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

IN THE

Supreme Court of the United States

GERALD LYNN BOSTOCK,
Petitioner,

v.

CLAYTON COUNTY, GEORGIA,
Respondent,

[Caption Continued On Following Page]

BRIEF FOR LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS, AND 57 CIVIL RIGHTS ORGANIZATIONS AS AMICI CURIAE SUPPORTING THE EMPLOYEES

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v.

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Respondents,

R.G. & G.R. HARRIS FUNERAL HOMES, INC.,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.,
Respondents.

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

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INTEREST OF AMICI CURIAE[1]

The Lawyers' Committee for Civil Rights Under Law (Lawyers' Committee) is a nonpartisan, nonprofit organization that was formed in 1963 at the request of President John F. Kennedy to enlist the private bar's leadership and resources in combating racial discrimination. The principal mission of the Lawyers' Committee is to secure equal justice for all through the rule of law. To that end, the Lawyers' Committee has participated in hundreds of impact lawsuits challenging race discrimination prohibited by the Constitution and federal statutes relating to voting rights, housing, employment, education, and public accommodation. As a leading national racial justice organization, the Lawyers' Committee has a vested interest in ensuring that racial and ethnic minorities, including minorities who identify as lesbian, gay, bisexual, transgender, and queer/questioning (LGBTQ), have strong, enforceable protections from employment discrimination.

The Leadership Conference on Civil and Human Rights (The Leadership Conference) is a diverse coalition of more than 200 national organizations charged with promoting and protecting the civil and human rights of all persons in the United States, including LGBTQ individuals. It is the nation's largest and most diverse civil and human rights coalition. For

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

more than half a century, The Leadership Conference, based in Washington, D.C., has led the fight for civil and human rights by advocating for federal legislation and policy, securing passage of every major civil rights statute since the Civil Rights Act of 1957. The Leadership Conference works to build an America that is inclusive and as good as its ideals.

Statements of interest for all other amici are included in the Appendix.

INTRODUCTION AND SUMMARY OF ARGUMENT

Workplace discrimination against LGBTQ people is discrimination "because of … sex." 42 U.S.C. § 2000e-2(a). Recognition of that reality is essential to safeguarding the job security and economic stability of millions of LGBTQ persons in America, especially those most often subjected to discrimination in the workplace: LGBTQ people of color. It also follows directly from Title VII's protections against other forms of prohibited discrimination—protections that depend on the same legal rules that the LGBTQ employees rely on in these cases. The diversity and vitality of American workplaces, and in turn the American economy, are dependent upon Title VII's continued application to provide robust protections against discrimination.

Outlawing job discrimination based on LGBTQ status is fully consistent with Title VII's long history of antidiscrimination achievements, as well as the statutory text that has made those successes possible. Title VII was enacted in 1964 with the ambitious goal

of "root[ing] out discrimination in employment." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 77 (1984). At that time, America's workplaces were rife with bias. While the plight of African-American workers was clearly Congress' primary impetus for action, *see United Steelworkers of Am. v. Weber*, 443 U.S. 193, 202 (1979), courts have repeatedly interpreted the plain language of Title VII to ensure protection against disparate treatment on the basis of *all* characteristics protected by Title VII—race, color, religion, sex, and national origin—and against *all* forms in which discrimination is manifested—whether overt or obscured by pretext, whether in the form of a termination notice or pervasive harassment that creates a hostile work environment, and whether part of categorical mistreatment of an entire group or targeted discrimination against an individual based on harmful stereotypes.

This record of far-reaching application is a product of the statute's plain terms. As this Court has recognized time and again, the reach of a statute is not limited to "the principal evil" Congress sought to address, but instead turns upon "the statutory text." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998). And here, that text is straightforward. It prohibits disparate treatment of an employee "because of" his or her race, sex, or other protected characteristic. That means courts need only apply a "simple test": "whether the evidence shows treatment of a person in a manner which but for [the protected characteristic] would be different." *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978).

In these cases, that "simple test" is clearly satisfied. Aimee Stephens was fired because she is a transgender woman who exhibits traits associated with women; she "would not have been fired for living openly as a woman if she had been assigned the sex of female at birth." Stephens Br. 25. Gerald Bostock and Donald Zarda were fired for being men who are attracted to men; if they were not men, "[they] would not have been fired for [their] attraction to men." Zarda Br. 21; *accord* Bostock Br. 15.

This application of Title VII's text is important to ensure that LGBTQ individuals are not "treated as social outcasts or as inferior in dignity and worth." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018). That is especially imperative for people living at the intersection of LGBTQ and racial-minority identities. For these people, racial bias is often compounded by other forms of discrimination.

Indeed, though LGBTQ people of color have made and continue to make great contributions to our society, they suffer far higher rates of job discrimination than their white counterparts. *See infra* at 22-23. If Title VII is interpreted to deny protection on the basis of LGBTQ status, employers could attempt to cloak their racial bias in anti-LGBTQ garb. And it may be challenging for employees suffering discrimination to prove that race, rather than LGBTQ status, caused the adverse employment action. Civil-rights leader Pauli Murray made the same point about protections for women of color at the time of Title VII's enactment: "Without the addition of 'sex'" to the statute, she explained, "Title VII would have protected only

half the potential Negro work force." After all, it would be "exceedingly difficult for a Negro woman to determine whether or not she is being discriminated against because of race or sex." *Infra* at 26. So too here: If Title VII does not bar LGBTQ discrimination, that will leave many LGBTQ people of color vulnerable to workplace discrimination—an outcome contrary to Congress' paramount goal of ensuring equal access to employment opportunities for minorities.

Adopting a restrictive interpretation of Title VII in these cases would also mark a deviation from settled Title VII doctrine as applied to other forms of discrimination, including racial prejudice. Racial bias, to be sure, implicates unique historical and institutional concerns. *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 438-44 (1968). For Title VII's purposes, however, race- and sex-based discrimination are treated equivalently, subject to narrow exceptions irrelevant here.

Accordingly, legal rules developed in race-discrimination cases must be applied with full strength to claims of sex discrimination, including the LGBTQ employees' claims here. For example, courts have long held that employers violate Title VII by treating employees adversely based on their marriage to, or association with, someone of a different race or national origin. There is no basis to carve out a special exception for discrimination on the basis of sex, including discrimination based on an employee's association with a spouse or romantic partner of the same sex.

Since the enactment of Title VII, there have been significant strides in making our workforce more diverse and inclusive. Title VII's enduring protections

help ensure that employees of all backgrounds can contribute to the economy free from harassment and discrimination—ever so important as our country continues to become more diverse. The sweeping text of Title VII, alongside the statute's storied history of rooting out pervasive workplace discrimination, compels treating LGBTQ discrimination as unlawful.

ARGUMENT

I. Title VII's Prohibitions Against Employment Discrimination Have Played A Critical Role In Advancing Civil Rights.

A. Title VII ensures workplace advancement based on job qualifications free from discrimination, and has expanded access to economic opportunities for all.

Discrimination was once the norm in many American workplaces. Congress understood that only a bold solution could rise to the challenge. Title VII's robust prohibition against discrimination has repeatedly operated over the past five decades to root out discriminatory employment practices even as new challenges have emerged that Congress did not necessarily anticipate in 1964. The cases at bar exemplify that history.

1. Before Title VII, federal law was powerless to combat repugnant workplace discrimination.

Workplace discrimination was flagrant and commonplace prior to Title VII's enactment. In the aftermath of the Civil War, African Americans were relegated to second-class citizenship through a system of laws, ordinances, and customs that separated white and African American people in every area of life. C. Vann Woodward, *The Strange Career of Jim Crow* 7 (1955). This code of segregation "lent the sanction of law to a racial ostracism that extended to churches and schools, to housing and jobs, to eating and drinking." *Id.*; *see also, e.g.*, John Hope Franklin, *History of Racial Segregation in the United States*, 304 Annals of the Am. Acad. of Polit. & Soc. Sci. 1, 7-8 (1956) (describing 1915 South Carolina statute that "forbade textile factories to permit employees of different races to work together in the same room").

A 1961 report by the U.S. Commission on Civil Rights documented the "vicious circle of discrimination in employment opportunities" that continued to harm African Americans. *Report of the U.S. Commission on Civil Rights*: *Employment* 153-54 (1961), https://tinyurl.com/y23r88ur. That discrimination included practices as blatant as government contractors' "outright refusal to employ" African-American workers. *Id.* at 155.

Women, too, suffered extraordinary discrimination in the workplace. A 1963 report by the President's Commission on the Status of Women (though itself expressing certain outmoded stereotypes about

women's family roles) documented examples of the obstacles faced by women in the workplace. For example, one in three surveyed private employers had separate pay scales for women employees, paying them less "for the same kind of work." *American Women: Report of the President's Commission on the Status of Women* 28 (1963), https://tinyurl.com/yxbdns5p.

The upshot is that before Title VII was enacted, a variety of odious practices, unimaginable today, were entirely legal. Employers overtly discriminated against employees in hiring, assignments, and pay. Some of them included express discriminatory exclusions for African Americans and women in job postings and ads.[2] It was thus not uncommon to find employers engaging in practices like the one this Court described in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). There, the employer "openly discriminated on the basis of race in the hiring and assigning of employees," placing African-American employees exclusively in a department "where the highest paying jobs paid less than the lowest paying jobs in the

[2] *See, e.g.*, William A. Darity Jr. & Patrick L. Mason, *Evidence on Discrimination in Employment: Codes of Color, Codes of Gender*, 12 J. Econ. Perspectives 63, 66-67 tbl.1 (1998) (collecting examples of newspaper help-wanted ads from 1960 that expressed racial preferences); Peter W. Kerman, *Sex Discrimination in Help Wanted Advertising*, 15 Santa Clara L. Rev. 183 (1974).

other four … departments in which only whites were employed." *Id.* at 427.[3]

Employers also operated unreservedly on the basis of noxious, demeaning stereotypes about both their employees and their customers. Many airlines, for instance, stopped hiring men as flight attendants and then infamously terminated women attendants when they reached a certain age or married. They strenuously defended such policies as necessary for marketing, arguing it was essential to sell male passengers a "fantasy centered on the sexual availability of female flight attendants." Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 Harv. L. Rev. 1307, 1348-54 (2012).

The consequence of such pervasive discrimination was serious damage to the self-worth and dignity of workers. "Denial of employment because of the color of a person's skin," gender, religion, or other protected characteristics "is an affront to human dignity." U.S. Commission on Civil Rights, *supra*, at 1. Unsurprisingly, studies find that workplace discrimination can cause serious emotional and psychological harm. *See, e.g.*, Wizdom Powell Hammond et al., *Workplace Discrimination and Depressive Symptoms*, 2 J. of Race

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[3] *See also, e.g.*, *United States v. Ga. Power Co.*, 474 F.2d 906, 910 (5th Cir. 1973) (Until 1963, "an open and unvarying policy of the company prevented black persons from competing for any but the most menial and low-paying jobs within the corporate structure."); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 543 (1971) (per curiam) (employer refused to hire mothers of young children for assembly trainee position, but hired fathers of young children for that position).

and Social Problems 19 (2010), https://tinyurl.com/y682yxox.

Workplace discrimination also inflicted (and continues to inflict) significant economic costs, both on the individual victims of that discrimination and, as study after study concludes, for the American economy overall. One recent publication by the National Bureau for Economic Research found that reducing workplace discrimination and discriminatory barriers to education has accounted for as much as 20-40% of increased economic output in the United States over the last half-century. Chang-Tai Hsieh et al., *The Allocation of Talent and U.S. Economic Growth* 1-5 (Nat'l Bureau of Econ. Research, Working Paper Ver. 7.0, Apr. 26, 2019), https://tinyurl.com/kxaz5zr.[4]

2. Over the past half-century, Title VII has resulted in remarkable progress toward fulfilling the promise of rooting out job discrimination.

Title VII has the ambitious purpose of "eliminat[ing] those discriminatory practices and devices which have fostered … job environments to the disadvantage of minority citizens." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 348 (1977) (internal

[4] As the report explains, "[t]he last 50 years have seen a remarkable convergence in the occupational distribution between white men, women, and black men. For example, 94 percent of doctors and lawyers in 1960 were white men. By 2010, the fraction was just over 60 percent. Similar changes occurred throughout the economy, particularly in highly-skilled occupations." Hsieh et al., *supra*, at 2.

quotation marks omitted). It is a "broad remedial measure, designed to assure equality of employment opportunities." *Pullman-Standard v. Swint*, 456 U.S. 273, 276 (1982) (internal quotation marks omitted).

Recently, this Court emphasized that Title VII furthers the government's "compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 733 (2014). The government's interest in rooting out sex discrimination, as well as disparate treatment on the basis of the statute's other protected characteristics, is of course compelling as well. *See Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 728-29 (2003); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625-29 (1984).

In light of these compelling interests, time and again, this Court and lower courts have applied Title VII to eliminate discriminatory barriers to equality in the workplace—even where, as in these cases, arguments were made that Title VII's drafters could not have anticipated such applications. As this Court observed in *Oncale*, the statute covers not just "the principal evil[s] Congress was concerned with when it enacted Title VII," but also "reasonably comparable evils" as long as they fall within the statutory text. 523 U.S. at 79; *see also* Zarda Br. 42-44.

Thus, rejecting claims by some employers that Congress intended Title VII to be limited to "economic or tangible discrimination," this Court held that the statute prohibits harassment that causes a "hostile

work environment." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65-66 (1986); *see also Oncale*, 523 U.S. at 79 (Title VII covers same-sex harassment). This essential protection shields employees against not only sexual harassment, but also workplace harassment based on race, religion, and national origin. *Meritor*, 477 U.S. at 66. To take just one example, Title VII's harassment prohibition helped remedy the egregious workplace harassment experienced by a Muslim worker in the wake of the September 11th attacks. *E.g.*, *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 321 (4th Cir. 2008).

As much discussed in these cases, this Court has also applied Title VII to forbid discrimination against subsets of men or women, rather than limiting application to discrimination against all men or all women. Notably, in *Price Waterhouse v. Hopkins*, the Court held Title VII bars discrimination on the basis of harmful stereotyping, *i.e.*, an employer's expectation that a person will behave a certain way based on perceived characteristics of that person's race, sex, religion, or national origin. 490 U.S. 228, 250 (1989) (plurality opinion); *id.* at 259-60 (White, J., concurring in the judgment) (agreeing with plurality that discrimination based on stereotyping "was supported by the record"); *id.* at 272-73 (O'Connor, J., concurring in the judgment) (same); *id.* at 294-95 (Kennedy, J., dissenting) (employee "plainly presented a strong case … of discrimination" based on stereotypes).

In addition, courts have taken care not to place artificial limitations on Title VII's protections. They have done so, in part, by guarding against employers' use of pretext to engage in unlawful discrimination on

the basis of protected characteristics. For example, as the population of the United States has become more linguistically and ethnically diverse, courts have recognized that discrimination based on language or accents can be a pretext for racial or national-origin discrimination. *See, e.g.*, *Gutierrez v. Mun. Ct. of Se. Judicial Dist.*, 838 F.2d 1031, 1038 (9th Cir. 1988) (striking down rule barring court employees from speaking a language other than English while attending to work duties), *vacated on other grounds*, 490 U.S. 1016 (1989); *Akouri v. State of Fla. Dep't of Transp.*, 408 F.3d 1338, 1348 (11th Cir. 2005) (emphasizing employer's remark that "all white" employees would never "take orders" from supervisor with "an accent").

Finally, beyond recognizing robust understandings of each Title VII protected characteristic, courts have held that employees may raise a successful claim based on an employer's combined grounds for discrimination "where two bases for discrimination exist," such as race and gender. *Lam v. Univ. of Haw.*, 40 F.3d 1551, 1562 (9th Cir. 1994). If the law were otherwise, it would force a plaintiff "to bisect [her] identity," "distort[ing] or ignor[ing] the particular nature of [her] experience[]." *Id.* It would also force courts to engage in the difficult, if not impossible task, of teasing out which of multiple forms of discrimination played a causal role in the discrimination. *Id.* Accordingly, "when a plaintiff is claiming race *and* sex bias, it is necessary to determine whether the employer discriminates on the basis of that *combination* of factors, not just whether it discriminates against people of the same race or of the same sex." *Id.*

The relief plaintiffs seek here—construing Title VII to forbid discrimination on the basis of LGBTQ status—is hardly a departure from Title VII's remarkable history. Since Title VII's enactment, there has been significant progress toward the statute's goal of eliminating bias from employment decisions. A cramped interpretation in these cases would be wholly inconsistent with the statute's text, history, and purpose.

B. Title VII's plain text imposes a straightforward bar on disparate treatment.

A critical reason why Title VII's history is so remarkable is the breadth of its *text*. Regardless of the particular "evil[s]" that motivated the statute's proponents, "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale*, 523 U.S. at 79; *see also Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) (similar). In fact, Title VII is the poster child for this principle: Justice Scalia's treatise on statutory interpretation points to Title VII as a prime example to illustrate that "general terms" are to be given their "full and fair scope," rather than interpreted narrowly to "infer exceptions for situations that the drafters never contemplated." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 101-04 (2012).

Two features of Title VII's text stand out for purposes of the cases presently before the Court:

First, it treats all forms of discrimination the same, regardless of the protected characteristic (race,

color, religion, sex, or national origin). *See Price Waterhouse*, 490 U.S. at 243 n.9 (plurality opinion); *Meritor Sav. Bank*, 477 U.S. at 66. "'The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices' that have been used to disadvantage racial, gender, and religious minorities in the workplace." *Lewis v. City of Union City*, 918 F.3d 1213, 1220 (11th Cir. 2019) (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973)).

Narrow exceptions, irrelevant in these cases, prove this general rule. For example, the bona fide occupational qualification (BFOQ) defense permits differential treatment in very limited circumstances for all characteristics other than race. *See* 42 U.S.C. § 2000e-2(e)(1); *Int'l Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 201 (1991) (construing the BFOQ exception "narrowly"). That the statute expressly provides a limited exception shows Congress knew how to depart from the general rule of equivalent treatment when it so wished. *See TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) ("*Expressio unius est exclusio alterius*."). This principle is particularly important when it comes to Title VII associational-discrimination doctrine, discussed *infra* at 29-33.

Second, Title VII's plain text provides for a straightforward test: Disparate treatment on the basis of a protected characteristic is unlawful. The statute bars adverse employment actions "because of" race, sex, or another protected characteristic. 42 U.S.C. § 2000e-2(a). As the Court has recognized, this

language dictates a "simple test": "whether the evidence shows treatment of a person in a manner which but for [the protected characteristic] would be different." *Manhart*, 435 U.S. at 711; *see also Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) (same); Stephens Br. 20-23.[5]

To see how *Manhart*'s "simple test" works in practice, one need look no further than these cases. Indeed, Judge Cabranes regarded *Zarda* as a "straightforward case of statutory construction," requiring just three short sentences of analysis to conclude that the employee should prevail. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 135 (2d Cir. 2018) (opinion concurring in the judgment). The question in *Zarda*, as in *Bostock*, is whether a male employee would have been fired for being attracted to men if he had instead been a woman. The answer is no, as the Second Circuit expressly held. *Id.* at 119 (majority). As to the transgender employee in *Harris*

[5] This test is the same for all disparate-treatment claims, whether the discrimination is overt (such as when an employer admits to firing an employee because of a protected characteristic), *see, e.g.*, *Manhart*, 435 U.S. at 711; *Trans World Airlines*, 469 U.S. at 121 (discussing an employer policy that was "discriminatory on its face"), or hidden from view (such as when an employer claims it fired an employee because of poor performance but indirect evidence reveals the worker's race was the true motivation, *see, e.g.*, *McDonnell Douglas*, 411 U.S. at 804). Where an employee lacks "direct evidence of discrimination," *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002), it may be more difficult to prove a Title VII violation, but the "ultimate question" is the same: whether there was disparate treatment on the basis of a protected characteristic, *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 875 (1984).

Funeral Homes, the question is whether Aimee Stephens would have been fired for living openly as a woman if she instead had been identified at birth as female rather than male. As the Sixth Circuit recognized, "[t]he answer quite obviously is no." *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 575 (6th Cir. 2018).

The employees in these cases were thus terminated "because of … sex." That is what the statutory text unambiguously forbids. As this Court has "stated time and again," "a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, … this first canon is also the last: 'judicial inquiry is complete.'" *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461-62 (2002) (some quotation marks omitted).

C. Title VII's history reinforces the plain meaning of the statutory text, which proscribes discrimination on the basis of sex, just as on the basis of other protected characteristics.

Because the Court's inquiry in these cases should be complete after examining the statutory text, there is no need to consider the statute's history. But that history, to the extent relevant, fully supports the straightforward application mandated by the text.

Sex discrimination may not have been the primary impetus for Title VII's passage, but the statutory history still shows that Congress had a genuine interest in stamping out sex-based workplace discrim-

ination. Once-prevalent accounts suggesting the addition of "sex" to Title VII was "the gambit of a congressman seeking to scuttle adoption of the Civil Rights Act," *see, e.g.*, *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984), are apocryphal. Careful work of legal historians and scholars has debunked this notion.[6]

The "poison pill amendment" story typically focuses on the fact that the sponsor of the amendment, Representative Howard W. Smith, was opposed to civil-rights legislation. But the reality is that, while Smith was opposed to progress on race relations, there are indications he supported women's rights. Cary Franklin, *supra*, at 1318 & n.36. For example, he supported the Equal Rights Amendment, and his constituency included "Virginia textile mills employ[ing] large numbers of women"—mills that stood to benefit if "protective" legislation limiting women's working hours were invalidated. Louis Menand, *How Women Got in on the Civil Rights Act*, New Yorker (July 14, 2014), https://tinyurl.com/y2cqzcfk.

Moreover, once Smith had introduced the "sex" amendment, it was taken seriously and debated deliberately. After the amendment was added to the House bill in February 1964, 110 Cong. Rec. 2584 (1964), the bill moved to the Senate, where the addition of "sex" was carefully considered for months before the final Senate vote in June, 110 Cong. Rec.

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[6] *See, e.g.*, Serena Mayeri, *Intersectionality and Title VII*, 95 Boston Univ. L. Rev. 713, 716-18 (2015); Vicki Schultz, *Taking Sex Discrimination Seriously*, 91 Denv. Univ. L. Rev. 995, 1014-15 (2015).

14,511 (1964). During this time, the amendment's position was tenuous. Senate Minority Leader Everett Dirksen, for example, reportedly sought to eliminate "sex" from Title VII's coverage. Menand, *supra*.

Women's rights advocates, including the National Women's Party and civil-rights leader Pauli Murray, advocated passionately for the provision to remain. Schultz, *supra*, at 1017; Mayeri, *supra*, at 717-18. Murray, for example, penned an influential memorandum that circulated in Congress and the Johnson administration. Mayeri, *supra*, at 718. She called for "bold," "imaginative" leadership to protect the millions of women who had become "a permanent sector of the labor force"—a sector that would "not diminish but increase." And she emphasized the breadth of the amendment, explaining that, if enacted, it would require equivalent protections against race and sex discrimination with the narrow exception for BFOQ. Pauli Murray, *Memorandum in Support of Retaining the Amendment to H.R. 7152 Title VII (Equal Employment Opportunity) to Prohibit Discrimination in Employment Because of Sex* 16, 25, 43-44 (April 14, 1964), https://tinyurl.com/y6kk82po.

Congressional supporters from both parties also ardently defended the amendment, all the while accentuating, instead of obscuring, its sweeping consequences. For example, rather than shying from criticism of opponents that Title VII might render unenforceable state-level "protective" legislation (laws supposedly designed to shield women from workplace harms), Representative Katharine St. George argued that protective legislation was either based on outmoded stereotypes or a subterfuge to prevent women

"from going into the higher salary brackets." 110 Cong. Rec. 2580; *see also id.* (statement of Rep. Griffiths) ("Most of the so-called protective legislation has really been to protect men's rights in better paying jobs.").

In short, the history of Title VII shows the statutory text means what it says: Apart from the BFOQ exception, the prohibition on sex discrimination is unqualified and stands on equal footing with the statute's other protected characteristics. Applied here, Title VII requires protection against LGBTQ discrimination as part of Title VII's ban on discrimination because of sex.

II. LGBTQ Employees Of Color Are Among Those In Greatest Need Of Title VII's Protections.

People of color, including people of color who identify as LGBTQ, represent a growing part of the U.S. population. The Census Bureau estimates that as of 2017, 41.3 million people (12.7%) are African American, 58.8 million (18.1%) are of Hispanic or Latino origin, and 21.6 million (6.6%) are Asian.[7] Gallup reports show that 5% of African Americans identify as LGBT, along with 6.1% of Hispanics and 4.9% of

[7] *ACS Demographic and Housing Estimates*, U.S. Census Bureau, https://tinyurl.com/y4r5bvfc (2017 ACS 1-Year Estimates) (last visited June 28, 2019).

Asians.[8] Nonwhites are now more likely than whites to identify as LGBT, and people of color comprise 42% of all LGBT-identified adults.[9]

Today, there are nearly two million LGBTQ people of color in America's workforce.[10] They are far more likely to suffer discrimination than their white counterparts. If Title VII is not construed according to its plain text so that it covers LGBTQ discrimination, such discrimination would go unchecked by federal law, and biased employers would have a convenient pretext for discriminating against LGBTQ persons of color. It is thus impossible to carve out LGBTQ discrimination from Title VII's ambit without inflicting severe harm on countless employees of color.

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[8] Frank Newport, *In U.S., Estimate of LGBT Population Rises to 4.5%*, Gallup News (May 22, 2018), https://tinyurl.com/y8cp2c3l.

[9] *Id.*; *LGBT Data & Demographics*, Williams Institute (Jan. 2019), https://tinyurl.com/y5b8l38h. It bears noting that LGBTQ people of color "played outsized roles during many of the earliest milestones of the gay rights movement," such as the Stonewall uprising. Scott James, *Queer People of Color Led the L.G.B.T.Q. Charge, but Were Denied the Rewards*, N.Y. Times (June 22, 2019), https://tinyurl.com/y2v9lhav.

[10] *U.S. LGBTQ Paid Leave Survey*, Human Rights Campaign Foundation (2018), https://tinyurl.com/yxevwczu.

A. Excluding LGBTQ status from Title VII's coverage would hit LGBTQ people of color the hardest.

While significant discrimination against the LGBTQ population writ large has been widely documented,[11] the millions of LGBTQ persons of color in the workforce suffer disproportionately.

LGBTQ persons of color are more than twice as likely to report discrimination as compared to their white peers. Whereas 13% of white LGBTQ persons report experiencing slurs or insensitive comments about their LGBTQ status during the job-application process, that figure is 32% for LGBTQ people of color.[12] Similarly, 27% of LGBTQ persons of color report being afraid to take time off work to care for a loved one for fear it would reveal their LGBTQ status at work (compared to 16% of white LGBTQ employees). Human Rights Campaign Foundation, *supra*. And the extraordinary rates of workplace discrimination against transgender people—including 26% reporting they have been fired based on anti-

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[11] *See, e.g.*, M.V. Lee Badgett et al., *Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination*, Williams Institute (June 2007), https://tinyurl.com/aff3h6p; M.V. Lee Badgett et al., *Evidence from the Frontlines on Sexual Orientation and Gender Identity Discrimination*, Center for Employment Equity (July 2018), https://tinyurl.com/y6t4savt.

[12] *Discrimination in America: Experiences and Views of LGBTQ Americans*, NPR/Robert Wood Johnson Foundation/Harvard T.H. Chan School of Public Health (Nov. 2017), https://tinyurl.com/y5n778nw.

transgender bias and 50% that have been harassed on the job—are even higher for transgender people of color, who face "up to twice or three times the rates of various negative outcomes" as compared to white transgender employees.[13]

The consequences of such discrimination are all the more severe because LGBTQ people of color continue to be economically disadvantaged. They suffer disproportionately from housing insecurity, lack of quality, affordable healthcare, and fewer educational opportunities.[14] A 2012 report found that 32% of children being raised by black same-sex couples live in poverty, compared to 14% for white same-sex couples, 13% for heterosexual black parents, and just 7% for heterosexual white parents. *Id.* LGBTQ people of color also face higher unemployment rates than their white counterparts,[15] and are more likely to have poor

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[13] Jaime M. Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* 51 (2011), https://tinyurl.com/y4m37rag; *see also, e.g.*, *Issues: Non-Discrimination Laws*, National Center for Transgender Equality, https://tinyurl.com/yye3y6vh (last visited June 28, 2019); Badgett, *Bias in the Workplace, supra*, at 3 (reporting similar evidence of pronounced discrimination against LGBTQ employees of color); Badgett, *Evidence from the Frontlines*, *supra* (same).

[14] *LGBT Families of Color: Facts at a Glance*, Movement Advancement Project, Family Equality Council & Center for American Progress (Jan. 2012), https://tinyurl.com/yy2kmmjj.

[15] *Paying an Unfair Price: The Financial Penalty for LGBT People of Color*, Movement Advancement Project (June 2015), https://tinyurl.com/yxk9jc94.

credit.[16] The unemployment rate for black transgender people is twice the rate of the overall transgender population, and over four times the general-population unemployment rate.[17]

It is no coincidence that LGBTQ persons of color face disproportionate rates of discrimination. People who identify as members of multiple categories subject to discrimination tend to be the most visible in the workplace and elsewhere. They thus become "targeted for discrimination." *Lam*, 40 F.3d at 1562. As one legal scholar put it, "[w]orking women who are members of racial minorities are frequently victimized by discrimination *precisely because* they are women of color." Judith A. Winston, *Mirror, Mirror on the Wall: Title VII, Section 1981, and the Intersection of Race and Gender in the Civil Rights Act of 1990*, 79 Cal. L. Rev. 775, 796-97 (1991) (emphasis added).

Anecdotal perspectives bear out these statistics and understandings. Many LGBTQ people of color understand their experience with discrimination as different, not only in degree, but in kind, relative to forms of discrimination suffered by other people of color and other LGBTQ persons. Naturally, then,

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[16] Devah Pager & Hana Shepherd, *The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets*, 34 Ann. Rev. of Soc. 181 (2008), https://tinyurl.com/y6brzh2o.

[17] *New Analysis Shows Startling Levels of Discrimination Against Black Transgender People*, National LGBTQ Task Force (2011), https://tinyurl.com/y6njbt3e.

many do not identify themselves based on rigid categories, *i.e.*, sorting their experiences and perspectives into separate "black" and "LGBTQ" boxes. They instead identify uniquely as "LGBTQ people of color."

For example, one scholar writes, "Today, the way I navigate the world in a same-sex interracial relationship as a black lesbian is different than the way a black heterosexual man in an interracial relationship navigates it. My experiences as a black lesbian are not the same as the experiences of a black heterosexual man, and to make the assumption of sameness marginalizes the unique experiences of black women and men …." Catherine Smith, *Queer As Black Folk?*, 2007 Wis. L. Rev. 379, 380-81 (2007).

B. Denying protection on the basis of LGBTQ status will facilitate pretextual race discrimination against LGBTQ people of color.

LGBTQ people of color could face greater workplace *racial* discrimination if Title VII is not construed to prohibit *LGBTQ* discrimination. Although Title VII plainly protects against race-based discrimination in the workplace, employers could mask disparate treatment of LGBTQ people of color by depicting it as discrimination based on (legal) disapproval of LGBTQ status, rather than (unlawful) racial discrimination. And in cases where LGBTQ discrimination is used as a pretext, problems of proof could inhibit minority employees from invoking the statute's protections against race discrimination.

This concern is not foreign to Title VII. A near-identical fear was an important part of the case for including "sex" in Title VII to begin with. Supporters of the "sex" amendment argued that, if the law prohibited only racial discrimination, it would fail to deter discriminatory employers from targeting black women by claiming that discrimination was on the basis of sex, not race.

Civil-rights leader Pauli Murray, for example, reasoned in her 1964 memo to Congress (discussed above at 19) that the "inclusion of the 'sex' amendment" in Title VII was "necessary to protect negro women." Murray, *supra*, at 19. Based on "prevailing patterns" of race-based discrimination, employers could continue to discriminate against black women based on their race, and those women would be left legally defenseless. After all, she emphasized, "it is exceedingly difficult for a Negro woman to determine whether or not she is being discriminated against because of race or sex." *Id.* at 20. "Without the addition of 'sex,'" Murray later observed, "Title VII would have protected only half the potential Negro work force." Pauli Murray & Mary O. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 Geo. Wash. L. Rev. 232, 243 (1965); *see also* 110 Cong. Rec. 2579 (1964) (statement of Rep. Griffiths) (similar).

The same logic demands that Title VII place every form of proscribed workplace discrimination, including both race- and sex-based discrimination, on equal footing to ensure robust protection for LGBTQ people of color. The discrimination such employees face in the workplace is one of today's most pressing challenges to Title VII's promise of equal treatment. This

Court should not dilute Title VII's potency as a remedy for race-based discrimination by carving out LGBTQ workers from its protections.

III. Excluding LGBTQ Discrimination From Title VII's Scope Would Depart From Settled Title VII Law Protecting Against Other Forms Of Discrimination.

Denying Title VII protection against LGBTQ discrimination would not merely facilitate pretextual discrimination against LGBTQ people of color. It would also deviate from Title VII's stable doctrinal framework for other protected characteristics. The protections the employees seek here are fully consistent with several well-settled areas of Title VII law.

A. Title VII proscribes disparate treatment based on a protected characteristic without requiring a separate inquiry into whether the employer is acting with "invidious," "racist," or "sexist" intent.

In arguing that Title VII excludes LGBTQ discrimination from its protections, dissenting judges in the Second and Seventh Circuits have maintained that discrimination must be "invidious"—and specifically, in the context of sex-discrimination claims, "sexist"—to be actionable. *Zarda*, 883 F.3d at 156-157 (Lynch, J., dissenting); *see also Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 368 (7th Cir. 2017) (Sykes, J., dissenting) ("Sexual orientation discrimination … is not inherently *sexist*."); *id.* at 367 (distinguishing miscegenation laws from LGBTQ workplace discrimination because "[m]iscegenation laws plainly

employ invidious racial classifications"). This reasoning is mistaken. While amici certainly believe that LGBTQ bias is an invidious form of discrimination, it is unnecessary for courts to make this judgment in passing on an LGBTQ discrimination claim under Title VII.

As explained above (at 15-16), Title VII's disparate-treatment test has never been an inquiry as to whether discrimination is "racist," "sexist," or otherwise reflecting animus tied to a protected characteristic. The relevant question is instead whether there is disparate treatment "because of" the protected characteristic. *See* Zarda Br. 34-35. If so, the employer's reason does not matter (unless a narrow exception, such as BFOQ, applies).[18]

In *Manhart*, for example, the Court concluded that it violated Title VII to require women employees to

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[18] Because "[t]he ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination," *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 153 (2000), an employer may defeat disparate-treatment liability when it can show it made a challenged employment decision for a "legitimate, *nondiscriminatory* reason," *McDonnell Douglas*, 411 U.S. at 802 (emphasis added); *see also supra* at 16 n.5. Importantly, this burden-shifting framework does *not* permit an employer to justify an employment decision that was made on the basis of a protected characteristic as somehow being non-biased. For example, an employer is entitled to prove it fired an employee for bad performance, not her sex. However, no employer is permitted to argue "yes, we terminated the employee because of her sex, but it was permissible because we didn't act with a 'sexist motive.'"

contribute in greater amounts to a pension fund because, statistically, women tend to live longer. There was no suggestion the employer's motive was "invidious" or "sexist." It was simply a matter of "actuarial" analysis. 435 U.S. at 716. Still, Title VII prohibited the practice because the employer's contribution plan "on its face[] discriminated against individual employees because of their sex." *Id.* Beyond narrow exceptions like BFOQ, "[n]either Congress nor the courts have recognized … a defense" permitting an employer to offer a "justification" for disparate treatment. *Id.* at 716-17. Applying *Manhart* here, LGBTQ discrimination straightforwardly constitutes discrimination "because of … sex."

B. Associational-discrimination precedent applies across Title VII's protected characteristics and supports the employees here.

"It is now accepted that a person who is discriminated against because of the protected characteristic of one with whom she associates is actually being disadvantaged because of her own traits." *Hively*, 853 F.3d at 347. That theory, known as associational discrimination, confirms that Title VII outlaws adverse employment action based on an employee's sexual orientation. *Id.*; *Zarda*, 883 F.3d at 128 (en banc majority); *accord, e.g.*, *Hively*, 853 F.3d at 359 (Flaum, J., concurring). Yet, echoing the argument that discrimination must reflect "racist" prejudice or similar animus to be actionable under Title VII, the employers, the United States, and lower-court dissenting judges have tried to cabin associational discrimination to the

context of race discrimination or other forms of discrimination that reflect "discriminatory animus."[19] That is misguided.

In the associational-discrimination cases, courts have recognized Title VII liability if an employer "takes action against an employee because of the employee's association with a person of another race." *Zarda*, 883 F.3d at 124. For example, in *Holcomb v. Iona College*, the Second Circuit held 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," such as when a white employee is fired because he is married to a black woman. 521 F.3d 130, 131-32 (2d Cir. 2008).[20]

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[19] *See Zarda*, 883 F.3d at 159 (Lynch, J., dissenting); *see also, e.g.*, *Hively*, 853 F.3d at 368 (Sykes, J., dissenting) (distinguishing miscegenation laws as resting on "invidious racial classifications); U.S. Br., *Zarda*, 2017 WL 3277292, at *21 (2d Cir. July 26, 2017) (treating race-based associational discrimination as distinctive because in that context, "the employer deems the employee's own race to be either inferior or superior to the partner's race") Altitude Express Cert. Pet. at 29 ("any employer that discriminates against an employee in a same-sex relationship has not engaged in sex-based treatment of women as inferior to men").

[20] *See also, e.g.*, *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc.*, 173 F.3d 988, 994-95 (6th Cir. 1999) (white employee with biracial child); *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986) (white job applicant married to black person); *Morales v. NYS Dep't of Labor*, 865 F. Supp. 2d 220, 226, 242 (N.D.N.Y. 2012) (white employee discriminated against based on associations "with persons of Mexican, Cuban, Puerto Rican, Columbian, Domini-

The same logic dictates treating sexual-orientation discrimination as discrimination on the basis of sex. As in *Holcomb* and similar cases, gay, lesbian, and bisexual Title VII claimants suffer discrimination based on a protected characteristic of the person they date or marry in relation to their own protected characteristic—except the discrimination is tied to the fact that their romantic partners are of the same sex, rather than a different race or national origin. The distinction makes no difference, however, because as explained above (at 14-15), Title VII principles "apply with equal force to discrimination based on" any of the protected characteristics. *Price Waterhouse*, 490 U.S. at 243 n.9 (plurality opinion). Accordingly, to fire an employee for being lesbian, gay, or bisexual is an action "based on an employer's opposition to association between particular sexes and thereby discriminates against an employee based on their own sex." *Zarda*, 883 F.3d at 128; *accord id*. at 133 (Jacobs, J., concurring).

Challenging this understanding, the employers, the United States, and lower-court dissenters instead read the associational-discrimination cases narrowly to turn upon a showing of "bigotry against" a "disfavored race." *E.g., id.* at 159 (Lynch, J., dissenting). Certainly, anti-miscegenation policies reflect "big-

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can, Ecuadorian, and Honduran national origin"); *Wiggins v. Social Security Administration*, EEOC Appeal No. 07A30048 (Jan. 22, 2004), https://tinyurl.com/y3ohcd22 (black employee punished by black manager because the employee "aligned herself" with white members of management rather than black managers).

otry" against a "disfavored race." *See Loving v. Virginia*, 388 U.S. 1, 11 (1967). But animus of that type is not necessary for a Title VII disparate-treatment violation. The statute instead asks a more basic question: whether disparate treatment of an employee was "because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a).

The "reason is simple" why this statutory standard is satisfied in the associational-discrimination cases. *Holcomb*, 521 F.3d at 139. These cases reflect the same longstanding test from *Manhart* for identifying unlawful disparate treatment. *See* Zarda Br. 31-36. Take *Holcomb*, for example, which involved discrimination against a white employee because of his marriage to a black woman. There, the court explained, "where an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination *because of the employee's own race*." 521 F.3d at 139 (emphasis added); *see also* Paula Rene Bruner, *Race Discrimination in the 21st Century Workplace*, *in* EEOC, Digest of Equal Employment Opportunity Law (2017), https://tinyurl.com/yxmhsses (same). In other words, Title VII was violated in *Holcomb* because the employee—a white man discharged as a result of the employer's aversion to interracial marriage—would not have been discharged if he were a black person married to a black person.

Accordingly, in associational-discrimination cases, just as in other Title VII cases, the ultimate legal inquiry is straightforward. Courts do not inquire whether the employer's motive was "racist," "sexist," or based on impermissible "animus." It is enough that

the employee is being subjected to disparate treatment because of his or her race, color, sex, national origin, or religion.

C. The employers' attempts to evade Title VII disparate-treatment liability echo the discredited "customer preference" defense.

Since Title VII's enactment, employers have tried to justify discrimination by claiming it was not "racist," "sexist," or otherwise "invidious." In particular, they have shifted the blame to their customers, alleging that their customers legitimately need, desire, or benefit in some way from employees of a certain race, sex, or other protected characteristic. But it "is now widely accepted that a company's desire to cater to the perceived racial preferences of its customers is not a defense under Title VII." *Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908, 913 (7th Cir. 2010); *see, also, e.g.*, 29 C.F.R. § 1604.2(a)(1) (EEOC regulation).

In urging here that Title VII requires a showing of animus or invidiousness beyond disparate treatment itself, the employers and court of appeals dissents rely on arguments similar to this repudiated customer preference theory.[21] Those advancing customer preference defenses likewise attempted to drive a wedge between disparate treatment and Title VII liability. Most famously, in *Diaz v. Pan Am. World Airways, Inc.*, an airline argued that hiring only

[21] For example, the owner of Harris Funeral Homes has asserted that "[a] male funeral director dressing in a female uniform would disrupt our clients' healing process." J.A. 130 ¶ 37.

women as flight attendants was lawful because its (mostly male) passengers preferred women. 442 F.2d 385, 389 (5th Cir. 1971). The Fifth Circuit emphatically rejected that notion: "While we recognize that the public's expectation of finding one sex in a particular role may cause some initial difficulty," the court observed, "it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome." *Id.*

Even today, employers continue to invoke such customer preference defenses, but courts uniformly recognize their incompatibility with Title VII. As recently as 2010, the Seventh Circuit rejected a nursing home's defense of allowing patients to opt for an all-white nursing staff, "foster[ing] … a racially-charged environment" by providing its employees with an "assignment sheet that unambiguously, and daily, reminded [staff] … that certain residents preferred no black [nurses]." *Chaney*, 612 F.3d at 912-13; *see also Significant EEOC Race/Color Cases*, EEOC, https://tinyurl.com/y5zk5eqh (last visited June 28, 2019) (detailing other similar recent cases).

Other employers have raised comparable defenses, claiming disparate treatment was not unlawful because it did not reflect impermissible animus. In *Knight v. Nassau County Civil Service Commission*, for example, a black employee was reassigned to a "minority recruitment" position. 649 F.2d 157, 162 (2d Cir. 1981). The employer argued this race-based assignment was permissible because it was trying to

"attract more minority applicants" and the black employee would be more effective than a white employee because "blacks work better with blacks." *Id.* "No matter how laudable the [employer's] intention might be," the Second Circuit held, the assignment was unlawful because the employee "was assigned a particular job (against his wishes) because his race was believed to specially qualify him for the work." *Id.*; *see also, e.g.*, *Ferrill v. Parker Grp., Inc.*, 168 F.3d 468, 471 (11th Cir. 1999) (similar).

The door to customer preference defenses and similar arguments has long been barred shut. The same logic should defeat the similar attempts in these cases to contend that disparate treatment is not actionable where it is not "sexist" or otherwise "invidious."

D. Artificial limitations on stereotyping claims are inconsistent with existing protections against sex- and race-based stereotyping.

"[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group." *Price Waterhouse*, 490 U.S. at 251 (plurality opinion); *supra* at 12. For that reason, *Zarda* and *Harris Funeral Homes* correctly held that Title VII prohibits the sex stereotyping inherent in discrimination against LGBTQ persons.[22]

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[22] Discrimination on the basis of LGBTQ status is highly bound up in gender stereotypes. Cases involving LGBTQ dis-

Resisting this straightforward application of *Price Waterhouse*, the employers, United States, and lower-court dissenters have suggested restricting Title VII's scope such that stereotyping would be legally relevant only where the trait in question (*e.g.*, "aggressiveness" for the management position in *Price Waterhouse*, 490 U.S. at 251) is essential to the job at issue. In other words, they think stereotyping may be the basis for a Title VII claim only when the employee would be placed in a "catch 22" (fired for exhibiting the trait and failing to conform to a stereotype or fired for conforming with the stereotype and not exhibiting the trait). *Zarda*, 883 F.3d at 157 (Lynch, J., dissenting); *see also e.g.*, U.S. Br., *Zarda*, 2017 WL 3277292, at *19; Harris Funeral Homes Cert. Pet. 21-22.

This narrow reading of *Price Waterhouse* is at odds with how that decision has rightly been applied to protect employees from both sex-based and race-based stereotypes—as well as combinations of the two. For example, in *Heard v. Board of Trustees of Jackson Community College*, a black woman employee brought a Title VII suit alleging that she was subject to poor reviews and terminated based on race-

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crimination commonly involve allegations, for instance, of epithets like "fem" and "sissy" alongside demeaning terms like "fag," *Zarda*, 883 F.3d at 121 (collecting cases), or "butch" alongside "dyke," *e.g., Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1221, 1224 (D. Or. 2002). It makes scant sense, and would yield highly arbitrary results, to require courts to determine whether such evidence speaks to gender stereotyping or LGBT discrimination. *See* Zarda Br. 27-31. Courts should avoid drawing "arbitrary and unprincipled line[s]." *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1522 (2019); *see also Republic of Sudan v. Harrison*, 139 S. Ct. 1048, 1061 (2019).

and sex-based stereotyping. In particular, she objected to supervisors' comments that she was "completely out of control," "would either scowl or grunt during … interactions," "bullied her colleagues," and adopted an inappropriate "tone"—comments that, she alleged, reflected her employer's stereotype-tainted view that she was an "angry black woman." No. 11-cv-13051, 2013 WL 142115, at *12 (E.D. Mich. Jan. 11, 2013). Recognizing that Title VII bars "discrimination … based on" stereotyping, including "racial stereotyping," the court held that the employee's claim could proceed to trial. *Id.*[23]

Holdings like *Heard* are consistent with what *Price Waterhouse* recognized decades ago: "[A]n employer who discriminates against employees based on assumptions about [protected characteristics]" violates Title VII, without need for a further showing that the stereotype operates as a "double-edged sword." *Zarda*, 883 F.3d at 123 (en banc majority). There is no reason to engraft special limitations on stereotyping claims that operate to the detriment of LGBTQ employees.

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[23] *See also, e.g.*, *Kang v. U. Lim Am., Inc.*, 296 F.3d 810, 817 (9th Cir. 2002) (recognizing Title VII claim based on Korean worker's failure to conform to employer's "stereotypical notions" about Koreans); *Kimble v. Wis. Dep't of Workforce Dev.*, 690 F. Supp. 2d 765, 777-78 (E.D. Wis. 2010) (finding evidence to establish Title VII violation based on employer's reliance on "uncomplimentary stereotype" about black males).

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Title VII's text and history reflect a simple yet critical goal: "to assure equality of employment opportunities." *McDonnell Douglas*, 411 U.S. at 800. As the United States becomes increasingly multicultural and diverse, it is all the more important to eradicate bias from the workplace, and to ensure that all employees are evaluated on the merits of their contributions. The employers in the present cases would instead have this Court contort basic principles of Title VII law and disregard the plain statutory text in the name of denying basic protections to LGBTQ employees. That misguided request should be denied.

CONCLUSION

The judgments in *Zarda* and *Harris Funeral Homes* should be affirmed, and the judgment in *Bostock* reversed.

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