No. _____

In The
Supreme Court of the United States

GERALD LYNN BOSTOCK,

Petitioner,

v.

CLAYTON COUNTY, GEORGIA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether discrimination against an employee because of sexual orientation constitutes prohibited employment discrimination "because of . . . sex" within the meaning of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2.

LIST OF PARTIES

Pursuant to Rule 14.1(b), Petitioner states that the parties include:

1. Gerald Lynn Bostock, Plaintiff and Petitioner;
2. Clayton County, Georgia, Defendant and Respondent.

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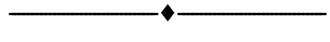
The opinion of the United States Court of Appeals for the Eleventh Circuit was issued on May 10, 2018. App. 1. The Eleventh Circuit affirmed the decision of the United States District Court for the Northern District of Georgia issued on July 21, 2017, document number 24 in the District Court's docketed matter number 1:16-CV-01460-ODE (N.D. Ga.). App. 26. The United States District Court adopted in its entirety the Final Report and Recommendation of the United States Magistrate Judge issued on November 3, 2016, document number 16 in the District Court's docket. App. 5.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Eleventh Circuit issued its opinion affirming the decision of the United States District Court for the Northern District of Georgia on May 10, 2018, App. 1, after denying the Petitioner's Petition for Hearing En Banc on May 3, 2018, *id.* at 4. The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1254(1).



CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the anti-discrimination provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2.

42 U.S.C. § 2000e-2(a) EMPLOYER PRACTICES It shall be an unlawful employment practice for an employer –

> (1) 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, because of such individual's race, color, religion, sex, or national origin, or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

The Eleventh Circuit Court of Appeals erroneously affirmed dismissal of Petitioner Gerald Lynn Bostock's case after refusing to recognize that this Court's decisions have abrogated old precedents which precluded him from maintaining a claim for sexual orientation discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. ("Title VII"). This Court must grant the writ of certiorari to correct the Eleventh Circuit's error, resolve a split between the Circuit Courts of Appeals, and

confirm the common sense proposition that discrimination against an employee because of sexual orientation is *ipso facto* discrimination "because of . . . sex" in violation of Title VII.

The lower federal courts, including the Eleventh Circuit, previously held that Title VII did not prohibit sexual orientation discrimination. But this Court sounded the death knell for that myopic interpretation in *Price Waterhouse v. Hopkins*, which held that discrimination on the basis of an employee's failure to act in accordance with gender-based expectations violates Title VII. *See* 490 U.S. 228, 250-51 (1989) (plurality opinion), *superseded by statute on other grounds as stated in Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94-95 (2003); 490 U.S. at 258-61 (White, J., concurring); 490 U.S. at 272-73 (O'Connor, J., concurring). The nail in the coffin was this Court's decision in *Oncale v. Sundowner Offshore Srvcs., Inc.*, which held that Title VII should be interpreted broadly to prohibit the "entire spectrum" of sex-based discrimination, even forms like same-sex sexual harassment which were not the primary concern of Congress when it passed Title VII. 523 U.S. 75, 79 (1998). But because "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils," *id.*, and because it is impossible to consider a person's sexual orientation without also considering that person's sex, *Baldwin v. Foxx*, EEOC Decision No. 0120133080, 2015 WL 4397641 (July 15, 2015), there is no longer any doubt that Title VII forbids employers from considering an employee's sexual orientation when making employment decisions.

Some lower federal courts have recognized this inescapable truth, but there is a pronounced division among the United States Circuit Courts of Appeals. The Second and Seventh Circuits recently issued en banc opinions overruling their old precedents to hold firmly that sexual orientation discrimination is prohibited as a form of sex discrimination under Title VII. *See Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 131 (2d Cir. 2018); *Hively v. Ivy Tech. Comm. Coll. of Indiana*, 853 F.3d 339, 351-52 (7th Cir. 2017). But older decisions in the other Circuits still confuse the lower courts, which are unsure whether *Zarda*, *Hively*, or the Equal Employment Opportunity Commission's decision in *Baldwin* mean that sexual orientation discrimination is actionable under Title VII, or whether they should follow prior conflicting precedents, some decided decades before this Court's decisions in *Price Waterhouse*, *Oncale*, *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

Petitioner Bostock is a gay man who was employed as the Child Welfare Services Coordinator for the Clayton County Juvenile Court System. He alleges that his former employer, Respondent Clayton County, Georgia, fired him because of his sexual orientation. App. 26-27. He asserts that, after the County learned of his sexual orientation, his participation in a gay recreational softball league, and his promotion of volunteer opportunities with the County to league members, the County falsely accused him of mismanaging public funds as a pretext for terminating his employment because of his

sexual orientation. *Id.* at 27-28. He asserts a single claim for sex discrimination in violation of Title VII, and prays that this Honorable Court will correct the error of the Eleventh Circuit for his sake and the sake of all the gay and lesbian workers across this country.

A. Factual Background

Petitioner Bostock began working for the Respondent Clayton County in January 2003. *Id.* at 27. For over ten years, he advocated passionately for the interests of at risk children as the Child Welfare Services Coordinator assigned to the Juvenile Court of Clayton County. *Id.* He received favorable performance evaluations and was given primary responsibility for the Clayton County Court Appointed Special Advocates program ("CASA"). *Id.* CASA volunteers, also known as guardians ad litem in some jurisdictions, are advocates who help to "assist and protect children whose physical or mental health and welfare is substantially at risk of harm from abuse, neglect, or exploitation and who may be further threatened by the conduct of others by providing for the resolution of dependency proceedings in juvenile court." *See* O.C.G.A. § 15-11-100(1), § 15-11-104(d). In Georgia, these men and women must meet certain requirements of the program and are sworn in by a judge of the juvenile court in which they serve. *Id.* at § 15-11-106(a). Their role is to be "advocate for the best interests of the child" during juvenile court dependency proceedings. *Id.* at § 15-11-106(b).

As a result of Mr. Bostock's leadership, Clayton County CASA flourished. In 2007, it received the Program of Excellence Award from Georgia CASA. App. 27. In 2010, it was the first county in the metropolitan Atlanta, Georgia area to supply a volunteer to every neglected or abused child in the juvenile court system. *See* Joel Hall, *Clayton CASA Welcomes New Volunteers*, Clayton News Daily, Mar. 10, 2010, *available at* http://www.news-daily.com/news/clayton-casa-welcomes-new-volunteers/article_331a8350-5ab2-5307-9130-2c3b15d08666.html (last visited May 15, 2018). Mr. Bostock was also recognized by the National CASA and served on the National CASA Standards and Policy Committee in 2011 and 2012. App. 27. Indeed, Mr. Bostock is a dedicated social services professional who has for many years been committed to ensuring that abused and neglected children have safe homes in which to live and grow.

Mr. Bostock is also gay. *Id*. Beginning in January 2013, he became involved with a gay recreational softball league called the Hotlanta Softball League. *Id.* He also actively promoted Clayton County CASA throughout the league as a source of volunteer opportunities for league members. *Id*. But in the months that followed, Mr. Bostock's participation in the gay softball league and his sexual orientation were openly criticized by someone with significant influence in the Clayton County court system. *Id.* In April of 2013, Clayton County advised Mr. Bostock it was conducting an internal audit on the CASA program funds. *Id.* at 28. Mr. Bostock never engaged in any misconduct with

regard to the program funds, and he alleges that Clayton County initiated the "audit" as a pretext for discrimination against him because of his sexual orientation. *Id.*

In May 2013, during a meeting of the Friends of Clayton County CASA Advisory Board at which Mr. Bostock's supervisor was present, at least one person disparaged Mr. Bostock's sexual orientation and his participation in the Hotlanta Softball League. *Id.* One month later, on June 3, 2013, Mr. Bostock was fired. *Id.* at 28. The stated reason for his termination was "conduct unbecoming of a county employee." *Id*. Mr. Bostock maintains that he never engaged in any misconduct and Clayton County's representation to the contrary is pretext for discrimination against him on the basis of his sexual orientation. *Id*.

B. The District Court's Erroneous Decision Dismissing Mr. Bostock's Case

Mr. Bostock first filed this lawsuit *pro se* on May 5, 2016, alleging that he was fired because of his sexual orientation in violation of Title VII. *Id.* at 8. After securing counsel, he filed a First Amended Complaint on August 6, 2016, and then a Second Amended Complaint on September 12, 2016, including an allegation of unlawful discrimination for failing to conform to a gender stereotype. *Id.* at 8-9. On September 26, 2016, Clayton County moved to dismiss under Fed. R. Civ. P. 12(b)(6), arguing that Mr. Bostock could not "state a viable claim for relief under established law because

Title VII does not protect [Mr. Bostock] (or anyone else) from discrimination due to his sexual orientation." *Id.* at 28, 31. Mr. Bostock filed his Response in Opposition on October 13, 2016, and Clayton County filed its Reply on October 27, 2016. *Id*. at 28-29.

On November 3, 2016, the United States Magistrate Judge issued a Report and Recommendation that Mr. Bostock's Second Amended Complaint should be dismissed with prejudice. *Id.* at 5. The Magistrate Judge agreed that Title VII does not encompass claims of discrimination based on sexual orientation. *Id.* at 9-17. The Magistrate Judge further recommended dismissal of Mr. Bostock's claim for sex discrimination based on a gender stereotype on the grounds that the Second Amended Complaint lacked sufficient factual support for that claim, and that Mr. Bostock failed to exhaust his administrative remedies because he did not reference the claim as such in the charge of sex discrimination he filed with the United States Equal Employment Opportunity Commission. *Id*. at 17-24.

Pursuant to Fed. R. Civ. P. 72(b), Mr. Bostock filed Objections to the Magistrate Judge's Report and Recommendation on November 17, 2016. *Id.* at 29. With respect to the cognizability of a claim for sexual orientation discrimination under Title VII, Mr. Bostock asserted that it was error for the Magistrate Judge to rely on *Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979),[1] because the case upon which the *Blum* Court

[1] Decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981 remain binding

relied, *Smith v. Liberty Ins. Co.*, 569 F.2d 325 (5th Cir. 1978), had been abrogated by *Price Waterhouse v. Hopkins*. *Id.* at 31 (citations omitted). Mr. Bostock argued that the entire basis on which *Blum* based its statement regarding sexual orientation discrimination was abrogated by *Price Waterhouse*, in which this Court held that Title VII also prohibits discrimination against an employee for failing to conform to the employer's expectations about how the employee should behave based on the employee's gender. 490 U.S. at 249-51. Clayton County filed a Response in Opposition on December 1, 2016, and Mr. Bostock filed a Reply on December 15, 2016. *Id*. at 29. On February 2, 2017, the District Judge deferred ruling on Mr. Bostock's objections pending the decision of the Eleventh Circuit in *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248 (11th Cir. 2017), because that case also presented the question of whether discrimination on the basis of sexual orientation is actionable under Title VII. *Id.* at 29.

On March 10, 2017, a divided panel of the Eleventh Circuit issued its decision in *Evans*, with the majority holding that discrimination based on sexual orientation is not actionable under Title VII. 850 F.3d at 1255-57. The majority rested this erroneous conclusion on the determination that it was bound to follow the decision of the former Fifth Circuit in *Blum* under the prior panel precedent rule, which requires Eleventh Circuit panels to follow a prior panel's decision

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precedent in the Eleventh Circuit. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

unless a later en banc or Supreme Court opinion overrules or undermines it to the point of abrogation. *Evans*, 850 F.3d at 1255 (citations omitted). The dissent stressed that this Court's decision in *Price Waterhouse* had in fact abrogated *Blum* and urged the Court to rehear the matter en banc. *See* 850 F.3d at 1270-71 (Rosenbaum, J., dissenting in part). But the Eleventh Circuit denied a petition for rehearing en banc on July 6, 2017. The next day, on July 7, 2017, the District Court in this case followed *Evans* to refuse to consider whether *Price Waterhouse* abrogated *Blum*, and dismissed Mr. Bostock's Second Amended Complaint with prejudice, holding that, "[a]s a matter of law, the Eleventh Circuit has . . . foreclosed the possibility of a Title VII action alleging discrimination on the basis of sexual orientation as a form of sex discrimination[.]" *Id.* at 31.

C. The Eleventh Circuit's Erroneous Refusal to Conclude that this Court's Decision in *Price Waterhouse v. Hopkins* Abrogated *Blum v. Gulf Oil Corporation*

On appeal, Mr. Bostock argued that the District Court's reliance on *Evans* was error because *Evans* conflicted with this Court's decision in *Price Waterhouse*. *Id.* at 45-52.[2] Specifically, Mr. Bostock argued

[2] Mr. Bostock abandoned his claim for sex discrimination based on a sex stereotype, App. 41 n.1, although as explained below, there is no principled difference between a claim for sex discrimination based on the failure to conform to a sex stereotype and a claim for sexual orientation discrimination, *see infra* at

that the decision in *Blum* was overruled or undermined to the point of abrogation by this Court's decision in *Price Waterhouse*, so that the opinion of the Eleventh Circuit in *Evans* and the District Court's reliance on it to dismiss his complaint were erroneous. *Id.* at 50-52. Aware of the prior panel precedent rule, Mr. Bostock also presented his appeal to the Eleventh Circuit with a petition for initial hearing en banc pursuant to Fed. R. App. P. 35(b)-(c). *See id.* at 46 n.3, 60. However, on May 3, 2018, the Eleventh Circuit again refused to consider en banc the question of whether *Blum* was abrogated so as to allow for claims of sexual orientation discrimination in violation of Title VII. *Id.* at 4.

On May 10, 2018, the Eleventh Circuit issued its opinion reaffirming *Evans* and upholding the District Court's erroneous dismissal of Mr. Bostock's Second Amended Complaint for failure to state a claim upon which relief can be granted. *Id.* at 1. The Court of Appeals explicitly reaffirmed its holding in *Evans* and refused again to conclude, as Mr. Bostock argued, that this Court's decisions in *Price Waterhouse* and *Oncale* overruled or undermined the former Fifth Circuit's decision in *Blum* to the point of abrogation. *Id*. at 3. As it was in *Evans*, this conclusion by the Eleventh Circuit is pure error, and this Court must now act to resolve the Circuit split on this critical question of whether discrimination against an employee on the basis of

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pp. 28-29, and in fact, the refusal of the lower courts to recognize the latter has caused evisceration of this Court's recognition of the latter in *Price Waterhouse*, *see infra* at pp. 19-26.

sexual orientation constitutes discrimination "because of . . . sex" under *Price Waterhouse*, *Oncale* and this Court's other decisions interpreting Title VII.

REASONS FOR GRANTING THE PETITION

I. This Court Must Resolve the Split Among the Circuits as to Whether Title VII of the Civil Rights Act of 1964 Prohibits Discrimination Against Employees on the Basis of Sexual Orientation

By reaffirming its conclusion that *Price Waterhouse* and *Oncale* did not undermine the former Fifth Circuit's decision in *Blum* to the point of abrogation, the Eleventh Circuit has reconfirmed the split among the Circuits on this critical question of whether Title VII prohibits discrimination against an employee on the basis of sexual orientation. The Second and Seventh Circuits, both sitting en banc, have answered the question in the affirmative. *See Zarda*, 883 F.3d at 131-32 (expressly overruling all conflicting prior precedents to hold that "Title VII prohibits discrimination on the basis of sexual orientation as discrimination 'because of . . . sex'"); *Hively*, 853 F.3d at 351-52 (holding that "a person who alleges that she experienced employment discrimination on the basis of her sexual orientation has put forth a case of sex discrimination for Title VII purposes").

Every other Circuit except the Federal Circuit has held that Title VII does not prohibit discrimination against an employee on the basis of sexual orientation. *See Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1252 (11th Cir.), *cert. denied*, 138 S. Ct. 557 (2017); *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006); *Medina v. Income Support Div., New Mexico*, 413 F.3d 1131, 1135 (10th Cir. 2005); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1063-64 (9th Cir. 2002) (holding that "an employee's sexual orientation is irrelevant for purposes of Title VII" and "neither provides nor precludes a cause of action for sexual harassment"); *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001) (noting that "[i]t is clear . . . that Title VII does not prohibit discrimination based on sexual orientation") (citations omitted); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999) (holding that "Title VII does not proscribe harassment simply because of sexual orientation"); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996) (noting that "it is true Title VII does not afford a cause of action for discrimination based upon sexual orientation") (citations omitted); *U.S. Dep't of Hous. & Urban Dev., Washington, D.C. v. Fed. Labor Relations Auth.*, 964 F.2d 1, 2 (D.C. Cir. 1992) (noting that "Title VII does *not* cover sexual orientation") (emphasis in original); *Williamson v. A.G. Edwards and Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) (per curiam) (holding that "Title VII does not prohibit discrimination against homosexuals").

There is even division within the federal government. *Compare Baldwin v. Foxx*, EEOC Decision No. 0120133080, 2015 WL 4397641 (July 15, 2015) *with* Brief for the United States as *Amicus Curiae* Supporting Defendants-Appellees, *Zarda v. Altitude Express, Inc.*, No. 153775 (2d Cir. July 26, 2017), 2017 WL 3277292. In *Baldwin*, the EEOC, acting in its capacity as a tribunal hearing Title VII claims asserted by federal employees, held squarely that "[s]exual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee's sex." *Baldwin*, 2015 WL 4397641, at *5. Yet, last year, the United States Department of Justice took the position as *amicus curiae* in *Zarda* that "when Congress prohibited sex discrimination [in Title VII], it did not also prohibit sexual orientation discrimination." 2017 WL 3277292, at *6. Without clarification from this Court, the internal and external guidance from the federal agencies will be contradictory and next to useless.

Not surprisingly, the split of authority in the Circuits and the federal government has produced a cacophony of results throughout the district courts across the country. *Compare, e.g.*, *Winstead v. Lafayette Cty. Bd. of Cty. Comm'rs*, 197 F. Supp. 3d 1334, 1346-47 (N.D. Fla. 2016) (rejecting the distinction between gender stereotype discrimination and sexual orientation discrimination and holding that "to treat someone differently based on her attraction is to treat that person differently because of her failure to conform to gender or sex stereotypes, which is, in turn, necessarily

discrimination on the basis of sex") *and Terveer v. Billington*, 34 F. Supp. 3d 100, 116 (D.D.C. 2014) (holding that the plaintiff stated a claim for gender stereotyping sex discrimination by alleging he was "a homosexual male whose sexual orientation is not consistent with the Defendant's perception of acceptable gender roles" and that his "status as a homosexual male did not conform to the Defendant's gender stereotypes associated with [other] men") *with Hinton v. Virginia Union Univ.*, 185 F. Supp. 3d 807, 816 (E.D. Va. 2016) (holding that Title VII does not prohibit sexual orientation discrimination and noting that "[d]istrict courts have, however, split on whether to follow the EEOC [in holding that sexual orientation discrimination is necessarily sex discrimination that violates Title VII] or to follow the law of their regional circuits [to the contrary]"), *motion to certify appeal denied*, No. 3:15CV569, 2016 WL 3922053 (E.D. Va. July 20, 2016) *and Clemons v. City of Memphis, Tn.*, No. 16-CV-02333-JPM-CGC, 2016 WL 7471412, at *3 (W.D. Tenn. Dec. 28, 2016) (dismissing the plaintiff's sexual orientation discrimination claim despite contrary authorities "[u]ntil the Sixth Circuit or the Supreme Court provides further commentary on this issue").

Moreover, this question of whether Title VII prohibits discrimination based on sexual orientation also carries repercussions extending far beyond the immediate issue of whether gay and lesbian people occupy a protected class. For example, the "opposition clause" of Title VII protects employees from retaliation based on their opposition to practices made unlawful under

Title VII. *See Crawford v. Metro. Gov't of Nashville and Davidson Cnty., Tn.*, 555 U.S. 271, 276 (2009) (citing and discussing 42 U.S.C. § 2000e-3(a)). However, in *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 271 (2001), this Court held that a woman who complained of sexual harassment consisting of only one incident did not engage in protected opposition activity under Title VII because "[n]o reasonable person could have believed that the single incident" violated Title VII. Lower courts have interpreted *Breeden* to require that employees alleging retaliation under Title VII for protected opposition activity must demonstrate that their belief that they were opposing conduct made unlawful under Title VII was reasonable, which is often measured by the substantive law. *See, e.g.*, *Clark v. Cache Valley Elec. Co.*, 573 Fed. App'x 693, 701 (10th Cir. 2014); *Brannum v. Mo. Dep't of Corr.*, 518 F.3d 542, 549 (8th Cir. 2008); *Clover v. Total Sys. Servs., Inc.*, 176 F.3d 1346, 1351 (11th Cir. 1999). To the extent that it is unclear whether Title VII prohibits sexual orientation discrimination, or whether an employee is being lawfully discriminated against because of sexual orientation or unlawfully on the basis of a sex stereotype, the scope of Title VII's opposition clause also remains unclear.[3]

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[3] This problem is not merely an academic one. *Compare Grove v. Midwest Airlines, Inc.*, No. 1:07-CV-1120-HTW-ECS, 2009 WL 10699906, at *7 (N.D. Ga. Jan. 21, 2009) (granting summary judgment for the employer on a plaintiff's retaliation claim because the employee's asserted protected activity was opposition to sexual orientation harassment which could not constitute protected opposition activity given that sexual orientation

Likewise, several Circuits recognize that Title VII prohibits discrimination against an employee not only because of his or her own protected class status, but also because of his or her association with someone who is a member of a particular protected class. *See, e.g.*, *Holcomb v. Iona Coll.*, 521 F.3d 130, 139 (2d Cir. 2008) (holding that "an employer may violate Title VII if it takes action against an employee because of the employee's association with a person of another race"); *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick & GMC Trucks, Inc.*, 173 F.3d 998, 994-95 (6th Cir. 1999) (same); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 589 (5th Cir. 1998) (same); *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986) (same). As explained by the Second Circuit in *Zarda*, the conclusion that Title VII prohibits discrimination against an employee because of his association with another employee of a particular sex – which is a protected class – is reinforced by this Court's decision in *Loving v. Virginia*, 388 U.S. 1 (1967), which held that a Virginia statute prohibiting interracial marriage was unconstitutional. *Zarda*, 883 F.3d at 125-26. Yet, without clarification from this Court,

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discrimination is not prohibited by Title VII) *and Fox v. Shinseki*, No. CV 11-04820 EDL, 2013 WL 4034086, at *7 (N.D. Cal. Aug. 6, 2013) (same) *with Centola v. Potter*, 183 F. Supp. 2d 403, 412 (D. Mass. 2002) (rejecting the argument that the employee did not engage in protected opposition activity when he complained about sexual orientation harassment only because the plaintiff did not specifically characterize his internal complaint as one for sexual orientation discrimination and he established an issue of material fact as to whether he was subjected to permissible sexual orientation discrimination or actionable sex stereotype discrimination under *Price Waterhouse*).

employees in most of the country may be discharged not only because they objected to discrimination against their gay and lesbian coworkers, but merely because they were associated with them as friends, family, or even members of the same church.

The disagreement over whether this Court's decisions in *Price Waterhouse* and *Oncale* abrogated older decisions which precluded sexual orientation discrimination claims under Title VII has ripened into a Circuit split between en banc decisions in the Second and Seventh Circuits and the EEOC and almost all of the other Circuits. Moreover, the derivative and interconnected nature of many Title VII discrimination and retaliation claims means that the split threatens confusion and inconsistency in other areas of the law as well.[4]

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[4] Another example is the question of whether a plaintiff has exhausted her administrative remedies before the EEOC as required before bringing a lawsuit in court. *See Gregory v. Ga. Dep't of Human Res.*, 355 F.3d 1277, 1279-80 (11th Cir. 2004). Generally speaking, "a plaintiff's judicial complaint is limited by the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination," which depends on whether the court determines that the charge alleged sufficient facts to put the Commission and the employer on notice of the allegations. *See id.* (citations omitted). If the court decides that the employee did not provide enough factual information in the charge, then she will be barred from pursuing that claim in the lawsuit. *Id.* Indeed, the Magistrate Judge in this case decided that Mr. Bostock could not assert his claim for sex discrimination because he did not reference it as such in the charge of discrimination he filed with the EEOC, despite the fact that he checked the only box on the charge applicable to both sexual orientation and sex stereotype discrimination: "sex." App. 8, 22-24. Mr. Bostock has since abandoned this articulation of his sex discrimination claim, *id.* at 41 n.1, but the issue highlights the continuing

For these reasons and those set forth below, this Court must grant the writ of certiorari in this case to clarify the law and define the scope of Title VII with respect to sexual orientation.

II. The Lower Courts are Eviscerating *Price Waterhouse* and the Civil Rights Act of 1991 as they Struggle to Observe an Artifical and Unworkable Distinction Between Sex Stereotype Discrimination and Sexual Orientation Discrimination

The Court must also grant certiorari because the efforts of the lower courts to resist recognizing sexual orientation discrimination claims while adhering to *Price Waterhouse* and *Oncale* have produced illogical and unpredictable results that threaten to effectively eviscerate both decisions and the Civil Rights Act of 1991. Even the courts have admitted the difficulty of properly applying these decisions. *See, e.g.*, *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 291 (3d Cir. 2009) (noting that "the line between sexual orientation discrimination and discrimination 'because of sex' can be difficult to draw"); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005) (noting that sex stereotype claims can present problems because "'stereotypical

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confusion caused by the unsettled law of how to "properly" allege sex discrimination. *See also Norris v. Diakin Drivetrain Components*, 46 Fed. App'x 344 (6th Cir. 2002) (holding that the plaintiff did not exhaust his same-sex sexual harassment claim by alleging sexual orientation discrimination in his charge and dismissing the plaintiff's case for lack of subject matter jurisdiction).

notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality' ") (citations omitted), *overruled by Zarda*, 883 F.3d 100; *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1065 n.5 (7th Cir. 2003) (noting that "distinguishing between failure to adhere to sex stereotypes . . . and discrimination based on sexual orientation . . . may be difficult"), *overruled by Hively*, 853 F.3d 339.

For example, some courts dismiss claims for sex discrimination where the plaintiff alleges verbal harassment reflecting a perception that he or she is gay, while others do not. *Compare, e.g.*, *Schmedding v. Tnemec Co., Inc.*, 187 F.3d 862, 865 (8th Cir. 1999) (permitting a claim for same-sex sexual harassment to proceed where a male plaintiff alleged he was harassed because of his "perceived sexual preference" but the court nevertheless determined that "simply because some of the harassment alleged . . . includes taunts of being homosexual . . . " did not make the complaint one for sexual orientation discrimination) *and E.E.O.C. v. BOH Bros. Const. Co., LLC*, 768 F. Supp. 2d 883, 893 (E.D. La. 2011) (denying summary judgment on a sex stereotyping discrimination claim where the alleged harasser said he thought the employee's use of wet wipes instead of toilet paper was "feminine" or "kind of homo" and supervisor made jokes about the employee being gay) *with Kay v. Independence Blue Cross*, 142 Fed. App'x 48, 50-51 (3d Cir. 2005) (affirming the dismissal of a complaint for sex discrimination because the epithets directed toward the plaintiff, including "faggot," "fem," and suggesting he was not a "real man"

indicated permissible sexual orientation discrimination and not sex stereotype discrimination) *and E.E.O.C. v. Family Dollar Stores, Inc.*, No. CIV.A. 1:06CV2569TWT, 2008 WL 4098723, at *1, *16-*20 (N.D. Ga. Aug. 28, 2008) (granting summary judgment for an employer on the ground that the harassment was based on sexual orientation and not sex stereotyping even though the alleged harasser asked why the employee "walk[ed] like that," said the employee was "half-female," and stated to him when he was stocking feminine products that he liked sticking things "up his butt" and "now you using tampons").[5]

Numerous judges have noted the utterly "unworkable" nature of this approach to analyzing sex discrimination claims. *Christiansen v. Omnicom Group, Inc.*, 852 F.3d 195, 205 (2d Cir. 2017) (Katzman, C.J., concurring); *see also Hively*, 853 F.3d at 350 (stating

[5] Of course, the *Oncale* Court never instructed lower courts to consider whether the particular epithets directed toward a plaintiff demonstrated sex stereotyping discrimination or sexual orientation discrimination. Another curious distinction, and also one without any basis in *Oncale*, is the extent to which an employee's knowledge of the plaintiff's sexual orientation purportedly bears on the motivation for discrimination against him. *Compare, e.g.*, *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass 2002) (suggesting that if the plaintiff had disclosed his sexual orientation at work, it may be relevant to whether he was discriminated against for that reason, but should not prohibit him from maintaining a claim for sex stereotype discrimination) *with Dandan v. Radisson Hotel Lisle*, No. 97 C 8342, 2000 WL 336528, at *4 (N.D. Ill. Mar. 28, 2000) (dismissing the plaintiff's claim as one for sexual orientation discrimination despite the fact that his harassers did not know he was gay because "whether [they] knew or only suspected what his sexual orientation is makes no difference").

that "the effort to [remove the 'sex' from 'sexual orientation'] has led to confusing and contradictory results"). Indeed, Judge Posner of the Seventh Circuit wrote a concurrence in *Hamm* specially for the purpose of "recording [his] conviction that the case law has gone off the tracks in the matter of 'sex stereotyping[.]'" 332 F.3d at 1066. In that opinion, written nearly fifteen years ago, Judge Posner explained how the lower courts had distorted this Court's decision in *Price Waterhouse* by trying to avoid recognizing discrimination based on sexual orientation as actionable:

> Hostility to effeminate men and to homosexual men, or to masculine women and to lesbians, will often be indistinguishable as a practical matter, especially the former. Effeminate men often are disliked by other men because they are suspected of being homosexual (though the opposite is also true – effeminate homosexual men may be disliked by heterosexual men because they are effeminate rather than because they are homosexual), while mannish women are disliked by some men because they are suspected of being lesbians and by other men merely because they are not attractive to those men; a further complication is that men are more hostile to male homosexuality than they are to lesbianism. To suppose courts capable of disentangling the motives for disliking the nonstereotypical man or woman is a fantasy.

Id. at 1067. Moreover, as noted by Judge Posner, the ill-conceived attempt to determine whether the motive for discrimination is a failure to conform to sex stereotypes or sexual orientation necessarily promotes an investigation of the plaintiff's sexual orientation, which was assuredly *not* the policy of Title VII. *Id.*

So too have commentators criticized this course of jurisprudence for causing more problems than it purported to solve. *See, e.g.*, William N. Eskridge, Jr., *Title VII's Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 Yale L.J. 322, 343 (2017) (arguing that "[a]s administrators, judges, and legislators have responded to our evolving understanding of the workplace, they have crafted a series of legal rules and precedents that render the exclusion of LGBT employees from Title VII increasingly anomalous and profoundly unworkable"); Zachary R. Herz, Price*'s Progress: Sex Stereotyping and Its Potential for Antidiscrimination Law*, 124 Yale L.J. 396, 425 (2014) (arguing that the case law developed under *Price Waterhouse* for analyzing whether sex discrimination claims are permissible sex stereotyping claims or precluded sexual orientation claims is "both doctrinally and descriptively incoherent"); Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 Am. U. L. Rev. 715, 754 (2014) (surveying cases); Anthony E. Varona, Jeffrey M. Monks, *En/gendering Equality: Seeking Relief Under Title VII Against Employment Discrimination Based on Sexual Orientation*, 7 Wm. & Mary J. Women & L. 67, 94-98

(2000) (summarizing the judicial conflation of sex and gender in cases decided under *Price Waterhouse*).

But ultimately, because this lack of workable rules only serves to "saddle the courts with the making of distinctions that are beyond the practical capacity of the litigation process," *Hamm*, 332 F.3d at 1067 (Posner, J., concurring), it eviscerates this Court's decision in *Price Waterhouse* and subverts the 1991 amendments to the Civil Rights Act. This Court explained in *Price Waterhouse* that:

> The critical inquiry, the one commanded by the words of § 703(a)(1), is whether gender was a factor in the employment decision at the moment it was made. Moreover, since we know that the words "because of" do not mean "solely because of," ***we also know that Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations***. When, therefore, an employer considers both gender and legitimate factors at the time of making a decision, that decision was "because of" sex and the other, legitimate considerations – even if we may say later, in the context of litigation, that the decision would have been the same if gender had not been taken into account.

490 U.S. at 241 (emphasis supplied). Congress confirmed and codified this lessened "motivating factor" causation standard for Title VII discrimination claims with § 107(a) of the Civil Rights Act of 1991, 105 Stat.

1075 (codified at 42 U.S.C. § 2000e-2(m)). *See Univ. of Tx. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 347-49 (2013) (citing and discussing *Price Waterhouse* and the Civil Rights Act of 1991). But in their misguided efforts to determine whether discrimination is motivated by an employee's failure to conform to a sex-based stereotype or by the employee's sexual orientation, the lower courts are erroneously throwing out cases where it is motivated by both. *See, e.g.*, *Kay*, 142 Fed. App'x at 50-51 (noting that the harassment included referring to "real men" as opposed to the "fem" plaintiff and assuming that this was evidence of sex stereotyping but nevertheless affirming the district court's dismissal because other evidence indicated sexual orientation bias); *Swift v. Countrywide Home Loans, Inc.*, 770 F. Supp. 2d 483, 488 (E.D.N.Y. 2011) (determining that the plaintiff's claim for sex discrimination was really one for sexual orientation discrimination even though the court acknowledged that he was disparaged with terms referring to the "non-conformism of his behavior"); *Family Dollar Stores, Inc.*, 2008 WL 4098723, at *17 (N.D. Ga. Aug. 28, 2008) (granting summary judgment on a sex stereotype discrimination claim because the record "clearly reflect[ed] that the harassment at issue was based *primarily*" on the plaintiff's perceived sexual orientation) (emphasis supplied).

None of this is surprising, since "[h]ostility to effeminate men and to homosexual men, or to masculine women and to lesbians, will often be indistinguishable as a practical matter." *Hamm*, 332 F.2d at 1067 (Posner, J., concurring); *see also Evans*, 850 F.3d at 1258

(Pryor, J., concurring) (noting that it is an "unsurprising reality that some individuals who have experienced discrimination because of sexual orientation will also have experienced discrimination because of gender nonconformity"). But the point is that even if Title VII does not prohibit sexual orientation discrimination and only prohibits sex stereotype discrimination, dismissing a case because the evidence suggests both types of discrimination is in direct contravention of this Court's mandate in *Price Waterhouse* – codified in the Civil Rights Act of 1991 – that Title VII prohibits *all* employment decisions "based on a mixture of legitimate *and* illegitimate considerations." 490 U.S. at 241 (emphasis supplied); *see also* 42 U.S.C. § 2000e-2(m) (providing that "an unlawful employment practice is established when the complaining party demonstrates that . . . sex . . . was a motivating factor for any employment practice, even though other factors also motivated the practice"). Thus, this Court must grant certiorari if only to ensure that the lower courts correctly apply the mixed motive framework for sex discrimination claims set forth in *Price Waterhouse* and codified in § 107 of the Civil Rights Act of 1991.

III. This Court Must End Workplace Discrimination Against Gay and Lesbian Employees Because it is Unjust and Forbidden by Title VII under this Court's Decisions

The Court must grant the writ of certiorari in this case not only to resolve the Circuit split and prevent further erosion of *Price Waterhouse* and *Oncale* by the

lower courts struggling with how to apply them, but also because justice demands the unequivocal determination that discrimination against an employee because of sexual orientation is discrimination "because of . . . sex" in violation of Title VII. Because a person's sexual orientation is immutable*, Obergefell*, 135 S. Ct. at 2596, discrimination against an employee on that basis is at least as "reasonably comparable [an] evil" as discrimination on the basis of biological sex alone, *Oncale*, 523 U.S. at 79. Accordingly, this Court must act to fulfill the congressional intent behind Title VII "to strike at the *entire spectrum* of disparate treatment of men and women resulting from sex stereotypes." *Oncale*, 523 U.S. at 78 (emphasis supplied) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)).

In *Price Waterhouse*, six members of this Court agreed that Title VII prohibits not only discrimination because of one's biological sex, but also gender stereotyping – that is, discrimination on the basis of an employee's failure to act and appear according to stereotypical gender expectations. *See* 490 U.S. at 250-51 (plurality opinion); *id.* at 258-61 (White, J., concurring); *id.* at 272-73 (O'Connor, J., concurring). The Court stated that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotypes associated with their group." *Id.* at 251. There is no reason in law, logic, or common sense why *Price Waterhouse* does not forbid discrimination against a gay person for failing to conform to a stereotype about how he should act in terms of who he should be attracted to or romantically

involved with. *See Evans*, 850 F.3d at 1264 (Rosenbaum, J., concurring in part and dissenting in part) (stating that "*Price Waterhouse* . . . demand[s] the conclusion that discrimination because an employee is gay violates Title VII's proscription on discrimination 'because of . . . sex' "); *Hively*, 853 F.3d at 350 (noting that "[i]t would require considerable calisthenics to remove the 'sex' from 'sexual orientation' " and that "[t]he logic of the Supreme Court's decisions, as well as the common-sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex, persuade us that the time has come to overrule our previous cases that have endeavored to find and observe that line").

That Congress truly intended with Title VII to attack the "entire spectrum" of employment discrimination "because of . . . sex" was confirmed again in *Oncale*. In that case, this Court specifically authorized a cause of action for same-sex sexual harassment under Title VII. 523 U.S. at 80. This Court noted that while "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII . . . *statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils*. . . ." *Id.* at 79 (emphasis supplied). The Court once again rejected the faulty premise that some mistreatment "because of . . . sex" might be outside the reach of Title VII, because "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Id.* at 79-80.

Additionally, the EEOC – whose interpretations of Title VII are entitled to at least some deference and "respect proportional to [their] power to persuade," *see Vance v. Ball State Univ.*, 570 U.S. 421, 462 (2013) (citations omitted) – has concluded that "sexual orientation is inherently a 'sex-based consideration,' and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII," *Baldwin*, 2015 WL 4397641, at *5. In *Baldwin*, the Commission explained that:

> When an employee raises a claim of sexual orientation discrimination as sex discrimination under Title VII, the question is not whether sexual orientation is explicitly listed in Title VII as a prohibited basis for employment actions. It is not. Rather, the question for purposes of Title VII coverage of a sexual orientation claim is the same as any other Title VII case involving allegations of sex discrimination – whether the agency has "relied on sex-based considerations" or "take[n] gender into account" when taking the challenged employment action.

2015 WL 4397641, at *4 (July 15, 2015). In discriminating against an employee on the basis of his sexual orientation, the employer has "taken gender into account," because "'[s]exual orientation' as a concept cannot be defined or understood without reference to sex." *Id.* That is, "sexual orientation is inseparable from and inescapably linked to sex and, therefore . . . allegations of sexual orientation discrimination [necessarily] involve sex-based considerations." *Id.* at *5. *See also*

Zarda. This interpretation is not only logical, but is also fully consistent with this Court's decision in *Price Waterhouse*.[6]

Nor does the fact that Title VII has not been specifically amended to expressly include sexual orientation mean that the statute does not already provide protection against such discrimination. This Court has warned against relying on Congressional inaction as an interpretative tool because "subsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress." *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (internal citations and quotation marks omitted). Indeed, "[i]t is a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns, as it does here, a

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[6] It is also consistent with the Court's other decisions which recognize that discrimination "because of . . . sex" in violation of Title VII may occur not only when an employer acts on the basis of an employee's *behavior* as a person of one gender or the other, but simply on the basis of that employee *being* one gender or the other. *See, e.g.*, *Newport News Shipbuilding and Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669, 683-85 (1983) (holding that exclusion of pregnant spouses from an employer's health insurance coverage plan discriminated against male employees in violation of Title VII simply because, as spouses of pregnant women, they would under the law at the time necessarily be male); *City of Los Angeles, Dep't of Water and Power v. Manhart*, 435 U.S. 702, 710-11 (1978) (holding that an employer's practice of requiring female employees to contribute more than male employees to a pension fund based on actuarial tables indicating the usual life expectancy of women violated Title VII because it "does not pass the simple test of whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different' ") (citation omitted).

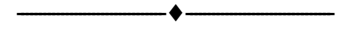
proposal that does not become law." *Id.*; *accord Zuber v. Allen*, 396 U.S. 168, 185 n.21 (1969) (explaining that "[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law") (quoting *Girouard v. United States*, 328 U.S. 61, 69 (1946)); *U.S. v. Price*, 361 U.S. 304, 310-11 (1960) (noting that "nonaction by Congress affords the most dubious foundation for drawing positive inferences"). The reason is that "Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, *including the inference that the existing legislation already incorporated the offered change*." *Pension Ben. Guar. Corp.*, 496 U.S. at 650 (internal quotations omitted) (emphasis supplied).[7]

Indeed, there are many more reasons to recognize that the purpose and history of Title VII, including its evolution through this Court's decisions and positive amendments by Congress, compel the conclusion that Title VII prohibits sexual orientation discrimination as a subset of sex discrimination. *See generally* Eskridge, *supra*, 127 Yale L.J. 322 (providing a detailed discussion of the various methodological approaches to interpretation of Title VII as it relates to sexual orientation discrimination and arguing, among other things, that the formal evolution of Title VII requires a dynamic

[7] And "Congressional inaction frequently betokens unawareness, preoccupation, or paralysis." *Zuber*, 396 U.S. at 185 n.21; *see also Pension Ben. Guar. Corp.*, 496 U.S. at 650 (noting that "[e]ven less deference is due silence in the wake of unsuccessful attempts to eliminate an offending interpretation by amendment").

interpretation of the anti-discrimination provision which recognizes that discrimination on the basis of sexual orientation falls within the statute's prohibition of sex discrimination). Indeed, to ignore these compelling reasons and pretend that the authors of Title VII intended it to protect "effeminate men from employment discrimination, but only if they are (or are believed to be) heterosexuals," is "to indulge in a most extravagant legal fiction." *Hamm*, 332 F.3d at 1067 (Posner, J., concurring).

Price Waterhouse and *Oncale* demonstrate that Title VII has become a robust source of protection from all workplace discrimination "because of . . . sex," regardless of any hypertechnical distinctions as to how sex becomes a factor in an employer's decision. In other words, the decision of the former Fifth Circuit in *Blum* has been "overruled or undermined to the point of abrogation" by *Price Waterhouse* and this Court's subsequent decisions, and therefore the Eleventh Circuit erred in following *Blum*. *See Tobinick v. Novella*, 884 F.3d 1110, 1118 (11th Cir. 2018) (noting that the court is not bound to follow a prior panel precedent if the holding has been overruled or undermined to the point of abrogation by an en banc or Supreme Court decision). This Court must act to correct this error, settle one of the most important questions ever presented under Title VII, and grant Petitioner Bostock his day in court.



CONCLUSION

This Honorable Court must grant the writ of certiorari in this case to confirm that discrimination against an employee because of his or her sexual orientation is necessarily discrimination "because of . . . sex" in violation of Title VII of the Civil Rights Act of 1964. The Circuits are irreconcilably split over this critical question, and the Eleventh Circuit has in this case again erroneously refused to recognize that this Court's decisions in *Price Waterhouse* and *Oncale* fatally undermined the old precedents precluding sexual orientation discrimination claims under Title VII. Other lower courts are uncertain whether they are bound by those old precedents, some decided decades before *Price Waterhouse*, *Oncale*, *Lawrence*, and *Obergefell*, or whether they should recognize sexual orientation discrimination claims based on the sound reasoning of the Second Circuit in *Zarda*, the Seventh Circuit in *Hively*, and the EEOC in *Foxx.*

The Circuit split on this question also threatens consistency and predictability because, in attempting the impossible task of separating discrimination on the basis of an employee's failure to conform to a sex stereotype from discrimination on the basis of her sexual orientation, the lower courts have distorted this Court's directives in *Price Waterhouse* and *Oncale* and developed unworkable rules leading to absurdly different results in similar cases. This confusion is not only a threat to ensuring the consistency and predictability required for the rule of law and commerce, but it is also eviscerating this Court's instruction in *Price*

Waterhouse, codified in Section 107(a) of the Civil Rights Act of 1991, that Title VII must be enforced to prohibit "even those [employment] decisions based on a mixture of legitimate and illegitimate considerations."

The question of whether discrimination "because of . . . sex" within the meaning of Title VII includes discrimination because of sexual orientation is not a difficult one. The formal evolution of Title VII, including the amendments to the statute over the years and this Court's decisions in cases like *Manhart*, *Newport News Shipbuilding and Dry Dock Co.*, *Price Waterhouse*, and *Oncale*, demand the conclusion reached by the Second Circuit in *Zarda*, the Seventh Circuit in *Hivley*, and the EEOC in *Baldwin*. Especially in light of this Court's recognition in recent years that gay and lesbian people are entitled to equal treatment and dignity under the Constitution of the United States, the old precedents denying to them protection from workplace discrimination under Title VII simply cannot stand.

Indeed, the words of Senator Everett Dirksen spoken in support of ending the filibuster to pass the Civil Rights Act in 1964 are appropriate to command this Court's attention in this case:

> There is another reason why we dare not temporize with the issue which is before us. It is essentially moral in character. It must be resolved. It will not go away. Its time has come. Nor is it the first time in our history that an issue with moral connotations and implications has swept away the resistance, the

> fulminations, the legislative speeches, the ardent but dubious arguments, the lamentations and the thought patterns of an earlier generation and pushed forward to fruition.

U.S. Congress, Senate, Cong. Rec. 88th Cong. 2d Sess., pp. 13319-20.

Petitioner Bostock and every gay and lesbian worker in this country urgently need this Court's answer to the question of whether discrimination against an employee because of that employee's sexual orientation is discrimination "because of . . . sex" in violation of Title VII of the Civil Rights Act of 1964. This Court must finally determine whether and to what extent Title VII of the Civil Rights Act truly "seeks a workplace where individuals are not discriminated against because of their . . . gender-based status." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-01 (1973).

Respectfully submitted,

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