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

IN THE
Supreme Court of the United States

GERALD LYNN BOSTOCK, *Petitioners*,
v.
CLAYTON COUNTY, GEORGIA, *Respondent*,

ALTITUDE EXPRESS, INC., ET AL., *Petitioners*,
v.
MELISSA ZARDA , ET AL., *Respondents*,

R.G. & G.R. HARRIS FUNERAL HOMES, INC.,*Petitioner*,
v.
EEOC and AIMEE STEPHENS, *Respondents*.

On Writs of Certiorari to the United States Courts of Appeals for the Second, Sixth, and Eleventh Circuits

BRIEF OF LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUEER (LGBTQ+) MEMBERS OF THE LEGAL PROFESSION AND LAW STUDENTS AS *AMICI CURIAE* IN SUPPORT OF THE EMPLOYEES

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TABLE OF CONTENTS

Table of Authorities iii

Interest of *Amici Curiae* 1

Summary of Argument 2

Argument.. 5

A. The Plain Text of the Statute Must Mean Sexual Orientation Discrimination and Transgender Status Discrimination Are Forbidden 6

B. The Term "Sex" Should be Treated Similarly to the Other Listed Protected Characteristics in Title VII 8

C. A Finding that Sexual Orientation Discrimination and Transgender Status Discrimination Are Not Prohibited by Title VII Would Open Up the Door for Employers to Discriminate Based on Other Sex Stereotypes.... 13

D. Congressional Intent Is Neutral in Terms of LGBTQ+ Discrimination 17

E. This Court Should Decide That Sex Discrimination Necessarily Includes Sexual Orientation Discrimination and Transgender Status Discrimination 18

Conclusion 19

APPENDIX...A-1

LIST OF *AMICI CURIAE* LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUEER (LGBTQ+) MEMBERS OF THE LEGAL PROFESSION, LAW STUDENTS, AND RECENT LAW GRADUATES A-1

TABLE OF AUTHORITIES

CASES:

Artis v. D.C.,
138 S. Ct. 594 (2018) 6

Barnes v. City of Cincinnati,
401 F.3d 729 (6th Cir. 2005) 2, 18

Bostock v. Clayton County Board of Commissioners,
723 Fed. Appx. 964 (11th Cir. 2018) 3, 7

EEOC v. R.G. &. G.R. Harris Funeral Homes, Inc.,
884 F.3d 560 (6th Cir. 2018) 3

EEOC v. Scott Medical Health Center,
217 F. Supp. 3d 834 (W.D. Pa. 2016) 2

Glenn v. Brumby,
663 F.3d 1312 (11th Cir. 2011) 2

Griggs v. Duke Power Co.,
401 U.S. 424 (1971) 11

Gustafson v. Alloyd Co., Inc.,
513 U.S. 561 (1995) 9

Hively v. Ivy Tech Community College of Indiana,
853 F.3d 339 (7th Cir. 2017) 2

Los Angeles Department of Water & Power v. Manhart,
435 U.S. 702 (1978) 6, 11

Marbury v. Madison,
5 U.S. 137 (1803) 18

Moskal v. United States,
498 U.S. 103 (1990) 6

Newport News Shipbuilding and Dry Dock Co. v. EEOC,
462 U.S. 669 (1983) 6, 17

Oncale v. Sundowner Offshore Services,
523 U.S. 75 (1998) 17

Parr v. Woodmen of the World Life Ins. Co.,
791 F.2d 888 (11th Cir. 1986) 10

Price Waterhouse v. Hopkins,
490 U.S. 228 (1989) 4, 11, 13, 15, 16

Schroer v. Billington,
577 F. Supp. 2d 293 (D.D.C. 2008) 9

Schwenck v. Hartford,
204 F.3d 1187 (9th Cir. 2000) 2, 18

Watson v. Fort Worth Bank & Trust,
487 U.S. 977 (1988) 6

Zarda v. Altitude Express, Inc.,
883 F.3d 100 (2d Cir. 2018)......................... 3, 7

EEOC DECISIONS:

Macy v. Holder,
No. 0120120821, 2012 WL 1435995 (EEOC Apr. 20, 2012) 2

Baldwin v. Foxx,
Appeal No. 0120133080, 2015 WL 4397641 (EEOC July 15, 2015) 2

STATUTES AND ACTS:

42 U.S.C. § 2000e-2(a)(1) 6, 8

Civil Rights Act of 1991 (Pub. L. 102-166) 18

Lily Ledbetter Fair Pay Act of 2009
(Pub. L. 111-2) 18

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International Lesbian, Gay, Bisexual, Trans and Intersex Association, https://ilga.org/about-us 5

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Frank Newport, *In U.S., Estimate of LGBT Population Rises to 4.5%* (May 22, 2018), https://news.gallup.com/poll/234863/estimate-lgbt-population-rises.aspx... 5, 15

Will Roscoe, *Changing Ones: Third and Fourth Genders in Native North America* (1998) 5

Will Roscoe, *The Zuni Man-Woman* (1992)................ 5

INTEREST OF *AMICI CURIAE*

Amici Curiae[1] are Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ+)[2] law students, recent law graduates, and members of the legal profession: lawyers, judges, and law professors, who have a personal stake in the outcome of this case. Many of us have experienced discrimination based on our sexual orientation and/or transgender status, and have experienced it as a form of sex discrimination because others have judged us for having what they considered having the "wrong" behavior, attraction, and/or identity for someone of our sex. If this Court decides that Title VII's prohibition on sex discrimination does not prohibit employers from discriminating based on sexual orientation or transgender status, then we, along

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[1] No counsel for a party authored this brief in whole or in part. No person other than *amici curiae* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have provided written consent to the filing of this brief.

[2] Lesbians are women who are romantically attracted to other women. *See* GLAAD Media Reference Guide at 6, http://www.glaad.org/sites/default/files/GLAAD-Media-Reference-Guide-Tenth-Edition.pdf. Gay people are people who are romantically attracted to other people of the same sex. *Id.* Bisexual people are people who can be romantically attracted to people of the same sex or people of a different sex. *Id.* Transgender people are people "whose gender identity and/or gender expression differs from what is typically associated with the sex they were assigned at birth." *Id.* at 10. Queer is "an adjective used by some people, particularly younger people, whose sexual orientation is not exclusively heterosexual." *Id.* at 6. It can also describe someone with a minority gender identity or expression. *Id.*

with more than 11 million other LGBTQ+ adults living in the United States, risk losing our current and/or future employment simply because of who we love or who we are.

SUMMARY OF ARGUMENT

Numerous courts have held that sexual orientation discrimination and transgender status discrimination are types of sex discrimination.[3] We, LGBTQ+ lawyers, judges, law professors, law students, and recent law graduates, urge this Court to find that sexual orientation discrimination and transgender status discrimination are types of sex discrimination, and that therefore Title VII's prohibition on sex discrimination necessarily protects employees from sexual orientation discrimination and transgender status discrimination. Our reasoning, in brief, follows.

First, looking at the plain and ordinary meaning of "sex discrimination," sexual orientation discrimination and transgender status

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[3] *See, e.g.*, *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (finding that discrimination against transgender individuals is sex discrimination); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005) (same); *Schwenck v. Hartford*, 204 F.3d 1187 (9th Cir. 2000) (same); *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. 2017) (finding that a claim of sexual orientation discrimination is a claim of sex discrimination); *EEOC v. Scott Med. Health Ctr.*, 217 F. Supp. 3d 834 (W.D. Pa. 2016) (same); *see also Macy v. Holder*, No. 0120120821, 2012 WL 1435995 (EEOC Apr. 20, 2012) (finding that gender identity discrimination is sex discrimination under Title VII); *Baldwin v. Foxx*, Appeal No. 0120133080, 2015 WL 4397641 (EEOC July 15, 2015) (finding that sexual orientation discrimination is sex discrimination under Title VII).

discrimination should be recognized as types of sex discrimination. "Sexual orientation" and "transgender" are just modern terms used to describe particular types of behavior or identity that do not conform to sex stereotypes. These modern terms should not obscure from the Court what actually occurs when an employer discriminates on these grounds.

For example, when an employer discriminates against an employee because he is gay, as Gerald Bostock and Donald Zarda allege happened to them,[4] the employer is discriminating against the employee because he is a man who does not conform to the sex stereotype that men should be attracted to, date, and marry only women. If not for Bostock's and Zarda's sex being male, they would not have been penalized for being attracted to men. Likewise, when an employer discriminates against an employee because she is transgender, as happened to Aimee Stephens,[5] the employer is discriminating against the employee because she does not conform to sex stereotypes about how those assigned the sex of male at birth should present themselves and identify. If not for

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[4] Neither case has reached the stage where findings of fact have been made. *See Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 132 (2d Cir. 2018) (finding that Title VII does prohibit sexual orientation discrimination and remanding for further proceedings); *Bostock v. Clayton Cty. Bd. of Comm'rs*, 723 Fed. Appx. 964, 965 (11th Cir. 2018) (holding Title VII does not prohibit sexual orientation discrimination).

[5] The court below held that Aimee Stephens had been discriminated because of her transgender status, in violation of Title VII. *See EEOC v. R.G. &. G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 567 (6th Cir. 2018).

Stephens being assigned the sex of male at birth, she would not have been penalized for identifying as a woman.

Second, when an employer discriminates based on sexual orientation or transgender status, it imposes its view of what is proper behavior and identity for a person based on the sex of the employee, and discriminates against the employee for not conforming to its view of proper behavior or identity for someone of that employee's perceived sex. This behavior and identity policing based on sex would not be permitted if it were based on any other protected characteristic under Title VII, and should not be permitted when based on sex either.

Third, sexual orientation discrimination and transgender status discrimination are simply types of discrimination against individuals who do not conform to certain sex stereotypes, where the employer determines who they should love or what sex they should identify as, based on their sex. If this Court finds that sexual orientation discrimination and transgender status discrimination are not prohibited by Title VII, the door is opened for employers to discriminate on the basis of other sex stereotypes, in contravention to the rule affirmed in *Price Waterhouse v. Hopkins*.

Finally, neither looking at Congressional intent nor the fact that the Equality Act has passed the House but not yet the Senate should stop this Court from finding that sex discrimination necessarily includes discrimination against employees because they are LGBTQ+.

ARGUMENT

Across cultures, geographies, and time periods, there have been, are, and always will be gender non-conforming people, including people that we now call lesbian, gay, bisexual, transgender, and queer.[6] Approximately 1 in 23 people in the United States is lesbian, gay, bisexual, transgender, or queer, which means there are approximately 11 million LGBTQ+ adults living in the United States right now.[7] What all these individuals have in common is that they exhibit behavior and/or an identity that is not

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[6] *See, e.g.*, Will Roscoe, *Changing Ones: Third and Fourth Genders in Native North America* (1998) (discussing Native American alternative gender roles, and noting that in many traditional Native American cultures LGBTQ+ individuals were celebrated and thought to bring good luck); Will Roscoe, *The Zuni Man-Woman* (1992) (focusing on the life of We'wha, a Native American from the Zuni tribe who lived from 1849 until 1896 and who was born identified as a male, but grew up identifying as female); International Lesbian, Gay, Bisexual, Trans and Intersex Association, https://ilga.org/about-us (working on behalf of LGBTQ+ organizations in 150 different countries). Gender non-conforming behavior also occurs throughout the animal kingdom. *See, e.g.*, Bruce Bagemihl, *Biological Exuberance: Animal Homosexuality and Natural Diversity* (1999) (discussing numerous scientifically documented examples of homosexual and transgender behavior in hundreds of animal species); Nellie Bowles, *The Gay Penguins of Australia: Two male penguins are raising a baby whose gender is unknown*, N.Y. Times, Jan. 15, 2019, https://www.nytimes.com/2019/01/15/style/gay-penguins-australia.html.

[7] *See* Frank Newport, *In U.S., Estimate of LGBT Population Rises to 4.5%* (May 22, 2018), https://news.gallup.com/poll/234863/estimate-lgbt-population-rises.aspx.

stereotypically associated with individuals of their sex.

A. The Plain Text of the Statute Must Mean Sexual Orientation Discrimination and Transgender Status Discrimination Are Forbidden

The plain and ordinary meaning of the text of Title VII necessarily prohibits employers from discriminating based on sexual orientation or transgender status. Title VII provides that "[i]t shall be an unlawful employment practice for an employer . . . to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). This section is violated when an employer treats a "particular person less favorably than others because of the plaintiff's race, color, religion, sex, or national origin." *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 985–86 (1988). In other words, Title VII is violated when an employer treats an employee "in a manner which but for that person's sex would be different." *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669, 683 (1983) (quoting *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978)).

To determine "the meaning of a statutory provision," this Court "look[s] first to its language, giving the words used their ordinary meaning." *Artis v. D.C.*, 138 S. Ct. 594, 603 (2018) (quoting *Moskal v. United States*, 498 U.S. 103, 108 (1990) (citation and

internal quotation marks omitted)). The plain text of the statute mandates the recognition that sexual orientation discrimination and transgender status discrimination are subsets of sex discrimination.

First, Stephens, Zarda, and Bostock all alleged that they were discharged from their employment because of their sex, in violation of the plain text and meaning of Title VII. Stephens was discharged because she was assigned the sex of male at birth, and informed her employer she identified as a woman and would be living openly as a woman at work. If Stephens had been assigned the sex of female at birth and had informed her employer she identified as a woman and would be living openly as a woman at work, she would not have been discharged. Therefore, she was discharged because of her sex. Stephens was treated less favorably than individuals assigned the sex of female at birth who identified and lived as women simply because her employer considered her male instead of female.

Zarda and Bostock alleged that they were discharged because they were men who had romantic attraction for men. Assuming their allegations are true,[8] if Zarda and Bostock had been women who had romantic attraction for men, they would not have been discharged. Therefore, Zarda and Bostock were

[8] Neither case has reached the stage where findings of fact have been made. *See Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 132 (2d Cir. 2018) (finding that Title VII does prohibit sexual orientation discrimination and remanding for further proceedings); *Bostock v. Clayton Cty. Bd. of Comm'rs*, 723 Fed. Appx. 964, 965 (11th Cir. 2018) (holding Title VII does not prohibit sexual orientation discrimination).

discharged because of their sex. Zarda and Bostock were treated less favorably than women who had romantic attraction for men simply because their sex was male instead of female.

Therefore, in each of these three cases, the employer "discharge[d] an[] individual . . . because of such individual's . . . sex," 42 U.S.C. § 2000e-2(a)(1), in violation of the plain and ordinary meaning of the statute's language. Indeed, whenever any employer discharges or otherwise treats unfavorably an employee because they are LGBTQ+, the employer is discriminating against the employee because of the employee's sex. If the employee had been someone of a different sex and exhibited the same behavior, attraction, or identity, then the adverse employment action would not have been taken.

B. The Term "Sex" Should be Treated Similarly to the Other Listed Protected Characteristics in Title VII

Next, it is clear that, for any of the other listed prohibited grounds of employment discrimination, an employer would not be permitted to impose its own views of what conduct or identification is appropriate for people based on their race, color, religion, or national origin, nor would the employer be permitted to penalize an employee who did not conform to the employer's opinions on this. Therefore, an employer should not be permitted to impose its own views of what conduct or identification is appropriate for people based on their sex, and nor should the employer be permitted to

penalize an employee who does not conform to its opinions on this.

"[A] word is known by the company it keeps" and this Court should look to the other words listed with "sex" in making sure that its interpretation of "sex" is correct. *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 575 (1995) (describing the doctrine of *noscitur a sociis*). The doctrine of *noscitur a sociis* mandates the recognition that sexual orientation discrimination and transgender status discrimination are subsets of sex discrimination.

For example, imagine that a particular employee believes that his national origin is the United Kingdom. However, after learning some more about his family history and his early life, he realizes his national origin is in fact French. An employer would not be able to penalize the employee for this change in his identity without violating Title VII's prohibition on national origin discrimination.

Similarly, imagine that an employer thought that an employee was white, but the employee later revealed that she was African American. The employer would not be permitted to fire the employee on this ground, without violating Title VII's prohibition on race discrimination.

Likewise, surely it would be religious discrimination under Title VII for an employer to fire an employee because she switched religions – say, she started out Jewish but then converted to Christianity. *Cf. Schroer v. Billington*, 577 F. Supp. 2d 293, 306 (D.D.C. 2008) (reasoning that an employer may not

discriminate based on transgender status under Title VII because: "Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only 'converts.' That would be a clear case of discrimination 'because of religion.' No court would take seriously the notion that 'converts' are not covered by the statute. Discrimination 'because of religion' easily encompasses discrimination because of a change of religion.").

In another example, imagine that an employer has strong beliefs that people of different races should not marry. Can there be any doubt that an African-American employee fired for marrying a Chinese-American would have a claim under Title VII for race discrimination? After all, but for the employer's view that the employee's race was "wrong" for that particular marriage, the employee would not have been fired. *Cf. Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986) (finding a Title VII violation had been stated when plaintiff alleged he had not been hired because of his interracial marriage).

Further, would it not also be religious discrimination under Title VII for an employer to require that employees date and marry someone from their own religion? Surely a Muslim employee fired for dating a Christian would have a claim under Title VII for religious discrimination.

From these examples, the principle is illustrated that when discrimination based on a particular

characteristic is prohibited, the employer must not take that characteristic into account when making employment decisions. *See, e.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989) (plurality) (Title VII requires "that gender must be irrelevant to employment decisions"); *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978) (Title VII is violated when the evidence shows negative "treatment of a person in a manner which but for that person's sex would be different.") (citations omitted); *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971) (Title VII requires that sex should be "irrelevant" to employment decisions). However, when the employer holds certain beliefs and stereotypes about how people should be based on these protected characteristics, and then penalizes employees for failing to conform to these beliefs and stereotypes, the employer is taking that characteristic into account when making employment decisions.

In the examples above then, an employer may not penalize an employee for being a different race than the employer thought she was without violating Title VII's race discrimination prohibition. And, an employer cannot penalize an employee for changing religions without violating Title VII's religious discrimination prohibition. Similarly then, an employer should not be able to penalize an employee for changing the sex with which they identify and present as or for revealing that they are a different sex than what the employer thinks they are or previously thought they were, without violating Title VII's sex discrimination prohibition.

An employer cannot police the race or religion of an individual that its employee dates or marries, based on its judgment about what is proper for someone of the employee's race or religion, without running afoul of Title VII's race and religion discrimination prohibitions. Similarly then, an employer should not be able to police the sex of the individual that its employee dates or marries, based on the employer's judgment about what is proper for someone of the employee's sex, without running afoul of Title VII's sex discrimination prohibition.

If we accept that an employer would not be able to penalize an employee for changing, discovering or revealing that they are a different race, color, religion, or national origin than the employer thought, then we must accept that an employer cannot penalize an employee for changing, discovering or revealing that they are a different sex than the employer thought. Otherwise, the term "sex" is being interpreted differently than the terms "race," "color," "religion," and "national origin," even though there is no indication in the statutory language that these terms should be interpreted differently.

Similarly, if we accept that an employer would not be able to require a person of a certain race, color, religion, or national origin to be attracted to, date, and marry only someone of a different race, color, religion, or national origin as a condition of employment, then we must accept that an employer may not require that a person of a certain sex must be attracted to, date, and marry only someone of a different sex. Otherwise, the term "sex" is being

interpreted differently than the terms "race," "color," "religion," and "national origin," even though there is no indication in the statutory language that these terms should be interpreted differently.

C. A Finding that Sexual Orientation Discrimination and Transgender Status Discrimination Are Not Prohibited by Title VII Would Open Up the Door for Employers to Discriminate Based on Other Sex Stereotypes

If this Court were to withdraw the protection that the Second and Sixth Circuits, as well as the EEOC, have found to exist and hold that sexual orientation discrimination and transgender status discrimination are not forms of sex discrimination barred by Title VII, this would open the door for employers to discriminate based on other sex stereotypes, which would be harmful for all people. This Court has previously found that if an employer makes an adverse employment decision because an employee does not conform to sex stereotypes, this violates Title VII's prohibition on sex discrimination. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality). In *Price Waterhouse*, Ann Hopkins was not promoted, at least in part because she was aggressive, did not wear make-up or jewelry, and did not conform to other female stereotypes. *Id.* at 235. *Price Waterhouse* was a plurality decision, and the nine Justices differed over the evidence and burden of proof requirements in a mixed motive case.[9]

[9] *See id.* at 241, 252 (employee does not need to show that discrimination on a prohibited ground is a "but-for" cause of the

However, all nine Justices on the Court agreed that penalizing an employee for failure to conform to sex stereotypes is prohibited by Title VII. *Id.* at 251 (plurality) (opinion of four justices noting that sex stereotyping had been shown in this case and that Title VII forbids adverse employment decisions on the basis of sex stereotyping); *id.* at 259 (White, J., concurring) (agreeing that Hopkins had shown that an "unlawful motive was a substantial factor in the adverse employment action"); *id.* at 261-62 (O'Connor, J., concurring) (noting that in this case "the employer . . . knowingly g[ave] substantial weight to an impermissible criterion"); *id.* at (Kennedy, J., dissenting) (writing for three Justices and noting that "Hopkins plainly presented a strong case . . . of the presence of discrimination in Price Waterhouse's partnership process").

While most women are romantically attracted to only men and not women, a small but significant percentage of women are romantically attracted to

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adverse employment action and employer must usually show objective evidence that its decision would have been the same absent the illegitimate motive); *id.* at 261 (White, J., concurring) (concurs with the plurality in result but believes that the employer does not need to employ objective evidence to show that it would have come to the same decision absent the illegitimate motive); *id.* at 262-63 (O'Connor, concurring) (believes that "but-for" causation must be shown in a Title VII case); *id.* at 281, 292-93 (Kennedy, dissenting) (noting that "Title VII liability requires a finding of but-for causation" and disagreeing with the plurality and concurrences over whether the employer should bear the burden of proof after the employee has shown substantial reliance on an illegitimate motive).

women.[10] While most men are romantically attracted to only women and not men, a small but significant percentage of men are romantically attracted to men.[11] While most people assigned female at birth grow up identifying as women, a small but significant percentage of people assigned female at birth do not grow up identifying as women.[12] While most people assigned male at birth grow up identifying as men, a small but significant percentage of people assigned male at birth do not grow up identifying as men.[13] Under the reasoning of *Price Waterhouse*, LGBTQ+ individuals should not be discriminated against simply because they do not conform to certain sex stereotypes. Employers should not be permitted to penalize employees simply because they fail to conform to the employers' generalizations about a protected characteristic.

If this Court finds that discrimination against LGBTQ+ workers is not a form of sex discrimination, this would be a negative result for all men and women across the country. The holding in *Price Waterhouse* would implicitly be reversed. Since a woman could be discriminated against for loving a woman, or having been identified at birth as male, could she also be discriminated against in other ways for not "acting like a woman," for example by

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[10] *See* Frank Newport, *In U.S., Estimate of LGBT Population Rises to 4.5%* (May 22, 2018), https://news.gallup.com/poll/234863/estimate-lgbt-population-rises.aspx.

[11] *Id.*

[12] *Id.*

[13] *Id.*

being too aggressive, thereby allowing employers to bar women from professions such as accounting executives which require aggressiveness? Since a man could be discriminated against for loving a man, or having been identified as female at birth, could he also be discriminated against in other ways for not "acting like a man," for example by being too kind and caring, thereby allowing employers to bar men from professions such as school teaching and nursing which require kindness and caring? As the Court in *Price Waterhouse* correctly reasoned, since to be successful at Hopkins' job required characteristics, such as aggressiveness, that are traditionally associated with being male, then if a woman is penalized for having these characteristics, she will not be able to succeed at this type of job. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality).

Both transgender status and sexual orientation are modern terms that only developed in the last 200 years,[14] to describe people who exhibit particular types of gender non-conforming behavior. In the future we may come up with other terms to describe other types of gender non-conforming behavior - perhaps a term for women who prefer blue to pink and men who prefer pink to blue. Or, a term describing people in occupations typically associated with someone not of their sex, such as women engineers and men nurses. Our language has developed specific terms, and may in the future develop other specific terms, to describe people who

[14] *See, e.g.*, David M. Halperin, *Is There a History of Sexuality*, 28 History & Theory 257 (1989).

do not conform to particular sex stereotypes. This reality should not obscure from this Court that what is being described are people who do not conform to particular sex stereotypes, and discrimination based on failure to conform to sex stereotypes is and should continue to be sex discrimination.

D. Congressional Intent Is Neutral in Terms of LGBTQ+ Discrimination

It is possible that Congress was not thinking about LGBTQ+ individuals when it enacted Title VII in 1964. However, as this Court made clear in *Oncale v. Sundowner Offshore Oil Servs.*, 523 U.S. 75, 79 (1998) when it found that same-sex sexual harassment was sex discrimination under Title VII, "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and *it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.*" *Id.* (emphasis added); *see also Newport News*, 462 U.S. at 679–81 (Title VII prohibits discrimination against men, even if the purpose of Title VII was to prohibit discrimination against women). Therefore, according to this Court in *Oncale*, the actual words of the law are more important than Congressional intent. As argued above, since the words are clear, no further examination into Congressional intent is necessary. However, even if this Court does look to Congressional intent, there is simply no legislative history about whether the sex discrimination prohibition was intended to apply to LGBTQ+ discrimination, as the prohibition on discrimination

based on "sex" was added to the legislation at the last minute. Further, even if some members of Congress were not aware of the existence of LGBTQ+ individuals at the time of the Civil Rights Act of 1964, Congress must have been aware of the existence of LGBTQ+ individuals by the time that it amended the Act in 1991 and in 2009[15] because the Stonewall Riots and subsequent modern LGBTQ+ rights movement began in 1969. Despite this knowledge, Congress did not remove protections for LGBTQ+ individuals in 1991 or in 2009 when it amended the Civil Rights Act of 1964, even though several lower courts had found that LGBTQ+ discrimination was sex discrimination years before 2009.[16]

E. This Court Should Decide That Sex Discrimination Necessarily Includes Sexual Orientation Discrimination and Transgender Status Discrimination

As this Court once famously pronounced, it is the job of the courts "to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). This Court should find that sex discrimination necessarily includes sexual orientation discrimination and transgender status discrimination. The Equality Act, which would explicitly prohibit discrimination against

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[15] *See* the Civil Rights Act of 1991 (Pub. L. 102-166) and the Lily Ledbetter Fair Pay Act of 2009 (Pub. L. 111-2).
[16] *See, e.g.*, *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005) (finding that discrimination against transgender individuals is sex discrimination); *Schwenck v. Hartford*, 204 F.3d 1187 (9th Cir. 2000) (same).

LGBTQ+ individuals in employment, has passed the House and may, at some later date, pass the Senate and be signed into law. However, that is the concern of the legislative branch. Discrimination based on sex in employment is already prohibited by statute, and this Court should not eliminate the protections against sex discrimination that the Second and Sixth Circuits and the EEOC have found necessarily cover LGBTQ+ individuals.

Conclusion

This Court should find that sexual orientation discrimination and transgender status discrimination are prohibited under Title VII because they are forms of sex discrimination. Especially in this era of social media and increasing divisiveness and expressions of hatred toward different social groups, minorities, including LGBTQ+ individuals, are being attacked and discriminated against at alarming rates.[17] If this Court were to decide that sex discrimination under Title VII does not include sexual orientation discrimination and transgender status discrimination, there is no doubt that many more

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[17] *See, e.g.*, Jen Christensen, *Killings of Transgender People in the US Saw Another High Year*, CNN (Jan. 17, 2019), https://www.cnn.com/2019/01/16/health/transgender-deaths-2018/index.html; Sandy E. James, Jody L. Herman, Susan Rankin, Mara Keisling, Lisa Mottet, & Ma'ayan Anafi, *The Report of the 2015 U.S. Transgender Survey*, NAT'L CTR. FOR TRANSGENDER EQUAL. 65 (2016), https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF (reporting high rates of discrimination, harassment, and violence against the transgender population).

LGBTQ+ individuals will lose their jobs. They and their families risk being thrown into poverty, not because of any job-related incompetence, but simply because of their employer's view of what is proper behavior, attraction, or identity for someone of their sex. This Court should therefore affirm the judgments of the Second and Sixth Circuits and reverse the judgment of the Eleventh Circuit.

Respectfully Submitted,

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