Virginia*, that the equal protection guarantee precludes the government from acting based on assumptions that all women or all men are the same. 518 U.S. 515, 542 (1996) [hereinafter “*VMI*”]. Thus, even assuming *arguendo* that “most women would not choose VMI’s adversative method,” the Court held that the government could not constitutionally deny the specialized training and related opportunities “to women who have the will and capacity.” *Id.*

Two decades prior to *VMI*, the Court similarly rejected, on due process grounds, a school board rule that barred women from teaching after they were several months pregnant, recognizing that although the school board had a legitimate interest in safety, the variation among pregnant women rendered the rule impermissible. *Cleveland v. LaFleur*, 414 U.S. 632, 644 (1974): “Even assuming, *arguendo*, that there are some women who would be physically unable to work past the particular cutoff dates . . . , it is evident that there are large numbers of teachers who are fully capable of

v. Gilbert, 429 U.S. 125, 133 (1976) *superseded on other grounds by statute in Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983) (“While there is no necessary inference that Congress . . . intended to incorporate into Title VII the concepts of discrimination which have evolved from court decisions construing the Equal Protection Clause . . . the similarities between the congressional language and some of those decisions surely indicate that the latter are a useful starting point in interpreting the former.”).

continuing work for longer than the . . . regulations will allow.” *Id.* at 645-46.

The Court has made clear that policies based on such overbroad sex-based generalizations are impermissible *even* if there is some empirical basis for them. See *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975) (rejecting sex-based rule while stating that “[o]bviously, the notion that men are more likely than women to be the primary supporters of their spouses and children is not entirely without empirical support.”); *cf.* *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 139, n.11 (1994) (“We have made abundantly clear in past cases that gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization.”); *Craig v. Boren*, 429 U.S. 190, 201 (1976) (striking down sex-based classification where evidence supporting the different experiences of young women and men with alcohol was “not trivial in a statistical sense”).

As the Court has also recognized, the empirical support for sex-based distinctions often reflects sex-based expectations and stereotypes that should not be permitted to limit individuals’ opportunities based on their sex. In *Miss. Univ. for Women v. Hogan*, for example, the Court observed that although most nurses were women and that nursing had long been seen as a women’s profession, excluding men from nursing school conflicted with the equal protection guarantee: “MUW’s admissions policy lends credibility to the old view that women, not men, should become nurses.” 458

U.S. 718, 729-30 (1982). In striking down that policy at the behest of a male nurse, the Court reiterated the importance of avoiding “traditional, often inaccurate, assumptions about the proper roles of men and women” in carrying out constitutional review. *Id.* at 726.

Similarly, in *Frontiero v. Richardson*, the Court invalidated different military benefits rules for male and female service members that rested on “the assumption . . . that female spouses of servicemen would normally be dependent upon their husbands, while male spouses of servicewomen would not.” *Schlesinger v. Ballard*, 419 U.S. 498, 507 (1975) (describing *Frontiero*, 411 U.S. 677 (1973)).

In *Weinberger*, the Court rejected “a virtually identical ‘archaic and overbroad’ generalization” embedded in a social security death benefits rule: “The fact that a man is working while there is a wife at home does not mean that he would, or should be required to, continue to work if his wife dies.” 420 U.S. at 651-52; see also *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1695 (2017) (rejecting as a basis for government action “the long-held view that unwed fathers care little about, indeed are strangers to, their children” and holding that “[l]ump characterization of that kind . . . no longer passes equal protection inspection”). These kinds of acts, which impose gender-based “stereotypical notions . . . deprive[] persons of their individual dignity,” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984), and “ratify and reinforce prejudicial views,” *J.E.B.*, 511 U.S. at 140.

* * *

Against this backdrop, the lesson of *Price Waterhouse* from three decades ago remains salient and essential today: “In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.” 490 U.S. at 250. As the lower courts have observed, the same is true for employers’ decisions to restrict work opportunities based on beliefs that women, whatever their sexual orientation and including those who are transgender, should have a certain “look,” personal style, leadership skills, or set of commitments to her spouse and children. Each of these can impose profound limits on women’s opportunities to advance in the workplace. As this Court recognized, this consequence—the limitation of employment based on traditional expectations about women, and men—is squarely among the sex-based barriers that Congress sought to eradicate in enacting Title VII.

II. Sex Stereotypes Continue to Limit Women’s Workplace Opportunities, as Extensive Research Demonstrates

“Glass ceiling” analyses continue to show strikingly low numbers of women in senior leadership roles in business, law and other sectors. Although some women have achieved at the highest levels, including *amicae* here, data show that senior management roles are still held primarily by men and that most women

earn substantially less than comparably educated men.

A variety of stereotypes about women, discussed *supra* and in numerous studies below, reinforce these disparities. Even at the highest levels, expectations about how women and men should look and act continue to limit opportunities for all women, regardless of their sexual orientation and including women who are transgender.

A. Expectations About Who Women and Men Are—and Who They Should Be—Contribute to These Disparities

A common theme runs through many of the glass-ceiling analyses just described: the view that “women ‘take care,’ men ‘take charge.’” *Quick Take: Women in Management*, Catalyst (Jul. 30, 2018), <https://www.catalyst.org/research/women-in-management/>.

A related theme in the research is that “[t]ypically ‘male’ characteristics are commonly used as the default or standard expectation by which women leaders are hired, retained, or promoted, while typically ‘female’ characteristics are devalued.” Marie A. Chisholm-Burns et al., *Women in Leadership and the Bewildering Glass Ceiling*, 74 *Am. J. of Health-Sys. Pharmacy* 312, 314 (2017); *see also* Madeline E. Heilman, *Description and Prescription: How Gender Stereotypes Prevent Women’s Ascent Up the Organizational Ladder*, 57 *J. Soc. Issues* 657, 657-74 (2001) (discussing numerous studies).

Researchers describe “a set of widely shared conscious and unconscious mental associations about women, men, and leaders,” observing that “[s]tudy after study has affirmed that people associate women and men with different traits and link men with more of the traits that connote leadership.” Alice Eagly & Linda L. Carli, *Women and the Labyrinth of Leadership*, Harv. Bus. Rev. (Sept. 2007), <https://hbr.org/2007/09/women-and-the-labyrinth-of-leadership> (last visited July 1, 2019).

A study of corporate law firms similarly found that “reliance on gender as a proxy for competence, use of sex-labeled roles and gender stereotypes as heuristics to assess candidate suitability for particular roles, and in-group favoritism—lead decision makers to prefer men over women in selection decisions at all levels.” Elizabeth H. Gorman & Julie A. Kmec, *Hierarchical Rank and Women’s Organizational Mobility: Glass Ceilings in Corporate Law Firms*, 114 Am. J. of Soc. 1428, 1465 (2009).

Consistent with the issues identified in *Price Waterhouse* and other cases discussed *supra*, research also shows that “[w]omen often face different expectations than men in the workplace, as well as increased scrutiny for reasons other than ability (e.g., appearance), and are frequently evaluated more severely, particularly women in management and leadership roles.” Chisolm-Burns, *supra*, at 314.

Women also face the dilemma of being perceived as too feminine (i.e., too ‘soft’) or not

feminine enough (i.e., too ‘tough’). [Scholars have] noted that women tend to be ‘penalized for displaying either too little or too much assertiveness, competitiveness, and independence.’ The warmer, less direct communication approach typically used by women may undermine confidence in their capabilities, again due to the appearance of being too soft. Women thus face a double burden in their careers if they want to get ahead: not only doing their jobs well but also overcoming stereotypes that may hamper perceptions of their leadership potential.

Id. (citations omitted); *see also* Stephanie Bornstein, *Unifying Antidiscrimination Law Through Stereotype Theory*, 20 Lewis & Clark L. Rev. 919, 962 (2016) (“A vast body of research has documented numerous patterns of stereotyping that operate to disadvantage women at work.”); Hannah Riley Bowles, Linda Babcock, & Lei Lai, *Social Incentives for Gender Differences in the Propensity to Initiate Negotiations: Sometimes it Does Hurt to Ask*, *Org. Behav. & Hum. Decision Processes* 84, 91 (2007) (finding that women experience a “large penalty” not imposed on men in negotiations for increased compensation).

Many of these expectations about women’s workplace roles are intensified for women who are mothers, with negative consequences for both earnings and workplace opportunities. *See, e.g.*, Stephen Benard et al., *Cognitive Bias and the Motherhood Penalty*, 59 *Hastings L.J.* 1359 (2008) (discussing studies); *see also* Joan C. Williams, *Beyond the Glass Ceiling: The*

Maternal Wall as a Barrier to Gender Equality, 26 T. Jefferson L. Rev. 1 (2003) (citing numerous cases and studies).

With respect to stereotypes, numerous studies have also found that mothers are perceived to be less competent in general than fathers or women without children. Benard et al., *supra*, at 1364 (footnotes and citations omitted). In addition,

[t]hey are . . . perceived to be less committed to work, likely because cultural beliefs about the ideal worker and the ideal mother conflict. The ideal worker is expected to be unreservedly devoted to work, while the ideal mother is expected to invest similarly intense levels of devotion to her children. As a result motherhood is perceived as incompatible with high levels of work effort.

Id. (footnotes and citations omitted); *see also, e.g.*, Amy J.C. Cuddy et al., *When Professionals Become Mothers, Warmth Doesn't Cut the Ice*, 60 J. Soc. Issues 701, 709 (2004) (showing data that working mothers were perceived as warmer but less competent than working fathers or women who were not parents).

More broadly, “negative reactions to women who are successful in traditionally male domains are a consequence of the perception that these women have violated stereotype-based ‘oughts’ about how women should behave and the resulting assumption that they are deficient in feminine attributes.” Madeline E. Heilman & Tyler G. Okimoto, *Why are Women Penalized for*

Success at Male Tasks?: The Implied Communal Deficit, 92 *J. of Applied Psychol.* 81, 81 (2007) (discussing research); see also Rhea E. Steinpreis, Katie A. Anders, & Dawn Ritzke, *The Impact of Gender on the Review of Curricula Vitae of Job Applicants and Tenure Candidates: A National Empirical Study*, 41 *Sex Roles* 509, 514-15, 522 (1999) (discussing a study of academic scientists showing that hiring and tenure committee members responded much more favorably to a resume with a man's name on top than to the identical resume with a woman's name).

Reflecting these themes, another scholar described “a double bind in which women can be penalized for displaying either too little or too much assertiveness, competitiveness, and independence” and observing that “if a woman exhibits too much assertiveness, which is contradictory to the stereotype, her influence and likability may be lowered.” Merida L. Johns, *Breaking the Glass Ceiling: Structural, Cultural, and Organizational Barriers Preventing Women from Achieving Senior and Executive Positions*, 10 *Persp. in Health Info. Mgmt.* 6 (Winter 2013) (footnotes and citations omitted).

* * *

Against this backdrop, *amicae curiae* have identified no research suggesting that it would be possible to separate the sex stereotypes that have a limiting effect on heterosexual women from those that negatively affect lesbian and bisexual women. Nor have *amicae* found research showing that views about how women

“should” present themselves, as discussed above, are different in kind when applied to women who are transgender.

To the contrary, the host of research just described reinforces what this Court and numerous lower courts have recognized for decades, which is that expectations about women’s appearance, leadership qualities, and parenting responsibilities can function as barriers to women’s advancement in the workplace—both for women who conform to those expectations and those who do not.

B. Stark Differences Continue in Earnings and Leadership Roles for Women and Men

In light of these well-documented workplace dynamics, it is perhaps not surprising that pay disparities between men and women in the United States have changed little during the past 15 years. *See* U.S. BUREAU OF LAB. AND STAT., *Highlights of Women’s Earnings in 2017* (Aug. 2018), <https://www.bls.gov/opub/reports/womens-earnings/2017/pdf/home.pdf>. Federal data show that “[s]ince 2004, the women’s-to-men’s earnings ratio has remained in the 80 to 83 percent range.” *Id.* at 1 (also showing disparities based on sex and race); *see also* INSTITUTE FOR WOMEN’S POL’Y RES., *Pay Equity and Discrimination* (2019), <https://iwpr.org/issue/employment-education-economic-change-pay-equity-discrimination/> (observing that if the pace of change remains the same, “it will take . . . until 2059—for

women to finally reach pay parity” and that “[f]or women of color, the rate of change is even slower”).

Notably, this differential is even greater for women with higher education. According to the U.S. Department of Labor, in 2018 women working full-time with advanced degrees earned 25.4% less than their male counterparts. U.S. DEPT OF LAB. WOMEN’S BUREAU, *Data and Statistics-Earnings*, <https://www.dol.gov/wb/stats/earnings.htm#earningsot> (last visited July 1, 2019) (also showing a 24.8% wage gap for women with bachelor’s degrees).

Data on differences in leadership roles for men and women are also striking, even if familiar to those in corporate or large law-firm landscapes. In the corporate domain, one major recent study concludes that “[w]omen are dramatically outnumbered in senior leadership. Only about 1 in 5 C-suite leaders is a woman, and only 1 in 25 is a woman of color.” Joanna Barsh & Lereina Yee, MCKINSEY & CO., *WOMEN IN THE WORKPLACE* 5 (2018), available at <https://womenintheworkplace.com/> (drawing conclusions based on four years of data from 462 companies with almost 20 million employees, including 279 companies in the 2018 study); *see also id.* (describing ways in which views about women limit the opportunities of lesbian women).

Another report, from the Pew Research Center, found that “women held only about 10% of the top executive positions (defined as chief executive officers, chief financial officers and the next three highest paid

executives) at U.S. companies in 2016-17,” based on federal securities filings by all companies in the Standard & Poor’s Composite 1500 stock index. Drew Desilver, *Women Scarce at Top of U.S. Business—And in the Jobs That Lead There*, PEW RES. CTR. (Apr. 30, 2018), <https://www.pewresearch.org/fact-tank/2018/04/30/women-scarce-at-top-of-u-s-business-and-in-the-jobs-that-lead-there/>. The same study found that “at the very top of the corporate ladder, just 5.1% of chief executives of S&P 1500 companies were women.” *Id.* See also Eagly & Carli, *supra* (“Despite years of progress by women in the workforce (they now occupy more than 40% of all managerial positions in the United States), within the C-suite they remain as rare as hens’ teeth.”).

The law firm environment is similar, and little has changed since 2013. Annie Pancak, *Glass Ceiling Slow to Break for Female Attorneys in 2018*, LAW360 (May 27, 2019), <https://www.law360.com/articles/1162800/glass-ceiling-slow-to-break-for-female-attys-in-2018>. In a 2018 survey of more than 300 law firms in the United States, including most large firms, nearly 80% of equity partners are men, even while women make up almost half of associates. *Id.* Among women of color, these percentages are even smaller—less than 9% of associates and 3% of equity partners. *Id.*

Global data echo these disparities, with women holding “under a quarter (24%) of senior roles across the world in 2018, a decrease from 25% in 2017.” *Quick Take: Women in Management, supra*. Among management positions more generally, the World Economic Forum has observed that “just about 34% of global

managers are women,” a much lower percentage than women in the workforce more generally. WORLD ECONOMIC FORUM, THE GLOBAL GENDER GAP REPORT 9 (2018), http://www3.weforum.org/docs/WEF_GGGR_2018.pdf. *See also id.* (“[T]he presence of women in management roles is today one of the main barriers to overcome, both in the public and private sector, in order to achieve full economic gender parity.”).

◆

CONCLUSION

As extensive case law and research show, employers sometimes rely on sex stereotypes to make workplace decisions. These stereotypes—about how women and men “should” present themselves, interact with others and conduct their family life—help explain why the number of women in leadership positions continues to lag behind the number of men, and why women earn less than men, on average, throughout the United States.

Nothing in Title VII suggests that employers may rely on any of these sex stereotypes when making decisions about an individual’s employment opportunities, including for women who are lesbian, bisexual, or transgender. Put simply, there are no “free passes” for employers that might seek to impose sex stereotypes as a way of restricting opportunities for some employees but not others. To the contrary, as this Court has recognized, by prohibiting sex discrimination in employment, Congress intended to get at the full

spectrum of sex stereotypes an employer might use to restrict workplace advancement—both for women and men who conform to those stereotypes and those who do not.

Respectfully submitted,

RICHARD M. SEGAL
PILLSBURY WINTHROP
SHAW PITTMAN LLP
501 West Broadway, Suite 1100
San Diego, CA 92101
(619) 544-3203
richard.segal@pillsburylaw.com

CYNTHIA COOK ROBERTSON
ROBERT C. K. BOYD
PILLSBURY WINTHROP
SHAW PITTMAN LLP
1200 Seventeenth Street NW
Washington, DC 20036
(202) 663-8000
cynthia.robertson@pillsburylaw.com
robert.boyd@pillsburylaw.com

SUZANNE B. GOLDBERG
Counsel of Record
SEXUALITY AND
GENDER LAW CLINIC
COLUMBIA LAW SCHOOL
435 West 116th Street
New York, NY 10027
(212) 854-0411
sgoldberg@columbia.edu

Counsel for Amicae Curiae

July 3, 2019