

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

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**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.,  
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 SERVICE EMPLOYEES  
INTERNATIONAL UNION, INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS, AND JOBS  
WITH JUSTICE AS *AMICI CURIAE* IN SUPPORT  
OF THE EMPLOYEES**

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## INTERESTS OF *AMICI CURIAE*

*Amicus curiae* Service Employees International Union (SEIU) is a labor organization representing approximately two million working men and women in the United States, Canada, and Puerto Rico.<sup>1</sup> SEIU is committed to the fair and equal treatment of all workers, including workers who are lesbian, gay, bisexual, and transgender (LGBT). SEIU's members rely on Title VII to enforce their rights to a safe workplace free of discrimination. SEIU strives to ensure that all workers are protected from discrimination because of sex, including discrimination because of a perception that a worker may be LGBT. As described below, Title VII provides important protections for SEIU members and members of other unions who experience such discrimination in the workplace.

*Amicus curiae* International Brotherhood of Teamsters (IBT) is a labor organization with more than 1.4 million members, including members of the LGBT community, who are employed in a wide array of industries across the United States, Canada, and Puerto Rico. The IBT strongly supports the rights of LGBT employees to work in an environment free of harassment and discrimination. The IBT and its affiliates have used Title VII protections in representing LGBT members in a variety of occupations and, therefore, would be adversely

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<sup>1</sup> All parties have consented to the filing of this brief. No counsel for a party authored any part of this brief and no counsel or party made a monetary contribution to its preparation or submission. Only *amici* and their attorneys have paid for the filing and submission of this brief.

affected by a decision that invalidates Title VII's application to LGBT members in the workplace.

Founded in 1987, *amicus curiae* Jobs With Justice is a national network of 36 local coalitions in 22 states. Jobs With Justice's local coalitions include labor unions, community organizations, faith-based groups, worker centers, and student organizations. Jobs With Justice strives to create an economy that works for everyone and to ensure that all people have collective bargaining rights, employment security, and a decent standard of living. Employer-based discrimination against working people because they are LGBT creates a climate of fear and unsafe working conditions for women and LGBT workers, and prevents qualified individuals from obtaining and retaining work and receiving a fair return on their labor. Such discrimination undermines Jobs With Justice's goal of advancing the ability of working people, regardless of sex and LGBT status, to organize and collectively bargain. Jobs With Justice believes employers must be prohibited from discriminating against workers based on stereotypes they may carry about a person's sex.

## INTRODUCTION AND SUMMARY OF ARGUMENT

*Amici curiae* SEIU, IBT and Jobs With Justice submit this brief to highlight the real-life experiences of women who work in traditionally male-dominated fields. *Amici* represent many women who work in predominantly male professions, including women who work as security guards, truck drivers, police officers, emergency medical technicians, electrical technicians, road repair crewmembers, corrections officers, and railroad engineers. These women's experiences show that discrimination against them "because of . . . sex," 42 U.S.C. § 2000e-2(a), is often expressed in assertions about their sexual orientation or gender identity, such that any attempt to exclude sexual orientation or gender identity from Title VII's scope will leave these barrier-breaking women inadequately protected against sex discrimination.

For example, when women succeed in jobs that have historically been held by men, they are often labeled as "gay" or "dykes" as a form of harassment, regardless of whether the assertions about their sexual orientation are true. A career firefighter may be told in her job interview that, if hired, she will "inevitably" become bisexual because no women firefighters are straight. *See infra* Part III. Women security officers may feel compelled to wear make-up and accept sexual advances from male supervisors in order to avoid being called "fags." *Id.* A warehouse worker may endure harassment from male co-workers who call her "boy" and "man hater" because they assume she is a lesbian. *Id.*

For these women, there is no legal or practical way to carve out discrimination based on (assumed) sexual orientation or gender identity from discrimination

because of sex. The former is part and parcel of the latter.

## ARGUMENT

### I. Title VII Protects Workers Against Discrimination Based On Sex Stereotypes.

In enacting Title VII, “Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.” *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (quoting *Los Angeles Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)); *see also Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998) (“[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils[.]”).

In *Price Waterhouse*, a heterosexual woman at a professional accounting firm was told that if she wanted to become a partner she needed to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.” 490 U.S. at 235. Six Justices agreed that requiring employees to match certain sex-based stereotypes constituted sex discrimination prohibited by Title VII. *Id.* at 250 (plurality) (“In the specific context of sex stereotyping, an employer ... has acted on the basis of gender.”); *id.* at 259 (White, J., concurring); *id.* at 266 (O’Connor, J., concurring). Title VII’s prohibition on sex-based discrimination thus bars employers from discriminating against employees who do not conform to sex stereotypes, i.e., stereotypes about how individuals should act or appear based on their sex.

## II. Sex Discrimination Against Women In Traditionally Male-Dominated Professions Is Often Expressed In Assertions About Women's Sexual Orientation And Gender Identity.

The experiences of women working in non-traditional professions show how discrimination and harassment “because of ... sex” often invokes sexual orientation and transgender status.

As an initial matter, women in professions historically dominated by men are often labeled lesbians, regardless of their sexual orientation and as part of a broader campaign of harassment. See Amy M. Denissen & Abigail C. Saguy, *Gendered Homophobia and the Contradictions of Workplace Discrimination for Women in the Building Trades*, 28(3) *Gender & Soc’y* 381, 385 (2014) (“In male-dominated contexts, where simply occupying a trade as a woman is associated with other forms of perceived gender inversion, ... men direct anti-gay harassment at straight women and lesbians alike[.]”). As one author described the phenomenon in the construction industry: “Any woman on a construction site, whatever her sexual orientation, is fair game for antigay harassment[.]” Miriam Frank, *Hard Hats & Homophobia: Lesbians in the Building Trades*, 8 *New Lab. F.* 25, 29 (Spring/Summer 2001).

The ingrained stereotypes that lead to sex discrimination in this form are both easily recognized and deeply flawed. Women who work in male-dominated professions are perceived as having acted contrary to type with respect to their career choices and so are assumed to live contrary to other norms as well. Thus, women who work in traditionally male

jobs are assumed to violate the quintessential sex-based stereotype—namely, that women are attracted to men. See *Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698, 711 (7th Cir. 2016), *rev'd*, 853 F.3d 339 (7th Cir. 2017) (en banc) (describing the assumption “that all men should form intimate relationships only with women, and all women should form intimate relationships only with men” as the “sine qua non of gender stereotypes”); *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 206 (2d Cir. 2017) (Katzmann, C.J., concurring) (describing the “idea that men should be exclusively attracted to women and women should be exclusively attracted to men” as “as clear a gender stereotype as any”).

The labeling of women as lesbians, when used in work environments where being lesbian is seen as a negative trait, serves the dual purposes of driving women from the workplace and reassuring those who are threatened by the presence of women that any women who remain are in some way “unnatural.” As one expert explained: “Defining women as lesbians (regardless of their actual sexual orientation) makes them less threatening ..., as they can be perceived as ‘unnatural’ women. Presumed lesbians do not disturb the gender order as heterosexual women might and men can find it easier to understand why lesbians are in the job.” Tessa Wright, *Gender and Sexuality in Male-Dominated Occupations: Women Working in Construction and Transport* 28 (2016) (internal quotation marks and citations omitted). In other words, harassment based on perceptions of sexual orientation and gender identity serve as a proxy both to reinforce sex-based stereotypes and to penalize women for entering traditionally male fields. See Dana Kabat-Farr & Lilia M. Cortina, *Sex-Based*

*Harassment in Employment: New Insights into Gender and Context*, 38(1) Law & Hum. Behav. 58, 68 (2014) (concluding that sexual harassment of women in male-dominated workforces often represents a form of punishment for women's deviation from traditional gender roles).

Labeling women in male-dominated professions as lesbians, whether accurately or not, is also often linked with other stereotype-based assertions about the same women workers being less warm or traditionally feminine than is “natural.” See, e.g., *infra* Part III (describing situation in which woman firefighter was faulted for not being sufficiently “soft”). In addition, women who want to succeed in male-dominated fields frequently have no choice but to eschew at least some ultra-feminine norms (e.g., with respect to dress), and those departures further reinforce the perception that they are “unnatural” in some way. Ultimately, the non-traditional career choices, assumptions about sexual orientation, and real or perceived departures from stereotypical feminine identity all merge in a discrimination that preserves work for men at women's expense. See, e.g., *infra* Part III; see also, e.g., *Ellingsworth v. Hartford Fire Ins. Co.*, 247 F. Supp. 3d 546, 549, 555 & n.7 (E.D. Pa. 2017) (sex discrimination took the form of an incorrect perception that a heterosexual, cisgender woman insurance salesperson was lesbian and disapproval of her dress and appearance as inadequately feminine); *Lewis v. Heartland Inns of America*, 591 F.3d 1033, 1036 (8th Cir. 2010) (worker stated sex discrimination claim with allegations that she was characterized by a supervisor as having “an Ellen DeGeneres kind of look” and was fired for her

masculine presentation, including wearing men's clothing and having a traditionally male haircut).

Even women's competence can feed this vicious cycle. Women who prove their competence at traditionally male tasks are often viewed as cold and personally dislikable compared to equally successful men. See Madeline E. Hellman, et al., *Penalties for Success: Reactions to Women Who Succeed at Male Gender-Typed Tasks*, 89(3) J. Applied Psychol. 416, 426 (2004). And when women are perceived as competent and successful, that perception can "serve to justify discrimination against [them] because they are viewed as potentially dangerous or unfair competitors who need to be put in their place." Thomas Eckes, *Paternalistic and Envious Gender Stereotypes: Testing Predictions from the Stereotype Content Model*, 47(3/4) Sex Roles 99, 112 (2002).

In sum, "stereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality," *Howell v. North Central Coll.*, 320 F. Supp. 2d 717, 723 (N.D. Ill. 2004), which explains why lower courts have struggled so mightily with efforts "to distinguish between gender stereotypes that support an inference of impermissible sex discrimination and those that are indicative of sexual orientation discrimination." *Zarda v. Altitude Express*, 883 F.3d 100, 121 (2d Cir. 2018) (en banc). Those efforts lead only to "a jumble of inconsistent precedents," *Hively*, 830 F.3d at 706, and "unsatisfactory results," *id.* at 711, further proving the point that "the line between sex discrimination and sexual orientation discrimination ... does not exist, save as a lingering and faulty



judicial construct.” *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1159 (C.D. Cal. 2015).

### **III. The Specific Experiences Of Women, Including *Amici’s* Members, Working In Traditionally Male-Dominated Professions Demonstrate The Impossibility Of Separating Sex-Based Discrimination From Discrimination Because Of Sexual Orientation Or Gender Identity.**

Women workers’ real-life experiences show an inextricable link between sex-based stereotypes and perceptions of women as lesbian or transgender. Members of SEIU, IBT, and other unions who work in traditionally male-dominated professions regularly experience sex discrimination that takes the form of assertions about their sexual orientation and transgender status.<sup>2</sup> And the stories of women workers who have litigated Title VII claims in lower courts further illustrate the impossibility and impracticability of segregating discrimination based on sexual orientation or transgender status from discrimination based on sex stereotypes.

#### ***Susan – Firefighter***

Susan worked for 25 years as a career firefighter in Utah. It took six years for her to get her first job in a fire department, despite repeatedly receiving high scores on her qualifying exams.

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<sup>2</sup> The union members whose stories are told here consented to having their experiences recounted in this brief, and records of the interviews conducted with them are on file with counsel. Participants chose to maintain a measure of anonymity by using first names only or nicknames.

At the interview for the job Susan would ultimately be offered, she was asked numerous questions about her personal life and her sexuality. The male interviewer told Susan that she needed to understand that “all women firefighters would inevitably be bisexual.” He also informed Susan that some men would immediately quit if she were hired because the men’s wives would not allow them to sleep in the same room with a female co-worker. Susan was also asked at her interview what she would wear to sleep in the firehouse. After her interview, when Susan asked male applicants what questions they had been asked, they reported being asked about their firefighting skills and knowledge, not about their sleepwear or sexual orientation.

Once Susan was hired, her supervisors and co-workers assumed her to be gay and repeatedly told her that they assumed she was gay. Even though Susan is not a lesbian, Susan’s co-workers would openly discuss how she must be gay because she was not interested in a sexual relationship with any of her male colleagues. Not infrequently, when Susan and other firefighters would be out in a truck, co-workers would point out a woman on a sidewalk and ask “Hey, do you like that chick?”

At one point, Susan’s co-workers cut out an article that claimed 100% of female firefighters are gay and hung it up in the closet that had been converted into her bathroom. And when another woman firefighter joined the crew, supervisors and co-workers made comments about how they must both be lesbians and a couple. They also called Susan and her woman co-worker “split tails,” a vulgar term for women’s genitals that also refers to does.

When Susan was promoted to engineer, a rank that no other woman in the department held, she experienced more extreme harassment, including having her car keyed. She would often find that firefighters had urinated in her boots. Although she reported this to the police, no action was taken.

Throughout her career, Susan had to prove that she could run as fast, carry as much weight, and be as tough as a man. And yet, her supervisor told her – even after she had been promoted to captain – that she was “not soft enough” because she did not cry in a disciplinary meeting.

For the first ten or so years of her career, Susan was only one of two women firefighters who were long-term employees in her department. Although eventually two more women joined the department, there were only four women firefighters out of 106 when Susan retired in 2018 after 25 years of service.<sup>3</sup>

Susan is an elected member of the International Association of Fire Fighters’ Elected Human Relations Committee, where she serves in a position dedicated to representing women in the profession. In that role, she works to address problems women firefighters face in the profession and hears from firefighters working throughout the country. Based on this experience, Susan knows that the stereotypes she experienced are commonplace: If women firefighters are able to keep up with their male co-workers and do their physically demanding jobs but

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<sup>3</sup> Less than four percent of career firefighters were women in 2017. Nat’l Fire Prot. Ass’n, *U.S. Fire Department Profile 2017* 4 (2019), <https://www.nfpa.org/-/media/Files/News-and-Research/Fire-statistics-and-reports/Emergency-responders/osfdprofile.pdf>.

do not want to sleep with their co-workers, they are assumed to be gay.<sup>4</sup>

***Tracy Stevens – Corrections officer***

Tracy Stevens is the plaintiff in *Stevens v. Alabama Dep't of Corrections*, No. 1:12-cv-3782-TMP, 2015 WL 1245355 (N.D. Ala. 2015). At the time she filed her complaint of sex-based discrimination, Ms. Stevens had worked as a correctional officer for 18 years. *Id.* at \*3-6.<sup>5</sup> Although Ms. Stevens is heterosexual, she was harassed repeatedly at work based on the perception that she was a lesbian. *Id.* at \*3. Her supervisor called her a “dyke” and told one of Ms. Stevens’ co-workers that “‘you could tell’ [she] didn’t like men by ‘the way she ... treated the inmates.’” *Id.* The supervisor also told Ms. Stevens’ co-worker that Ms. Stevens “‘hated men because of what her husband did to her in the past,’ and said her husband had ‘dogged her out.’” *Id.* Ms. Stevens filed internal complaints about these comments and experienced additional harassment and retaliation: after she complained, her supervisor called her “sir”

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<sup>4</sup> Women in firefighting “entirely upend societal gender norms.” Lorraine Dowler, *Female Firefighters Defy Old Ideas of Who Can Be an American Hero*, Conversation (April 26, 2018, 6:37 a.m.), <https://theconversation.com/female-firefighters-defy-old-ideas-of-who-can-be-an-american-hero-95342> (survey of 100 women firefighters); see also Melanie A. Hom, et al., *Women Firefighters and Workplace Harassment*, 205(12) *J. Nervous & Mental Disease* 910, 910 (2017) (85% of women firefighters reported being treated differently because of their sex).

<sup>5</sup> *Amicus* SEIU represents men and women working as correctional officers, as well as other employees in correctional facilities. Jobs in this field have traditionally been held by men. See Eric Lambert, et al., *Gender Similarities and Differences in Correctional Staff Work Attitudes and Perceptions of the Work Environment*, 8(1) *Western Criminology Rev.* 16, 16-17 (2007).

and an inmate, possibly provoked by one of Ms. Stevens' co-workers, called her a “‘dyke bulldog [sic] bitch,’ in a conversation with [a] corrections officer.” *Id.* at \*3-6.

The district court refused to acknowledge this harassment as being based on Ms. Stevens' sex, finding instead discrimination based on the “supervisor's perception that [she was] a lesbian” “disparage[d] [her] perceived sexual orientation, and not her gender.” *Id.* at \*7. But of course, Ms. Stevens would not have been accused of “hating men” or being a “dyke” if she had been a male officer.

### ***Mimi – Security officer***

Mimi is a member of SEIU and has been a private security officer for more than seven years. Security is a predominantly male profession and Mimi's job site has approximately three or four times more men than women.<sup>6</sup>

Mimi and many of her women co-workers have been called “Helgas” by male supervisors and co-workers, which is a reference to buff, masculine-looking women. Supervisors and male co-workers have also called women security guards “fags” or “friggin' faggot.” Although Mimi and some of her women co-workers have been labeled as lesbians by their supervisors and co-workers, they are not.

The women security guards who are targeted with slurs suggesting they are lesbian are those women

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<sup>6</sup> In the security profession, women “face distinctive challenges in proving themselves to their colleagues,” including proving competence that would be assumed in men. Andrew Woods, *Opportunities and Obstacles for Women in Security, in Women in the Security Profession: A Practical Guide for Career Development* 111, 115 (Sandi J. Davies ed., 2016).

who don't present as traditionally feminine. In Mimi's experience, some women security officers have intentionally chosen to dress and behave in more traditionally feminine ways in order to avoid this discrimination: women can insulate themselves if they change their appearance and behavior, including by wearing make-up, putting their hair up in a ponytail, and not rebuffing sexual advances from male supervisors and co-workers.

As a union shop steward and a member leader of SEIU, Mimi is concerned with ensuring that all employees are safe and respected at work, regardless of whether their appearances comport with traditional sex stereotypes.

### ***Laura – Warehouse worker***

Laura, a member of IBT, has worked as a warehouse worker and clerk for her employer for the last 16 years. Laura is physically strong, does not generally wear make-up at work, and does not wear stereotypically feminine clothes to work. Since she started, and without any knowledge of Laura's sexual orientation, Laura's male co-workers and supervisors have assumed that she is a lesbian.

Laura's co-workers and supervisors regularly call her "boy." Indeed, they have called her "boy" for the entire period of her employment. Laura has also been subjected to other comments suggesting that she is a man or that she is a lesbian: One co-worker asked her if she uses the bathroom standing up, and another asked "who is the new guy" when meeting her. Co-workers have also called her a "man hater" and a "dyke," slurs that are overheard by her direct supervisor who does nothing to stop the harassment. Once, after a co-worker repeatedly cat-called Laura

and made pig noises and barked in her direction, she complained to her employer, but her employer said the noises were not directed at her.

Laura has complained about the harassment she experiences at work, but does not believe her employer takes her complaints seriously. Her co-workers tease her for reporting the harassment, often taunting her with cry-baby gestures. Laura feels that, unless she changes her appearance, her co-workers and supervisors will continue to discriminate against her.

### ***Anna Menchaca – Paramedic***

Anna Menchaca successfully asserted a claim of sex-based employment discrimination in *Menchaca v. American Medical Response of Illinois, Inc.* (*Menchaca II*), No. 98-C-547, 2002 WL 48073 (N.D. Ill. 2002). Ms. Menchaca worked for an ambulance company for almost ten years, first as an emergency medical technician, then as a paramedic, and finally as a station manager. *Menchaca v. American Medical Response of Illinois, Inc.*, No. 98-C-547, 2000 WL 1141570, at \*1 (N.D. Ill. 2000). Ms. Menchaca's supervisor at the time she was fired from her job called her a "pit bull dyke," and a former supervisor had called her a "bull dyke from hell." *Id.* at \*3. Ms. Menchaca's supervisor also complained that her management style was "aggressive" and "assertive." *Id.* Managers, despite Ms. Menchaca's outstanding job performance, indicated that they preferred to interact with "other men in the garage." *Id.*

Ms. Menchaca's employer argued that the supervisor's words were not relevant to her sex discrimination claims. *Menchaca II*, 2002 WL 48073, at \*3. The district court, however, recognized that the

slurs were “reflective of an attitude that [Ms. Menchaca] was too tough and thus did not conform to traditional gender stereotypes.” *Id.*<sup>7</sup>

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The real-life experiences of women working in male-dominated professions demonstrate the impossibility of trying to separate the discrimination such women face because they defy traditional sex stereotypes and the discrimination they face based on actual or perceived sexual orientation or transgender status.

## CONCLUSION

For the foregoing reasons, this Court should find that Title VII’s ban on discrimination “because ... of sex” includes discrimination on the basis of sexual orientation and transgender status and should affirm the judgments of the Second and Sixth Circuits and reverse the judgment of the Eleventh Circuit.

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<sup>7</sup> SEIU represents men and women working as paramedics, emergency medical technicians and other emergency medical personnel. Approximately three of every four certified emergency medical service professionals nationally are male. See Gary Blau, et al., *Gender Differences in EMS Professionals*, 2(3) J. Behav. Health 82, 84 (2014). See also *Maldonado-Catala v. Municipality of Naranjito*, 255 F. Supp. 3d 300, 313 (D. P.R. 2015) (emergency medical technician harassed by co-workers as “machito” or manly and mocked for her perceived sexual orientation could bring sex-based harassment claim because sexually suggestive comments “implicat[ed]” her sex).



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