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., and RAY MAYNARD,
Petitioners,
v.
MELISSA ZARDA and WILLIAM MOORE, JR.,
Co-Independent Executors of the Estate of Donald Zarda,
Respondents.

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

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

BRIEF OF AMICI CURIAE IMPACT FUND, NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, EMPLOYEE RIGHTS ADVOCACY INSTITUTE FOR LAW & POLICY, AND 19 LEGAL AND ADVOCACY ORGANIZATIONS IN SUPPORT OF PETITIONER IN NO. 17-1618 AND RESPONDENTS IN NOS. 17-1623 & 18-107

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INTEREST OF AMICI CURIAE[1]

This brief is submitted by the Impact Fund, the National Employment Lawyers Association, the Employee Rights Advocacy Institute for Law & Policy, and 19 other legal and advocacy organizations.

The **Impact Fund** is a non-profit legal foundation that provides strategic leadership and support for impact litigation to achieve economic, environmental, racial, and social justice. The Impact Fund provides funding, offers innovative training and support, and serves as counsel for impact litigation across the country. The Impact Fund has served as party or amicus counsel in a number of major civil rights cases before this Court, including cases challenging employment discrimination, unequal treatment of lesbian, gay, bisexual, and transgender (LGBT) people, and limitations on access to justice. Through its work, the Impact Fund seeks to use and support impact litigation to achieve social justice for all communities.

The **National Employment Lawyers Association (NELA)** is the largest professional membership organization in the country comprising lawyers who represent workers in labor, employment, and civil rights disputes. NELA advances employee rights and serves lawyers who advocate for equality and justice in

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amici curiae, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented in writing to the filing of this brief.

the American workplace. NELA and its local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases are implemented. NELA strives to protect the rights of its members' clients and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

The **Employee Rights Advocacy Institute for Law & Policy (NELA Institute)** advances workers' rights through research and advocacy to achieve equality and justice in the American workplace. The NELA Institute works hand-in-hand with NELA to create workplaces in which there is mutual respect between employers and workers, and to ensure that workplaces are free of discrimination, harassment, and retaliation.

Additional amici are listed in Appendix A. The Impact Fund, NELA, the NELA Institute, and their fellow amici share an interest in the certified questions because the outcome will impact the communities we serve as legal advocates and allies, as well as our country's commitment to the elimination of workplace discrimination.

SUMMARY OF ARGUMENT

In their Opening Briefs, Petitioner Gerald Bostock, Respondents Melissa Zarda and William Moore,

Jr., Co-Executors of the Estate of Donald Zarda, and Respondent Aimee Stephens explain in detail how and why Title VII of the 1964 Civil Rights Act's prohibition of sex discrimination, 42 U.S.C. § 2000e-2(a), (m), includes discrimination based on sexual orientation and gender identity, including transgender status.[2] Amici write separately to emphasize the significant challenges that lower courts and workers face in attempting to differentiate among the legal constructs of sex, sexual orientation, and gender identity. Guidance from this Court is necessary to resolve the confusion and unpredictability that reigns in many circuits, frustrating Title VII's purpose of eradicating workplace discrimination.

Lesbian, gay, bisexual, and transgender (LGBT) people experience pervasive discrimination and harassment in industries across the country because of their sexual orientation and/or gender identity. Incidents of discrimination and harassment increase for LGBT people who are also people of color, low-wage workers, persons with disabilities, or older workers. Protecting workers requires recognizing their legal right to a workplace free of all discrimination, including

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[2] Gender identity is a person's deeply felt, inherent sense of being male, female, or an alternate gender. Am. Psychological Ass'n, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 Am. Psychol. 832, 834 (Dec. 2015), https://www.apa.org/practice/guidelines/transgender.pdf. Discrimination because of a person's gender identity encompasses discrimination because of their transgender or transitioning status.

that based on their sexual orientation and gender identity.

The three decisions under review underscore the unpredictability in the law for LGBT people. Faced with similar factual scenarios, the Second Circuit and the Eleventh Circuit reached opposing conclusions on the question of whether discrimination based on sexual orientation is unlawful sex discrimination under Title VII. Meanwhile, the Sixth Circuit's ruling in favor of Ms. Stephens reflects the nearly unanimous consensus of courts that Title VII protects transgender or transitioning status, as well as gender identity.

The split between the Second and Eleventh Circuits did not arise in a vacuum. Courts have repeatedly acknowledged the difficulty of navigating the current state of the law. Judges and juries struggle to apply an unworkable and illogical analysis that forces them to sort between evidence of discrimination motivated by the plaintiff's sex versus that motivated by sexual orientation. Moreover, this artificial dichotomy bears little or no relationship to the real-world experiences of lesbian, gay, and bisexual workers. Discrimination based on sex and sexual orientation are often one and the same, making the legal distinction baffling to both courts and plaintiffs.

In contrast, a significant majority of courts agree with the Sixth Circuit and already have concluded that it is impossible to differentiate sex from transgender or transitioning status for purposes of Title VII's ban on sex discrimination. They no longer attempt to do

so and instead apply a single federal standard recognizing that the law prohibits discrimination against transgender people based on their status as transgender or their perceived gender nonconformity. In these cases, courts are permitted to consider all of the evidence presented in transgender workers' claims without first having to engage in an illogical sorting of the facts. A similar unified standard barring sex discrimination because of sexual orientation should apply to claims of lesbian, gay, and bisexual workers.

Amici respectfully request that the Court provide much-needed guidance for lower courts and workers by confirming that Title VII's prohibition of sex discrimination includes discrimination based on sexual orientation and transgender status.

ARGUMENT

I. LGBT Workers Face Pervasive Discrimination and Urgently Need Title VII's Protection.

Title VII, "a broad remedial measure, designed to assure equality of employment opportunities," is the bedrock of civil rights protections in the workplace. *Pullman-Standard v. Swint*, 456 U.S. 273, 276 (1982) (internal quotations omitted). Congress intended Title VII "to prohibit all practices in whatever form which create inequality in employment opportunity . . . and ordained that its policy of outlawing such discrimination should have the highest priority." *Franks v.*

Bowman Transp. Co., Inc., 424 U.S. 747, 763 (1976) (internal quotations omitted). Confirming that discrimination because of sexual orientation or transgender status is illegal sex discrimination would fulfill Title VII's promise of equal opportunity in the workplace, protection that LGBT workers urgently need.

LGBT people face discrimination, both in the public arena and at work. This Court recently recognized that our laws must protect the civil rights of lesbian, gay, and bisexual people because "[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth" and that "[t]he exercise of their freedom on terms equal to others must be given great weight and respect by the courts." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018). In addition, "[t]here is no denying that transgender individuals face discrimination, harassment, and violence because of their gender identity." *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017), *cert. dismissed sub nom. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ. v. Whitaker ex rel. Whitaker*, 138 S. Ct. 1260 (2018).

Roughly four and a half percent of the U.S. adult population (some 11,343,000 adults) identify as LGBT.[3] One in four LGBT workers reported that they

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[3] The Williams Inst., *Adult LGBT Population in the United States* 1 (Mar. 2019), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Population-Estimates-March-2019.pdf.

experienced workplace discrimination because of their sexual orientation or gender identity in 2016 alone,[4] making the workplace one of the areas where LGBT people perceive the highest levels of discrimination.[5] Forty-six percent of LGBT workers remain closeted at work, largely because they fear being stereotyped or losing their professional relationships, which would irreparably damage their careers.[6] A majority of LGBT workers have overheard derogatory remarks about LGBT people in their workplaces.[7]

In particular, transgender people experience discrimination at "alarming" rates in public life. *See Whitaker*, 858 F.3d at 1051 (reporting that seventy-eight percent of transgender or gender nonconforming students report being harassed in school). *See also Doe*

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[4] Sejal Singh & Laura E. Durso, Ctr. for Am. Progress, *Widespread Discrimination Continues to Shape LGBT People's Lives in Both Subtle and Significant Ways*, at "Introduction" (May 2, 2017), https://www.americanprogress.org/issues/lgbt/news/2017/05/02/429529/widespread-discrimination-continues-shape-lgbt-peoples-lives-subtle-significant-ways.

[5] Nat'l Pub. Radio et al., *Discrimination in America: Experiences and Views of LGBTQ Americans* 29 (Nov. 2017), https://www.npr.org/documents/2017/nov/npr-discrimination-lgbtq-final.pdf.

[6] *See* Human Rights Campaign Found., *A Workplace Divided: Understanding the Climate for LGBTQ Workers Nationwide* 10-11 (Jun. 2018), https://assets2.hrc.org/files/assets/resources/AWorkplaceDivided-2018.pdf.

[7] *Id.* at 16; *see also* Ctr. for Am. Progress & Movement Advancement Project, *Paying an Unfair Price: The Financial Penalty for Being LGBT in America* 19 (Nov. 2014), http://www.lgbtmap.org/file/paying-an-unfair-price-full-report.pdf.

ex rel. Doe v. Boyertown Area Sch. Dist., 897 F.3d 518, 523 (3d Cir. 2018) (observing that transgender people are many times more likely to attempt suicide than the general population, at least partly due to exclusion and discrimination), *cert. denied*, No. 18-658, 2019 WL 2257330 (May 28, 2019). In a 2015 study, forty-one percent of transgender workers surveyed reported being fired, not hired, or not promoted in the past year because of their gender identity or expression.[8] Eighty percent reported experiencing some form of discrimination on the job and/or taking steps to avoid discrimination at work.[9] In part because of this discrimination, transgender individuals are three times more likely to be unemployed than American adults generally.[10]

Discrimination faced by LGBT workers undermines equal opportunity in the workplace and leads to lower wages and higher rates of economic insecurity.[11] Twenty-five percent of LGBT individuals earn less than $24,000 a year, compared to eighteen percent of

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[8] Sandy E. James et al., Nat'l Ctr. for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey* 151 (Dec. 2016), https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.pdf.

[9] *Id.* at 155.

[10] *Id.* at 140-41.

[11] Ctr. for Am. Progress & Movement Advancement Project, *supra* note 7, at 9.

non-LGBT individuals.[12] More than forty percent of the sexual orientation- or gender identity-related charges filed with the EEOC between 2013 and 2016 came from a small number of industries, including several typically low-wage industries, such as retail, accommodations, and food services.[13]

Many LGBT people experience even greater vulnerability in the workplace because they are also subject to discrimination based on their race, disability, or age. For example, LGBT people of color report over twice the rate of discrimination related to sexual orientation as white LGBT individuals when applying for jobs.[14] Research from the United Kingdom recently found that LGBT workers with disabilities suffer higher rates of discrimination than the aggregate LGBT population.[15] One in five older LGBT adults

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[12] The Williams Inst., *LGBT Demographic Data Interactive* (Jan. 2019), https://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=LGBT#economic.

[13] M.V. Lee Badgett et al., Ctr. for Emp't Equity, *Evidence from the Frontlines on Sexual Orientation Discrimination*, at "Key Findings" (Jul. 2018), https://www.umass.edu/employmentequity/evidence-frontlines-sexual-orientation-and-gender-identity-discrimination.

[14] Nat'l Pub. Radio, *supra* note 5, at 10-11.

[15] Stonewall, *LGBT in Britain: Work Report* 7, 9, 10, 11, 13 (2018), https://www.stonewall.org.uk/system/files/lgbt_in_britain_work_report.pdf. LGBT people also are more likely to live with one or more disabilities than non-LGBT adults. James, *supra* note 8, at 57; Karen I. Fredriksen-Goldsen et al., *Disability Among Lesbian, Gay, and Bisexual Adults: Disparities in Prevalence and Risk*, 102(1) Am. J. Pub. Health e16, e18 (2012), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3490559/pdf/AJPH.2011.300379.pdf.

reported recent involuntary job loss due at least in part to their perceived sexual orientation or gender identity, and older LGBT workers postpone retirement at a higher rate than the general population, likely due to a lifetime of economic disadvantage.[16]

The alarming statistics of discrimination endured by LGBT workers because of their sexual orientation and/or gender identity illustrate the urgent need for the Court to effectuate Title VII's broad mandate and recognize their right to equal opportunity in the workplace. *See Pullman-Standard*, 456 U.S. at 276 (describing Title VII as "a broad remedial measure"); *accord Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 348 (1977) ("The primary purpose of Title VII was to assure equality of employment opportunities. . . .") (internal quotation and citation omitted); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 424 (1975) (referring to "the broad purposes of Title VII"). Clarification from the Court that Title VII's prohibition of sex discrimination includes that based on sexual orientation

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[16] *See* Karen I. Fredriksen-Goldsen et al., *The Unfolding of LGBT Lives: Key Events Associated with Health and Well-being in Later Life*, 57 Gerontologist S15, S24, S26 (2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5241757/pdf/gnw185.pdf. *See also* Angela Houghton, AARP Research, *Maintaining Dignity, Understanding and Responding to the Challenges Facing Older LGBT Americans: An AARP Survey of LGBT adults age 45-plus* 12, 32, 42-46 (Mar. 2018), https://www.aarp.org/content/dam/aarp/research/surveys_statistics/life-leisure/2018/maintaining-dignity-lgbt.doi.10.26419%252Fres.00217.001.pdf (LGBT respondents age 45 and over show high levels of concern about challenges as they age, including access to quality healthcare, long-term care, housing, and other social supports).

and transgender status is necessary to eliminate an arbitrary carve-out to Title VII that has confused courts and wrongly denied LGBT workers access to its protection.

II. The Decisions Under Review are Emblematic of the Current Lack of Clarity in the Law.

The divergent lower court opinions in the cases on appeal illustrate the challenges courts face in navigating the line between discrimination based on sex and that based on sexual orientation, as well as the impossibility of drawing any line at all between sex and transgender status. Presented with similar scenarios, the Second and Eleventh Circuits issued diametrically opposed rulings in *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (en banc), and *Bostock v. Clayton County Board of Commissioners*, 723 F. App'x 964 (11th Cir. 2018) (per curiam), as to whether terminating someone's employment because of their sexual orientation is unlawful sex discrimination. In contrast, the Sixth Circuit followed substantial circuit precedent in *E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018), to hold that discrimination based on gender nonconformity and transgender status is prohibited sex discrimination.

The factually similar cases of *Zarda* and *Bostock* present a striking contrast in analysis. The Second and

Eleventh Circuits disagreed as to whether discrimination against lesbian, gay, and bisexual workers constitutes a Title VII violation because of their failure to conform to sex stereotypes, a well-recognized basis for sex discrimination set forth in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989) (plurality op.). In *Zarda*, the employee, a gay man, alleged that he was open about his sexual orientation at work and that his employer criticized him for painting his toenails and wearing pink colors. *Zarda v. Altitude Express, Inc.*, 855 F.3d 76, 80-81 (2d Cir. 2017) (panel decision) (per curiam). The district court and the Second Circuit panel concluded that Mr. Zarda was not entitled to Title VII protection because he was terminated for disclosing his sexual orientation to a client; the courts declined to consider whether he was terminated in part because he failed to conform to the stereotype "that men should date women." *Id.* at 80-82. Sitting en banc, the Second Circuit reversed and held that "act[ing] on the basis of a belief that men cannot be attracted to men" is unlawful sex stereotyping discrimination that violates Title VII. *Zarda*, 883 F.3d at 120-21 (en banc) (internal punctuation and quotation omitted).

Meanwhile, in *Bostock*, Mr. Bostock's "sexual orientation and identity were openly criticized" at his workplace, but the district court dismissed his claim because his complaint failed to identify "a single mention of or fact supporting gender stereotype discrimination." *Bostock v. Clayton Cty.*, No. 16-cv-1460, 2017 WL 4456898, at *1, *3 (N.D. Ga. Jul. 21, 2017), *aff'd sub nom. Bostock v. Clayton Cty. Bd. of Comm'rs*, 723

F. App'x at 965.[17] Judge Rosenbaum of the Eleventh Circuit later dissented from the denial of Mr. Bostock's petition for rehearing en banc and endorsed the Second Circuit's analysis: "Title VII prohibits discrimination against gay and lesbian individuals because they fail to conform to their employers' views when it comes to whom they should love." *Bostock v. Clayton Cty. Bd. of Comm'rs*, 894 F.3d 1335, 1338 (11th Cir. 2018) (Rosenbaum, J., dissenting) (en banc pet. denied).

In contrast, in *R.G. & G.R. Harris Funeral Homes*, the Sixth Circuit held that discrimination based on transgender status is unlawful sex discrimination, and it also reaffirmed circuit precedent that such discrimination is unlawful sex stereotyping. 884 F.3d at 572, 574-75. Ms. Stephens was terminated because she was a transgender woman preparing to undergo a gender-confirming transition and requested permission to follow the female dress code at work and otherwise present as female. *Id.* at 568-69. The Sixth Circuit held that the employer "engaged in improper sex stereotyping when it fired Stephens for wishing to appear or behave in a manner that contradicts the Funeral Home's perception of how she should appear or behave based on her sex." *Id.* at 574. It concluded that her termination "f[ell] squarely within the ambit of sex-based discrimination" without having to evaluate other evidence of Ms. Stephens's gender nonconformity. *Id.* at 572. The court further held that discrimination

[17] The Eleventh Circuit did not rule on Mr. Bostock's gender stereotyping claim because he did not appeal its dismissal. *Bostock*, 723 F. App'x at 965.

because of transgender or transitioning status is per se sex discrimination "because transgender or transitioning status constitutes an inherently gender nonconforming trait." *Id.* at 577.

Altitude Express and *Bostock* encapsulate the current unpredictable state of the law with regard to the artificial distinction between sex and sexual orientation under Title VII. Meanwhile, *R.G. & G.R. Harris Funeral Homes* represents the increasing abandonment of any attempt to draw a similar line between sex and gender identity, which has created a more uniform and straightforward body of law.

III. There is No Clear and Predictable Way to Distinguish Between Sex and Sexual Orientation Discrimination.

Courts need a "uniform and predictable standard" to apply Title VII consistently. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754 (1998). Should this Court hold that the statute's prohibition of sex discrimination excludes discrimination based on sexual orientation, courts and potential plaintiffs will lack any meaningful or predictable standard. Lower courts will be required to undergo a highly fact-specific, case-by-case analysis to ascertain whether a lesbian, gay, or bisexual worker presents a valid claim of sex discrimination. Courts and juries would be forced to artificially sort evidence and disregard facts that are probative of discrimination but nonetheless appear directed toward the plaintiff's sexual orientation. This illogical sorting

is at odds with the trier of fact's responsibility to determine whether the totality of the evidence demonstrates that unlawful discrimination occurred. *See*, *e.g.*, *Petrosino v. Bell Atl.*, 385 F.3d 210, 223 (2d Cir. 2004); *Bell v. Crackin Good Bakers, Inc.*, 777 F.2d 1497, 1501 (11th Cir. 1985). For lesbian, gay, and bisexual workers, discrimination based on sex and that based on sexual orientation are invariably intertwined. Requiring courts to distinguish between them is a futile exercise that risks inconsistent and unpredictable results.

A. Courts will be forced to engage in unworkable line-drawing if this Court excludes discrimination based on sexual orientation from Title VII's purview.

The absence of a clear, consistent standard for Title VII, under which "an almost unlimited number of factual variations" can arise, is unhelpful for judges and juries alike. *See*, *e.g.*, *Vance v. Ball State Univ.*, 570 U.S. 421, 441, 441 n.12 (2013) (adopting an interpretation "that can be readily applied" and avoiding a "nebulous standard"); *id.* at 444 ("Courts and commentators alike have opined on the need for reasonably clear jury instructions in employment discrimination cases."); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 24 (1993) (Scalia, J., concurring) (cautioning against a test that would leave juries "virtually unguided"). A rule that excludes lesbian, gay, and bisexual plaintiffs from Title VII protections unless they can prove that they experienced discrimination based on their sex,

separate from their sexual orientation, is burdensome and difficult for courts.

As the Second Circuit observed, courts have "long labored to distinguish between gender stereotypes that support an inference of impermissible sex discrimination and those that are indicative of sexual orientation discrimination." *Zarda*, 883 F.3d at 121 (en banc). A court faced with evidence of harassment based on a plaintiff's sexual orientation *and* nonconformity with gender stereotypes must construe each discrete fact presented and evaluate the sum of this "lexical bean counting." *See id.* ("In parsing the evidence, courts have resorted to lexical bean counting, comparing the relative frequency of epithets such as 'ass wipe,' 'fag,' 'gay,' 'queer,' 'real man,' and 'fem' to determine whether discrimination is based on sex or sexual orientation.").

Multiple circuit courts have concluded that maintaining a legal distinction between sex and sexual orientation is "unworkable," "illogical," and "produces untenable results." *See id.* at 122 (citations and internal quotations omitted). *See*, *e.g.*, *id.*; *Hively v. Ivy Tech. Cmty. Coll. of Ind.*, 853 F.3d 339, 350 (7th Cir. 2017) (en banc) ("It would require considerable calisthenics to remove 'sex' from 'sexual orientation.' The effort to do so has led to confusing and contradictory results. . . ."); *Christensen v. Omnicom Grp., Inc.*, 852 F.3d 195, 200 (2d Cir. 2017) (observing the "confusion in our Circuit about the relationship between gender stereotyping and sexual orientation discrimination claims"); *id.* at 205 (Katzmann, C.J., concurring) (calling it a "logically untenable" and "unworkable"

approach); *Evans v. Georgia Reg'l Hosp.*, 850 F.3d 1248, 1266 (11th Cir. 2017) (Rosenbaum, J., concurring in part and dissenting in part) ("As a matter of logic, no basis exists for this arbitrary line."), *cert. denied*, 138 S. Ct. 557 (2017); *Hively v. Ivy Tech. Cmty. Coll.*, 830 F.3d 698, 706 (7th Cir. 2016) (panel decision) ("Whether the line is nonexistent or merely exceedingly difficult to find, it is certainly true that the attempt to draw and observe a line between the two types of discrimination results in a jumble of inconsistent precedents."), *rev'd*, 853 F.3d 339; *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 291 (3d Cir. 2009) ("the line between sexual orientation discrimination and discrimination 'because of sex' can be difficult to draw").

Absent clear governing law, the district courts that review these issues in the first instance also are struggling to apply a workable standard. For example, in *Guess v. Philadelphia Housing Authority*, 354 F. Supp. 3d 596 (E.D. Pa. 2019), the court acknowledged the "difficulty" in applying circuit precedent because "the line between sexual orientation claims and gender stereotyping claims involving sexual orientation may seem arbitrary," as the evidence "may fit within both rubrics." *Id.* at 604 (internal punctuation and quotation omitted) (citing cases within the Third Circuit). The *Guess* court was "at a loss to conceive of a sexual orientation discrimination claim that could occur in so much of a vacuum as to be free of any gender stereotyping," and it "question[ed] whether forcing litigants to replead essentially the same case under different

labels is mere artifice." *Id.* at 605, 607 (dismissing plaintiff's claim based on binding circuit precedent).

Other district courts have similarly wrestled with the "lingering and faulty judicial construct" of the ambiguous case law. *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1159 (C.D. Cal. 2015) ("the Court concludes that the distinction [between discrimination based on gender stereotyping and discrimination based on sexual orientation] is illusory and artificial"). *See also Philpott v. New York*, 252 F. Supp. 3d 313, 317 (S.D.N.Y. 2017) ("I decline to embrace an 'illogical' and artificial distinction"); *Centola v. Potter*, 183 F. Supp. 2d 403, 408 (D. Mass. 2002) ("[T]he line between discrimination because of sexual orientation and discrimination because of sex is hardly clear.").

The ambiguity in the law has led to unpredictable and inconsistent outcomes. *Compare Boyd v. Johnson Food Servs., LLC*, No. 17-cv-03414, 2019 WL 1090725, at *1, *6 (D.S.C. Mar. 8, 2019) (denying motion to dismiss claims by lesbian employee who alleged that her "appearance is more characteristic of a man" and "does not conform to gender stereotypes and norms" because her claims were predicated on gender stereotypes); *Varner v. APG Media of Ohio, LLC*, No. 18-cv-706, 2019 WL 145542, at *1, *6 (S.D. Ohio Jan. 9, 2019) (allowing gay plaintiff's claim to proceed because "verbal and physical attacks," bullying, and being called "derogatory names" like "faggot" and "your faggot ass" "may be reasonably construed as motivated by sex stereotyping and/or gender non-conforming behavior") *with Berghorn v. Xerox Corp.*, No. 17-cv-01345, 2019

WL 2226763, at *2-3 (N.D. Tex. May 23, 2019) (granting summary judgment to employer where gay employee's co-workers described him as having "more effeminate mannerisms," "being gay for going to a Brittany [*sic*] Spears concert," "com[ing] off as a gay person," having a higher voice, dressing well, and waving "not like any [other] guy"); *Kilpatrick v. HCA Human Res.*, No. 17-cv-00670, 2019 WL 998315, at *1, *4 (M.D. Tenn. Mar. 1, 2019) (dismissing sex discrimination claims where gay plaintiff received gifts like "pink nail polish, a nail file, . . . bath bombs, and . . . a pair of pink sunglasses").

Guidance from the Court that Title VII's prohibition of sex discrimination encompasses that based on sexual orientation would greatly simplify the task before federal courts and permit them to focus on the merits of a plaintiff's claim of discrimination, rather than the preliminary question of whether the discrimination arose from the plaintiff's sex or sexual orientation.

B. Lesbian, gay, and bisexual workers will be subject to an ambiguous and arbitrary standard if this Court excludes discrimination based on sexual orientation from Title VII's purview.

If the Court draws a line between *unlawful* sex discrimination and *lawful* sexual orientation discrimination, lesbian, gay, and bisexual workers will be required to prioritize evidence of discrimination based on

sex, such as sex stereotyping, over evidence of conduct motivated by homophobia. Such a standard would pressure lesbian, gay, and bisexual workers to downplay their full experience in the workplace for fear of having their claims dismissed as lawful sexual orientation discrimination. In contrast, heterosexual workers will remain free to describe the complete picture of their experience and rely on evidence of homophobic behavior to support claims of sex discrimination or harassment because their sexual orientation is not at issue.

Title VII requires all plaintiffs to show that their sex was a cause or motivating factor of the discrimination they faced. 42 U.S.C. § 2000e-2(a), (m). Lesbian, gay, and bisexual workers, however, must undergo the "lexical bean counting" described by the Second Circuit. Put plainly, a lesbian has a greater chance of success if she can show evidence of sexism or gender nonconformity without evidence of homophobic conduct. Otherwise, she risks the perception that she is "bootstrapping" a sexual orientation claim through her sex-stereotyping claim. *See Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005) ("[W]e have therefore recognized that a gender stereotyping claim should not be used to bootstrap protection for sexual orientation into Title VII." (internal quotation omitted)).

However, workplace discrimination often does not fit tidily into categories of sex or sexual orientation. For example, in *Prowel v. Wise Business Forms, Inc.*, a gay employee was called "Princess," "Rosebud," "fag," and

"faggot"; he discovered a "man-seeking-man" ad, a pink feather tiara, and a package of lubricant jelly left at his work station; he found messages in the men's bathroom claiming that he had AIDS and engaged in sexual relations with male co-workers; and he endured co-workers' remarks about his clothing, mannerisms, and way of walking. 579 F.3d at 287-88, 291-92. The district court granted the employer's motion for summary judgment, "holding that Prowel's sex discrimination claim was an artfully-pleaded claim of sexual orientation discrimination." *Id.* at 291. The Third Circuit reversed, concluding "that the record is ambiguous on this dispositive question" and identified an issue of material fact as to whether the plaintiff was harassed because of his sexual orientation or because he failed to conform to gender stereotypes. *Id.* at 291-92. The court identified "the difficult question" as "whether the harassment he suffered . . . was because of his homosexuality, his effeminacy, or both," and ultimately left it to the jury. *Id.* at 291.

The current ambiguity in the law has also meant that courts have dismissed the Title VII claims of lesbian, gay, and bisexual plaintiffs who litigated their claims pro se and failed to provide adequate allegations carefully characterized as sex or sex-stereotyping discrimination. Without informed counsel able to thread the needle, pro se plaintiffs will not know they are required to plead specific facts of discrimination resulting from their gender nonconformity. For example, in *Evans v. Georgia Regional Hospital*, the Eleventh Circuit concluded that the plaintiff, proceeding pro se,

"did not provide enough factual matter to plausibly suggest that her decision to present herself in a masculine manner led to the alleged adverse employment actions." 850 F.3d at 1254. *See id.* at 1251 (noting that it was "'evident' that [Evans] identified with the male gender, because of how she presented herself"). The court granted her leave to amend because her "gender non-conformity claim . . . constitute[d] a separate, distinct avenue for relief." *Id.* at 1254-55. *But see*, *e.g.*, *Milot v. Maxx*, No. 14-cv-00759, 2015 WL 770250, at *3 (S.D. Ohio Feb. 23, 2015) (dismissing pro se plaintiff's complaint because she "has not alleged additional facts indicating she was discriminated against because she failed to conform to female gender norms so as to state a Title VII claim for sex discrimination based on sex stereotyping"). A plaintiff's case should not rise or fall solely based on the artfulness of her complaint or ability to retain skilled counsel.

Moreover, straight plaintiffs need not run this gauntlet. This Court and multiple circuit courts have permitted plaintiffs to rely on evidence of homophobic harassment in support of sex discrimination claims when sexual orientation was not at issue. These decisions suggest that courts will consider such comments and actions to be evidence of sex discrimination when the plaintiff is straight or not out at work. *See*, *e.g.*, *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 77, 82 (1998) (allowing sexual harassment claim to proceed based on evidence of same-sex sexual assault and threats of same-sex rape); *E.E.O.C. v. Boh Bros. Constr. Co.*, 731 F.3d 444, 457-60 (5th Cir. 2013) (en banc)

(upholding jury verdict that "sex-based epithets like 'faggot,' 'pussy,' and 'princess'" that were "directed at [male plaintiff's] masculinity" and "several other sexualized acts" could constitute harassment based on sex); *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 870, 874-75 (9th Cir. 2001) (finding evidence of male plaintiff being called "she," "her," "like a woman," "faggot," and "fucking female whore" was "closely linked to gender" and constituted sex discrimination prohibited by *Price Waterhouse*).[18]

The pitfalls in the Title VII landscape imperil the rights of lesbian, gay, and bisexual workers. These workers are forced to differentiate between sexual orientation and sex discrimination, which they often experience in tandem, so as to adhere to an ambiguous legal distinction that limits their ability to rely on evidence of homophobic harassment, without so limiting their heterosexual co-workers. In other words, they must contend with an "odd body of case law that protects a lesbian who faces discrimination because she fails to meet some superficial gender norms . . . but not a lesbian who meets cosmetic gender norms, but violates the most essential of gender stereotypes by

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[18] The sexual orientation of the plaintiff in *Oncale* is not mentioned in this Court's or any lower court opinion. *See generally Oncale*, 523 U.S. at 76-82. The *Boh Brothers* panel identified "no evidence that [plaintiff or his harasser] . . . was either homosexual or attracted to homosexuals." *E.E.O.C. v. Boh Bros. Constr. Co.*, 689 F.3d 458, 460 (5th Cir. 2012), *aff'd in part and rev'd in part*, 731 F.3d 444 (5th Cir. 2013) (en banc). The *Nichols* plaintiff's sexual orientation is also not mentioned in the opinion. *See generally Nichols*, 256 F.3d at 869-78.

marrying another woman." *Hively*, 830 F.3d at 715 (panel decision).

IV. The Court Should Not Disturb the Clarity Produced by the "Near-Total Uniformity" of the Circuits Recognizing that Gender Identity Discrimination is Sex Discrimination.

As noted above, federal courts have nearly unanimously concluded that the task of distinguishing between sex and gender identity is futile. *R.G. & G.R. Harris Funeral Homes* represents the latest in a long line of circuit and district court decisions that recognizes with "near-total uniformity" that Title VII's prohibition of discrimination "because of sex" extends to transgender and transitioning people. *See Glenn v. Brumby*, 663 F.3d 1312, 1318 n.5 (11th Cir. 2011).

Since at least 2000, virtually all circuit courts presented with the question have recognized that Title VII and its sister civil rights laws protect transgender people. *See*, *e.g.*, *Whitaker*, 858 F.3d at 1049-50; *Glenn*, 663 F.3d at 1320; *Smith v. City of Salem*, 378 F.3d 566, 576 (6th Cir. 2004); *Rosa v. Park W. Bank & Tr. Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187, 1202-03 (9th Cir. 2000). *See also Wittmer v. Phillips 66 Co.*, 915 F.3d 328, 330 (5th Cir. 2019) (recognizing circuit precedent precluding sexual orientation claims under Title VII but affirming dismissal of plaintiff's claim of discrimination based on transgender status on other grounds); *Boyertown*, 897 F.3d

at 536 (considering favorably that a transgender-inclusive school policy would likely avoid liability under Title IX); *Tovar v. Essentia Health*, 857 F.3d 771, 775 (8th Cir. 2017) ("assum[ing] . . . that the prohibition on sex based discrimination under Title VII . . . encompasses protections for transgender individuals"); *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224 (10th Cir. 2007) ("assum[ing], without deciding" that a transgender individual could raise a sex discrimination claim based on nonconformity with sex stereotypes).[19]

This consensus on gender identity protections under Title VII has provided transgender people with the same legal protections as their co-workers without imposing additional analysis or challenge on the courts. All Title VII plaintiffs—transgender and non-transgender alike—continue to prove their cases of individual discrimination through direct evidence or circumstantially through the same *McDonnell Douglas* burden-shifting framework. *See*, *e.g.*, *Chavez v. Credit Nation Auto Sales*, 641 F. App'x 883, 892 (11th Cir. 2016) (concluding that transgender mechanic could satisfy her burden by "show[ing] that discriminatory animus existed and was at least 'a motivating

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[19] District courts without guiding circuit precedent have relied on the near-unanimous national consensus to conclude that transgender and transitioning workers are protected by federal prohibitions of sex discrimination. *See*, *e.g.*, *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 518, 522-24 (D. Conn. 2016); *Finkle v. Howard Cty., Md.*, 12 F. Supp. 3d 780, 787-88 (D. Md. 2014); *Schroer v. Billington*, 525 F. Supp. 2d 58, 62-63 (D.D.C. 2007).

factor'"); *Kastl v. Maricopa Cty. Cmty. Coll. Dist.*, 325 F. App'x 492, 493-94 (9th Cir. 2009) (holding that a transgender university instructor stated a prima facie case of discrimination but was not able to establish pretext); *Barnes v. City of Cincinnati*, 401 F.3d 729, 737-38 (6th Cir. 2005) (holding that a transgender police officer satisfied his prima facie case of sex discrimination and presented sufficient evidence for a reasonable jury to find intentional discrimination).

The Sixth Circuit's central holding that "Title VII protects transgender persons because of their transgender or transitioning status, because transgender or transitioning status constitutes an inherently gender non-conforming trait" should be affirmed. *R.G. & G.R. Harris Funeral Homes*, 884 F.3d at 577. For the same reason, the Second Circuit's holding that Title VII protects lesbian, gay, and bisexual people should be affirmed—and the Eleventh Circuit's contrary ruling reversed—to accord sexual orientation the same uniform and predictable standard. The resulting clarity in the law would enable LGBT workers to present evidence of the totality of discrimination they experience when enforcing their statutory rights. It would also establish a uniform and inclusive standard for all LGBT workers that would allow courts to more effectively identify unlawful discrimination under Title VII and fulfill the statute's promise of equal employment opportunity.

CONCLUSION

For the foregoing reasons, the rulings of the Second and Sixth Circuits should be affirmed and the ruling of the Eleventh Circuit should be reversed.

Respectfully submitted,

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