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

IN THE
Supreme Court of the United States

GERALD LYNN BOSTOCK,
Petitioner,
v.
CLAYTON COUNTY, GEORGIA,
Respondent.

ALTITUDE EXPRESS, INC., AND RAY MAYNARD,
Petitioners,
v.
MELISSA ZARDA AND WILLIAM MOORE, JR.,CO-INDEPENDENT EXECUTORS OF THE ESTATE OF DONALD ZARDA,
Respondents.

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

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

BRIEF OF ANTI-DISCRIMINATION SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF THE EMPLOYEES

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page(s)

CASES:

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATEMENT OF INTEREST

Amici curiae are scholars of anti-discrimination law. For decades, they have published scholarship demonstrating that sexual orientation discrimination and transgender discrimination are forms of sex discrimination that violate Title VII of the Civil Rights Act of 1964. *Amici* submit this brief to explain the basis for this widespread scholarly consensus, to address the principal arguments offered in support of the contrary view, and to explain why the plaintiffs' position accords with the text and history of Title VII. A list of *amici* is set forth in the Appendix.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

A simple analogy should resolve these cases. Suppose an employer announced a policy that, beginning the following day, all workers would be fired unless they adhered to traditional gender roles. All male employees would now be required to be "manly": They must follow sports, speak assertively, and serve as the family's primary breadwinner. All female employees, meanwhile, would need to be "ladylike"—wearing makeup, cooking and cleaning for their husbands, and speaking softly.

Beyond doubt, such a policy would be unlawful. Title VII "proscribes discrimination in employment

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

on the basis of * * * sex." *Fort Bend Cty.* v. *Davis*, 139 S. Ct. 1843, 1846 (2019). That means employers cannot put employees to the choice of adhering to "sex stereotypes" or forgoing full employment opportunities. *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 251 (1989) (plurality opinion) (quoting *Los Angeles Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 707 n.13 (1978)); *id.* at 261, 272-273 (O'Connor, J., concurring in the judgment)); *see id.* at 294 (Kennedy, J., dissenting). A policy that men and women must behave in accord with the roles traditionally reserved for their respective sexes or face termination would plainly violate that prohibition. And the fact that an employer required *both* men and women to adhere to traditional gender roles would simply compound the discrimination: It would make doubly clear that men and women were being held to different standards and subjected to different burdens "because of * * * [their] sex." 42 U.S.C. § 2000e-2(a)(1).

The forms of discrimination at issue in these cases are simply variants on that clearly forbidden policy. In substance and effect, discrimination against lesbian, gay, bisexual, and transgender ("LGBT") persons punishes men and women for failing to adhere to core stereotypes of masculine and feminine behavior. Gay and bisexual men flout the traditional expectation that men will only have sexual and romantic relationships with women, while lesbian and bisexual women fail to conform to the traditional expectation that women will welcome sexual or romantic advances only from men. Transgender individuals in turn do not conform to the expectation that persons identified as male and female at birth will identify and present in that way throughout

their lives. Expectations like these have long been deemed constitutive of male and female identity, and have undergirded a host of assumptions about the purportedly distinct and complementary roles of men and women in society. By penalizing employees who depart from those expectations, an employer holds men and women to stereotypes specific to each sex, punishing men deemed insufficiently masculine and women deemed insufficiently feminine.

Once this insight is grasped, the argument that Title VII permits discrimination against LGBT individuals quickly collapses. Such discrimination does not subject members of each sex to *the same* standard. It requires men and women to adhere to *different* stereotypes and follow *different* gender-specific standards of conduct. And—although Title VII does not require such a showing—those different sex-based standards reinforce a hierarchy of gender roles that operates, ultimately, to the particular detriment of women.

That lower courts have only recently begun to appreciate this insight is not a reason to suspect its soundness. When interpreting a statute, "[w]e do not inquire what the legislature meant; we ask only what the statute means." Oliver Wendell Holmes, Jr., *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417, 419 (1899). It is thus the meaning of a statutory text, not the manner in which a statute's drafters and their contemporaries expected it to be applied, that governs us today. *E.g.*, *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79-80 (1998). And it is hardly surprising that in the years immediately after Title VII's enactment—when homosexuality and "transsexualism" were deemed

psychological disorders, and many states still banned homosexual conduct altogether—many judges failed to see discrimination against LGBT persons for what it is. Moreover, Congress has substantially amended Title VII since its initial enactment, including by adopting a more expansive causation standard while leaving undisturbed this Court's recognition that sex stereotyping is a form of sex discrimination. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 3(4), 105 Stat. 1071, 1071. Since that amendment, judges have increasingly recognized that discrimination against LGBT persons falls within Title VII's prohibition.

History is replete with instances of courts taking a long time—too long—to realize the full implications of a broad promise of equality. *See, e.g.*, *United States* v. *Virginia*, 518 U.S. 515 (1996); *Loving* v. *Virginia*, 388 U.S. 1 (1967); *Brown* v. *Bd. of Educ.,* 347 U.S. 483 (1954). And often those implications were not specifically contemplated by drafters of the relevant legal texts. These cases were not instances of judicial policymaking but of fidelity to the law in its fullest sense. Here, logic and lived experience show that discriminating against LGBT persons because they do not conduct themselves as men and women were traditionally expected to behave is discrimination "because of * * * sex." The Court should say so.

ARGUMENT

I. DISCRIMINATION AGAINST LGBT EMPLOYEES VIOLATES TITLE VII BECAUSE IT REQUIRES MEN AND WOMEN TO ADHERE TO STEREOTYPES DISTINCTIVE TO EACH SEX.

A. Title VII Prohibits Employers From Insisting That Men And Women Conform To Their Respective Sex Stereotypes.

Title VII forbids discrimination in employment "because of * * * sex." 42 U.S.C. § 2000e-2(a)(1). In enacting this statute, Congress sought to "'strike at the entire spectrum of disparate treatment of men and women' in employment." *Meritor Sav. Bank, FSB* v. *Vinson*, 477 U.S. 57, 64 (1986) (quoting *Manhart*, 435 U.S. at 707 n.13). Title VII therefore prohibits any practice that subjects a person to terms and conditions of employment that a member of the other sex would not face. *Oncale*, 523 U.S. at 80. A woman cannot be required to meet expectations or endure treatment at the office that she would not have to endure if she were a man. *Id.* at 79-80. And a man cannot be subjected to standards or adverse treatment that he would not suffer were he a woman. *Id.*

In *Price Waterhouse*, the Court held that one way that an employer violates this prohibition is by making employment decisions on the basis of sex stereotypes. 490 U.S. at 251 (plurality opinion). Ann Hopkins was told that she was denied a promotion because she acted too aggressively, refused to wear makeup and jewelry, and did not behave in a manner considered appropriate for "a lady." *Id.* at 235. The Court held that these facts, if proved, showed that

Hopkins had been a victim of sex discrimination. *Id.* at 251. A woman cannot be denied a promotion based on "stereotypical notions about women's proper deportment." *Id.* at 256. By "insisting that [Hopkins] matched the stereotype associated with [her] group"—for instance, that "a woman cannot be aggressive, or that she must not be"—Price Waterhouse imposed a kind of burden to women's advancement that men did not face. *Id.* at 250-251; *see id.* at 261, 272-273 (O'Connor, J., concurring in the judgment) (agreeing that Hopkins made out a prima facie case of sex discrimination).

Although *Price Waterhouse* involved discrimination against a woman, the same protections necessarily extend to men. *See Manhart*, 435 U.S. at 707 ("It is now well recognized that employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males *or* females." (emphasis added)); *see also Oncale*, 523 U.S. at 80. Thus, an employer cannot refuse to promote a man because he fails to conform to stereotypical notions of masculinity—for instance, because he is soft-spoken or serves as his household's primary caretaker. *E.g.*, *Nichols* v. *Azteca Rest. Enters.*, 256 F.3d 864, 874 (9th Cir. 2001). A man in that situation faces burdens that a woman would not, solely on the basis of certain expectations of how his sex should behave. Just like Ann Hopkins, he is subject to discrimination "because of * * * [his] sex." *See* Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 Yale L.J. 1, 46-47 (1995).

It follows that an employer violates Title VII twice over by requiring members of *both* sexes to conform to their respective sex stereotypes. If an employer announced that it would only promote women who were "ladylike" and only promote men who were "masculine"—say, by insisting that all women cook and refrain from swearing and that all men join the company baseball team—it would be imposing differential impediments to men's and women's advancement. It would be allowing only a certain kind of man and a certain kind of woman to enjoy full employment opportunities. The fact that the employer subjected members of each sex to complementary burdens would make the discrimination *more* clearly sex-based, not less. It would establish the type of workplace defined by "prescribed gender roles" that Title VII was specifically enacted to eliminate. Vicki Schultz, *Taking Sex Discrimination Seriously*, 91 Denv. U. L. Rev. 995, 1014-22 (2015)

It is immaterial, moreover, what words an employer uses to engage in such discrimination. An employer cannot convert its policy of sex-based discrimination into a neutral one merely by employing a common term to refer to both forms of discrimination. An employer who announced that men and women alike must follow "traditional behaviors," for instance, would be just as guilty of discrimination as an employer who stated that "men must be manly and women must be ladylike," if both policies amounted in substance to the same thing: a requirement that members of each sex conform to their respective sex stereotypes.

B. Discrimination Against LGBT Employees Penalizes Men And Women For Failing To Conform To Stereotypes Distinctive To Each Sex.

Sexual orientation discrimination and transgender discrimination are merely variants on that clearly forbidden policy. An employer who discriminates against lesbian, gay, bisexual, or transgender workers is punishing them for departing from society's most basic stereotypes of masculinity and femininity. Such discrimination is tantamount to a policy that only "traditionally masculine" men and "traditionally feminine" women may have full employment opportunities. Title VII does not tolerate such discrimination.

1. Sexual orientation discrimination punishes men and women for departing from fixed gender roles stereotypically assigned to each sex.

Start with sexual orientation discrimination. Traditionally, one of the most fundamental distinctions between men and women in our society was the identity of their sexual and romantic partners. Men were expected to love, partner with, and marry women, and women were expected to love, partner with, and marry men. These basic expectations dictated the social roles of men and women for centuries. Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 Wis. L. Rev. 187, 197-206. And they undergirded many other stereotypes associated with the sexes: that men would be assertive and women submissive; that a man would be a household's breadwinner and a woman its caretaker; that men should be dominant and powerful, and

women subordinate and demure. *Id.* at 197-206, 218-221.

Gay men and lesbians do not conform to these distinctive roles that were traditionally assigned to each sex. By definition, gay men and lesbians do not have or wish to have the romantic partners traditionally deemed appropriate for their sex. Gay men partner and seek to partner with men, not women. Lesbians partner and seek to partner with women, rather than men. They diverge from what were long thought to be the core behaviors that defined the respective gender roles of men and women.

As a consequence, gay men and lesbians also do not adhere to the cluster of stereotypes that arise out of the traditional expectation of different-sex coupling. *See* Cass R. Sunstein, *Homosexuality and the Constitution*, 70 Ind. L.J. 1, 22 (1994); I. Bennett Capers, *Sex(ual Orientation) and Title VII*, 91 Colum. L. Rev. 1158, 1161-63 (1991). By entering into same-sex partnerships, they do not follow the expectation that a man should be the provider for a female spouse and a woman protected and cared for by a man. *See* Law, *Homosexuality and the Social Meaning of Gender*, at 187, 199, 208, 218; Deborah A. Widiss, Elizabeth L. Rosenblatt & Douglas NeJaime, *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 Harv. J. L. & Gender 461, 487-504 (2007). In their intimate conduct, they transgress deeply rooted norms regarding each gender's proper, complementary sexual role. *See* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. Rev. 197, 235-236 (1994) [hereinafter "*Sex Discrimination*"]; Sunstein, *Homosexuality and the Constitution,* at 22. And in

our society, gay men and lesbians are widely presumed to have affects, interests, appearances, and behaviors that are not stereotypical of their sex. *See* Koppelman, *Sex Discrimination*, at 235.

Taken together, these departures strike at the heart of stereotypical—and hierarchical—notions of masculinity and femininity. *See* Samuel A. Marcosson, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 Geo. L.J. 1, 24-25 (1992). A man who does not pursue sexual relations with women, provide for a female partner, or engage in traditional male sexual conduct does not conform to the stereotypical notion of a "real" man. Zachary A. Kramer, *The Ultimate Gender Stereotype*: *Equalizing Gender-Conforming and Gender-Nonconforming Homosexuals Under Title VII*, 2004 U. Ill. L. Rev. 465, 489-492 (2004). He fails to engage in behaviors that were traditionally deemed critical to the conception of men as the naturally dominant, strong, and assertive sex, and instead engages in sexual and romantic conduct traditionally thought characteristic of women's role as the passive and subordinate gender. *See* Catharine A. MacKinnon, Sex Equality 1352-55 (3d ed. 2016); Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 Yale. L.J. 145, 159-160 (1988); Ann C. McGinley, *Erasing Boundaries: Masculinities, Sexual Minorities, and Employment Discrimination*, 43 U. Mich. J. L. Reform 713, 717-724 (2010).

The same goes for lesbians. A woman who does not have sex with men, rely on a male provider, or engage in traditionally female sexual behavior departs from the stereotype of a "real woman." She is not the

paradigm of femininity, but orders her life in ways traditionally reserved for men alone. MacKinnon, Sex Equality, at 1352-55; Koppelman, *The Miscegenation Analogy*, at 160. And in so doing, she subverts the notion that it is natural and inevitable for a woman to serve as the passive and subordinate partner to a man. Sunstein, *Homosexuality and the Constitution*, at 22-23.

All of these points hold true, as well, for bisexual men and women. They too do not conform to the stereotypes that men should partner exclusively with women and women with men. And they too blur the rigid lines between men and women, and subvert the distinctive and complementary role traditionally assigned to each sex.

These observations enjoy a wealth of scholarly support, but they do not require any elaborate sociology to prove. In every social context—from the schoolyard to the water cooler—hostility to individuals perceived as gay, lesbian, or bisexual is tightly linked with disapprobation for their failure to conform to archetypal notions of masculinity and femininity. Homophobic epithets frequently imply that gay and bisexual men are insufficiently masculine—that they look, act, speak, and have tastes that are "effeminate" or "queer." Lesbians and bisexual women are subjected to the inverse stereotype: that they are "mannish," "butch," or insufficiently feminine. "The two stigmas, sex-inappropriateness and homosexuality, are virtually interchangeable." Koppelman, *Sex Discrimination*, at 235; *see* Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 Yale L.J. 1683, 1776-77 (1998); McGinley, *Erasing Boundaries*, at 721-724.

In short, gay men and lesbians fail to conform to stereotypes *distinctive to each sex*. Gay men do not match the traditional stereotype of masculinity. Lesbians, in turn, fail to conform to a traditional stereotype of femininity. While the single word "homosexuality" is sometimes used to describe both orientations, that word can obscure the fact that gay men and lesbians are departing from *different* sex-specific behavioral expectations—just as the word "heterosexuality" refers to the different roles that men and women were traditionally expected to fill. Koppelman, *Sex Discrimination*, at 211-212.

Accordingly, an employer who discriminates on the basis of sexual orientation subjects members of each sex to impermissible sex stereotyping. Such a policy places members of each sex in a bind: adhere to the traditional expectations of how men and women, respectively, should behave and order their lives, or forgo full employment opportunities. That is exactly what Title VII forbids.

Indeed, a policy of sexual orientation discrimination is simply a variant—and an especially pernicious one, at that—of a policy that states that an employer will hire only "manly" men and "feminine" women. Rather than requiring members of each sex to adhere to *outward* stereotypes of masculine and feminine behavior—demanding, say, that women be demure and that men "take charge"—discrimination against gays and lesbians requires employees to adhere to *core* stereotypes about men's and women's respective identities. By engaging in such discrimination, the employer polices conduct that has long been considered most threating to sharply delineat-

ed—and limiting—gender roles. Sunstein, *Homosexuality and the Constitution*, at 20-21.

Exempting this fundamental form of sex stereotyping from Title VII's protection would therefore open a significant "sexual orientation loophole" in Title VII law. Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 Cal. L. Rev. 1, 18 (1995). It would create a scheme under which, in all respects but one, employers are barred from requiring their employees to look, act, or conduct themselves in ways stereotypical of their sex. But when it comes to the most fundamental sex stereotypes our society knows—stereotypes about romantic and sexual interests and behavior—employers would be given free rein to punish any deviation from deeply-rooted conceptions of masculinity and femininity. Such a rule would itself discriminate against gay, lesbian, and bisexual employees, excluding them from "the protection from gender stereotyping extended to all other people *as men and women*." Schultz, *Reconceptualizing Sexual Harassment*, at 1785.

This exemption is not just illogical; it is unworkable. Because the traditional norm against same-sex sexual and romantic conduct is so tightly linked with other norms of masculine and feminine behavior, it is often impossible to disentangle sexual orientation discrimination from other forms of sex stereotyping. *See* Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 Am. U. L. Rev. 715, 731-732 (2014). If, for instance, an employer uses an antigay slur against an employee perceived as effem-

inate, or permits vicious harassment against a woman with a short haircut who follows sports, is he discriminating against these individuals because of their outwardly gender non-conforming behavior, or because they are perceived as gay or lesbian? As even the Department of Justice admits, courts that exempt antigay discrimination from Title VII have often found it "difficult" to try to distinguish these two motives. Br. for the United States as Amicus Curiae at 20 n.2, *Zarda* v. *Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (No. 15-3775), ECF No. 417. The reason is that, as a general matter, there is no distinction: Conduct seen as gender nonconforming suggests homosexuality, and the employee's perceived homosexuality gives rise to the perception of gender nonconformity.

2. Transgender discrimination also punishes men and women for departing from traditional gender roles.

Transgender discrimination violates Title VII for similar reasons. Discrimination against transgender persons arises from stereotypes at least as basic as the stereotype of opposite-sex coupling: that those designated male at birth must behave, dress, and look a certain way, and those designated female must behave, dress, and look another way. For many years, it was simply assumed that a person's assigned gender at birth would determine whether that person would be masculine or feminine. McGinley, *Erasing Boundaries*, at 713, 717-718. A person who refused to dress, speak, or even identify himself or herself in a way consistent with his or her birth-assigned sex would have been viewed as flouting our society's most basic gender norms.

That is what transgender persons do. By definition, transgender individuals do not identify with the sex that they were assigned at birth. *Id*. at 746. Thus, a transgender individual designated as male at birth does not identify as a man, and a transgender individual designated as female at birth does not identify as a woman. Discrimination against transgender individuals enforces sex stereotypes about the distinct identities, behaviors, appearances, and roles expected of individuals assigned as male or female at birth. And it penalizes transgender individuals for failing to conform to these gender stereotypes. Discrimination against a transgender woman, for example, necessarily consists of punishing that person for failing to identify, dress, or comport herself in accord with expectations for a person assigned male at birth. This is inescapably discrimination because of sex.

In short, like gay men and lesbians, transgender individuals depart from the stereotypes *unique to their respective sexes*. Indeed, this divergence from the stereotypes associated with each sex is definitional to transgender identity. Although discrimination against transgender persons, much like sexual orientation discrimination, is sometimes lumped under the single umbrella of "transgender discrimination," it unavoidably consists of the enforcement of two respective gender stereotypes: a stereotype of masculinity and a stereotype of femininity.

An employer who engages in such discrimination enforces a workforce defined by traditional gender roles to the same degree as an employer who demands that all men be manly and all women ladylike, or that all men fulfill a traditionally masculine

sexual role and that all women fulfill a traditionally feminine sexual role. In every case, the employer is denying full employment opportunities to persons who deviate from the stereotypes associated with their sex. In every case the employer is flatly violating Title VII.

C. Arguments To The Contrary Misconceive The Nature Of The Discrimination At Issue.

Neither the defendants, the Department of Justice, nor the judges who rejected plaintiffs' claims below have offered any persuasive reason why discrimination against LGBT individuals does not rest on impermissible sex stereotypes. Instead, all of their arguments rest on fundamental misconceptions about the role sex-stereotyping plays in the Title VII framework, the nature of the stereotypes at issue, and the implications of this position for other workplace policies.

1. Some judges and the Department of Justice have suggested that sex stereotyping cannot serve as a basis for invalidating discrimination against LGBT persons because sex stereotyping is merely an evidentiary tool for determining whether sex played a role in the employment decision at issue. They contend that because sexual orientation and transgender discrimination are "gender neutral," sex stereotyping plays no role in the analysis. *See* U.S. Br. in Opposition at 20, *R.G. & G.R. Harris Funeral Homes*, No. 18-107; *Wittmer* v. *Phillips 66 Co.*, 915 F.3d 328, 339 (5th Cir. 2019) (Ho, J., concurring).

This argument fails on its own terms. Sex stereotyping is relevant to the question precisely *because* it shows that sexual orientation and transgender

discrimination are *not* gender neutral. In particular, the parties to this litigation have proposed two different ways of looking at the discrimination at issue. The plaintiffs have argued that sexual orientation and transgender discrimination are discrimination "because of *** sex" because both types of discrimination necessarily take into account the sex of the individual, and treat a person differently than he or she would be treated if they were a member of the other sex. The defendants, in contrast, argue that this discrimination is not sex-based because it discriminates based on a characteristic—homosexuality or transgender status—that is shared by both men and women, and so ostensibly treats similarly situated members of both sexes equally.

We believe the plaintiffs have the clearly better argument as a matter of text and precedent. But to the extent the Court is uncertain of which way to view the issue as a formal matter, the sex-stereotyping analysis resolves the question. It demonstrates that these policies do *not* treat members of each sex equally. Rather, they require individuals to adhere to stereotypes *specific* to each sex. They require men to behave in a manner that is traditionally masculine, and women in a way that is traditionally feminine. Put another way, requiring men to behave in a masculine manner violates Title VII, and employers cannot evade that proscription by *also* forcing women to behave in a feminine manner. Doubling down on discrimination does not cure it. *See Manhart*, 435 U.S. at 708 (explaining that Title VII's "focus on the individual is unambiguous" and that the statute does not ask whether women and men are being treated the same "as a class"). A sex stereotyping analysis thus fills exactly the eviden-

tiary role the Department of Justice advocates: It shows that a purportedly neutral policy is in fact one that subjects members of each sex to differentiated and sex-specific burdens.

2. Some judges and the Department of Justice have also suggested that the stereotypes at issue are not impermissible because they do not subject either sex to worse conditions than the other. *See* U.S. Br. in Opposition at 20-21, *R.G. & G.R. Harris Funeral Homes*; *Zarda* Pet. App. 117-118 (Lynch, J., dissenting). That, however, is both irrelevant and fundamentally untrue.

Title VII does not extend only to conduct that makes life worse for women than for men, or vice versa. The statute prevents any "discrimination"—that is, the imposition of materially different terms and conditions of employment on men than women. *See Oncale*, 523 U.S. at 78 (Title VII "strike[s] at the entire spectrum of *disparate treatment* of men and women in employment" (emphasis added) (quoting *Meritor Sav. Bank*, 477 U.S. at 64)). An employer who requires men to adhere to one set of standards and women to adhere to another is engaging in discrimination, even if in the final analysis the differential burdens on individuals of each sex could be considered in some sense equally severe. *See Manhart*, 435 U.S. at 708-709; *cf. Loving*, 388 U.S. at 8-12. Otherwise, the "traditional gender roles" workplace—where men are required to be manly and women ladylike—would be perfectly lawful.

Requiring members of each sex to adhere to their respective sex-based stereotypes is discrimination of this kind. Telling men that they must be stereotypically masculine and women that they must be stereo-

typically feminine subjects each sex to a different standard: It enables only a certain kind of man and a certain, different kind of woman to enjoy full employment opportunities. The fact that both sexes face *complementary* sex-based burdens does not change the fact that members of each sex are held up to different standards and required to endure different sex-based burdens.

In any event, one of the key premises of Title VII is that *any* sex-based stereotyping in the workplace is likely to redound, ultimately, to the particular detriment of women. *See* Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 Harv. L. Rev. 1307, 1333-34 (2012). Gender stereotypes have traditionally inhibited women to a greater degree than men in the workplace: They have characterized women as better suited to being mothers and caretakers, less able to act in ways thought necessary to succeed in the office, and less capable at jobs traditionally reserved for men. Policies that require both sexes to adhere to their traditional stereotypes are thus likely to reinforce the traditional gender hierarchy that long placed women in a subordinate position and relegated them to less desirable and more limited employment opportunities. Vicki Schultz, *Telling Stories About Women and Work*, 103 Harv. L. Rev. 1750, 1824-39 (1990).

Discrimination against gay men, lesbians, and bisexuals is an especially potent way of reinforcing that hierarchy. MacKinnon, Sex Equality, at 1310-20, 1352-54. The privileged role of men in society has rested, in substantial part, on the notion that it is "natural" for men to be the dominant sex in sexual and family life. *Id.* at 1352-53. Gay and bisexual

men threaten that idea by suggesting that men's perceived dominance is not natural or inevitable. *Id.* at 1353-54. And lesbian and bisexual women threaten it, as well, by denying that women must rely on men to give their lives meaning. *Id.* Discrimination against LGBT individuals—and, indeed, the violence that often accompanies such discrimination—punishes those perceived deviations and reasserts the purported "naturalness" of male dominance. *Id.* at 1355; *see* Koppelman, *Sex Discrimination*, at 235-236; Sunstein, *Homosexuality and the Constitution*, at 21-23. A workplace in which such discrimination goes unchecked is thus a workplace in which employers retain a critical means of reaffirming hierarchical gender roles and, ultimately, of subordinating women.

3. Finally, the Department of Justice and the dissenters below have suggested that if discrimination against LGBT people is forbidden, then policies that require individuals to use sex-specific restrooms or follow sex-specific dress codes would necessarily be unlawful as well.

That is not true. Separate bathrooms and dress codes can potentially be distinguished from discrimination against LGBT people on both the front end—whether they involve discrimination because of sex at all—and on the back end—whether they are justified by an exception to Title VII.

On the front end, it is a matter of debate whether sex-specific bathrooms and dress codes involve sex stereotyping that violates Title VII. It could be argued, for instance, that bathrooms do not enforce different stereotypes for each sex, but merely separate men and women for the purpose of preserving

privacy. One could also argue that equally professional and convenient dress options for men and women reflect standards of professional neatness and courtesy rather than stereotypical notions of masculinity and femininity. Or one could argue that bathroom and dress code policies do not "impose 'disadvantageous terms or conditions of employment'" at all because, unlike discrimination on the basis of LGBT status, they do not ask employees to deny a key aspect of their personal identity. *Zarda* Pet. App. 33 (quoting *Harris*, 510 U.S. at 25 (Ginsburg, J., concurring)); *cf. Lawrence* v. *Texas*, 539 U.S. 558, 578 (2003) (proscriptions on same-sex conduct "demean the[ ] existence" of gays and lesbians).

To be clear, not all *amici* necessarily endorse these distinctions, and some of us disagree with them. *See, e.g.*, Katharine T. Bartlett, Deborah L. Rhode & Joanna L. Grossman, Gender and Law: Theory, Doctrine, Commentary 115 (7th ed. 2017); Jessica A. Clarke, *Frontiers of Sex Discrimination Law*, 115 Mich. L. Rev. 809, 829 & n.114 (2017); Schultz, *Taking Sex Discrimination Seriously*, at 1103 & n.569. And these distinctions, even if they have merit, do not justify requiring a transgender employee to use a restroom or follow a dress code inconsistent with the employee's gender identity, since refusing to accept a transgender employee's gender identity because it differs from his or her birth-assigned gender unquestionably involves sex stereotyping. But the differences between maintaining sex-specific restrooms and dress codes, on one hand, and engaging in LGBT discrimination, on the other, at minimum mean that resolution of this case would not necessarily prejudge whether those policies also entail sex stereotyping. Indeed, in the more than

two years since the Seventh Circuit accepted the anti-stereotyping theory in *Hively* v. *Ivy Tech Community College of Indiana*, 853 F.3d 339 (2017) (en banc), no court has held separate restrooms or dress codes *per se* unlawful.

In any event, even if these policies were found to discriminate on the basis of sex, they could also potentially be distinguished on the back end. Title VII permits sex-based classifications that constitute "bona fide occupational qualification[s] reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e). Some courts have found that sex-differentiated bathrooms and certain dress codes fall within this exception. *See* Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 Mich. L. Rev. 2541, 2565-67 (1994); *cf. Kastl* v. *Maricopa Cty. Cmty. Coll. Dist.*, 325 F. App'x 492 (9th Cir. 2009). *Amici* express no view on the validity of these decisions, which may themselves be vulnerable to criticism. It suffices to note that no such defense has been or plausibly could be offered to justify discrimination against employees simply because they are lesbian, gay, bisexual, or transgender. That means resolution of this case would not foreclose an employer from raising these arguments as a justification for sex-differentiated restrooms and dress codes in the future.

II. THAT COURTS HAVE BEEN SLOW TO APPLY TITLE VII TO LGBT INDIVIDUALS IS NO REASON TO PERPETUATE THE ERROR.

Following Title VII's passage in 1964, courts were slow to appreciate how discrimination against LGBT individuals is bound up with sex stereotyping, and thus unlawful. The fact that the full promise of Title VII has been long deferred, however, is no reason to defer its promise indefinitely. Further, changes to Title VII made by Congress since its initial enactment have only reinforced the law's goal to eradicate sex stereotypes from the workplace, and have thus reinforced the case for applying its protections to LGBT individuals.

1. It is often noted that in 1964, when Title VII was first enacted, a typical member of Congress would not have understood or intended the law to protect LGBT individuals from discrimination. *See Zarda* Pet. App. 83-90 (Lynch, J., dissenting); *Hively*, 853 F.3d at 362-363 (Sykes, J., dissenting); *cf. id.* at 353 (Posner, J., concurring). That is not relevant to the question before the Court: Whatever the intent or understanding of Congress (or the general public) in 1964 about how Title VII would be applied, it is the law Congress passed that governs. Discrimination against LGBT people was admittedly "not the principal evil Congress was concerned with when it enacted Title VII." *Oncale*, 523 U.S. at 79. "But 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*. Here, it is settled that Title VII

prohibits discrimination against employees who fail to conform to gender stereotypes. *Supra* at 5-7. Discrimination against LGBT people is not just a "reasonably comparable evil[]"; it is an *inseparable* evil. *Oncale*, 523 U.S. at 79. Title VII thus protects LGBT people from discrimination, whatever the "principal concerns" of Congress in 1964. *Id*.

Judge Lynch in the Second Circuit and Judge Sykes in the Seventh Circuit seek to reframe this argument in terms of the original public meaning of Title VII when it was enacted, rather than in terms of Congress' intent. In their view, "any reasonable member of Congress, and indeed * * * any literate American" in 1964 would not have understood Title VII to mean that gay people are protected from discrimination. *Zarda* Pet. App. 86 (Lynch, J., dissenting). This argument is doubly misguided.

To begin with, for the reasons explained below, it is incorrect to focus exclusively on the meaning of Title VII in 1964 in light of the 1991 amendments that bear directly on the issues in this case. *See infra* at 27-29. More to the point, Judges Lynch and Sykes conflate the *meaning* of the statute with how the statute would have been *applied* in light of the prevailing social context at that time. *See Oncale*, 523 U.S. at 79; *cf.* Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 Fordham L. Rev. 1269, 1284 (1997) ("Mainstream originalists recognize that the Framers' analysis of particular applications could be wrong, or that circumstances could have changed and made them wrong."); Michael Stokes Paulsen, *How To Interpret the Constitution (and How Not To)*,

115 Yale L.J. 2037, 2059 (2006) (a "crude intentionalism that focuses on * * * expectations of individuals as to how a provision might be applied" is "a caricature of originalism"). Indeed, it is not even clear that Title VII was originally understood to prohibit sexual harassment in the workplace: Early decisions from district courts rejected such claims, *e.g.*, *Barnes* v. *Train*, No. 1828-73, 1974 WL 10628, at *1 (D.D.C. Aug. 9, 1974); *Tomkins* v. *Pub. Serv. Elec. & Gas Co.*, 422 F. Supp. 553, 556-557 (D.N.J. 1976); *Corne* v. *Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163 (D. Ariz. 1975); but then the EEOC in 1980 adopted guidelines prohibiting employers from tolerating quid pro quo harassment or hostile work environments, Guidelines on Discrimination Because of Sex, 45 Fed. Reg. 74,677 (Nov. 10, 1980) (codified at 29 C.F.R. pt. 1604); and the Supreme Court accepted that reading of Title VII in 1986, *Meritor Sav. Bank*, 477 U.S. at 65-67. Now, of course, sexual harassment is a paradigmatic form of discrimination "because of * * * sex."

Likewise, as explained above, it is by now settled that Title VII includes a right not to be discriminated against for failing to conform to gender stereotypes, and that right is consistent with the public meaning of the text. *Price Waterhouse*, 490 U.S. at 251 (plurality opinion). But the *content* of the pertinent gender stereotypes—and thus the *application* of this anti-stereotyping principle in practice—were not fixed in stone in 1964 or at any other point. As a result, there is no inconsistency between applying Title VII to LGBT people and the original public meaning, in the same way there is no problem with applying the proscription against sexual harassment to male-on-male harassment even though that was

not an expected application of Title VII in 1964. *Oncale*, 523 U.S. at 79.

2. Moreover, the legislative history of the Civil Rights Act in 1964 and the public debate during and following its passage are richer and more complex than many confident appraisals of Title VII's original intent would suggest. Indeed, they generally serve to confirm the basic point that, in enacting Title VII, Congress sought to "strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *County of Washington* v. *Gunther*, 452 U.S. 161, 180 (1981) (quoting *Manhart*, 435 U.S. at 707 n.13); *see generally* Schultz, *Taking Sex Discrimination Seriously*, at 1016-20 (describing legislative history). Although "claims about the narrow mindset and goals of the Eighty-Eighth Congress have exerted a powerful regulative influence over the interpretation of Title VII's sex provision," such claims are "inattentive[]" to "the historical record." Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, at 1319-20; *see* Mary Anne Case, *Legal Protections for the "Personal Best" of Each Employee*, 66 Stan. L. Rev. 1334, 1338-42 (2014). The proponents of adding "sex" to Title VII in Congress contended that the "core purpose" was to ensure that women not be held back by "traditional sex and family roles." Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, at 1326. Indeed, "a succession of female legislators from both political parties argued that, in fact, employment practices that enforced the traditional sex-role structure were detrimental to women and their families, and that adding 'sex' to Title VII would help to eradicate such practices." *Id.*; *see also id.* at 1326-29 (collecting legislative history).

Indeed, in the very first case to come to the Supreme Court on the meaning of sex discrimination, Justice Marshall, concurring in the Court's brief *per curiam* opinion, wrote that the intent of Title VII was "to prevent employers from refusing 'to hire an individual based on stereotyped characterizations of the sexes.'" *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542, 545 (1975) (Marshall, J., concurring) (quoting EEOC, Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.1(a)(i)(ii)). In sum, then, statements by legislators and prominent commentators during and immediately after the passage of Title VII evince "an understanding of Title VII's sex provision as a check on employment practices that reflected and reinforced traditional conceptions of men's and women's roles." Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, at 1332.

3. But arguments regarding the public meaning of Title VII in 1964 also suffer from a more fundamental flaw: They ask the wrong question. Title VII has been amended continually in the half century since its enactment, sometimes in ways quite relevant to the meaning of sex-based discrimination. Any account of the original purpose or public meaning of Title VII must consider these later interventions. In other words, it makes no sense to ask only about Congress' purpose in 1964 or the public meaning of Title VII in 1964 when Title VII (and its proscription on sex-based discrimination) is the product of several Congresses acting at several points in time. William N. Eskridge, Jr., *Title VII's Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 Yale L.J. 322, 342 (2017). Widening the aperture in this way, it becomes clear that "Congress has endorsed, in both statutory text and vast

legislative deliberations, the notion that discrimination because of sex includes employer policies that impose gender-based norms onto male and female employees alike." *Id*. at 362.

The most significant amendment for present purposes was the Civil Rights Act of 1991. Two years prior, in *Price Waterhouse*, the Court had recognized that eliminating discrimination based on sex stereotypes was a central purpose of Title VII. 490 U.S. at 251 (plurality opinion); *see id.* at 272-273 (O'Connor, J., concurring in the judgment). Congress then essentially ratified this understanding of Title VII. Through the Civil Rights Act of 1991, Congress "respond[ed] to recent decisions of the Supreme Court" that had interpreted Title VII narrowly "by expanding the scope of relevant civil rights statutes." Pub. L. No. 102-166, § 3(4), 105 Stat. at 1071. As relevant here, Congress liberalized the *Price Waterhouse* plurality's approach to mixed-motive causation, providing that an "employment practice" is "unlawful" if "sex" is a "*motivating factor*." *Id.* § 107(a), 105 Stat. at 1075 (codified at 42 U.S.C. § 2000e-2(m)) (emphasis added). In that way, Congress "overrule[d] one aspect of the [*Price Waterhouse*] decision." H.R. Rep. No. 102-40, pt. 1, at 48 (1991). But Congress left the substantive holding—that discrimination against someone who fails to conform to sex stereotypes is discrimination because of sex—undisturbed. As one committee report put it, "evidence of sex stereotyping is sufficient to prove gender discrimination." H.R. Rep. No. 101-644, pt. 1,

at 29, n.17 (1990); *see* Eskridge, *Title VII's Statutory History*, at 374-376.[2]

In a word, then, it is wrong to focus solely on what the phrase "because of sex" meant in 1964. Congress amended Title VII to prohibit discrimination whenever sex is a "motivating factor," and any interpretation must account for that later intervention. Moreover, in that later intervention, Congress endorsed the basic reading of Title VII advanced in this brief—that it prohibits discrimination against those who fail to conform to sex stereotypes. That reading is faithful to the currently operative text, and to Congress' intent embodied in that text.[3]

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[2] Similarly, when the Supreme Court held that an employer could refuse to cover pregnancy under its disability insurance plan, Congress repudiated that decision, passing the Pregnancy Discrimination Act of 1978. Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e(k)). The Senate Report accompanying the Act explained: "[T]he assumption that women will become pregnant and leave the labor market is at the core of the sex stereotyping resulting in unfavorable disparate treatment of women in the workplace." S. Rep. No. 95-331, at 3 (1977); *accord* H.R. Rep. No. 95-948, at 3 (1978). Congress thus "reaffirm[ed] and entrench[ed] as the central purpose of Title VII the notion that no one should be denied employment opportunities based upon descriptive or prescriptive stereotypes about the capabilities of men and women." Eskridge, *Title VII's Statutory History*, at 366.

[3] There have been a number of attempts to add express protections to LGBT individuals to Title VII. But it scarcely bears repeating that "failed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute.'" *United States* v. *Craft*, 535 U.S. 274, 287 (2002) (quoting *Pension Benefit Guaranty Corp.* v. *LTV Corp.*, 496 U.S. 633, 650 (1990)). "Congressional inaction lacks persuasive significance because several equally tenable inferences may be

4. Prior to the *Price Waterhouse* decision in 1989 and the 1991 amendments to Title VII, a number of courts rejected sex discrimination claims brought by individuals who lost jobs because they were "homosexual," "transsexual," or "effeminate." *See, e.g.*, *Ulane* v. *E. Airlines, Inc.*, 742 F.2d 1081, 1086 (7th Cir. 1984); *Sommers* v. *Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (per curiam); *DeSantis* v. *Pac. Tel. & Tel. Co.*, 608 F.2d 327, 330-331 (9th Cir. 1979); *Smith* v. *Liberty Mut. Ins. Co.*, 569 F.2d 325, 327 (5th Cir. 1978); *Holloway* v. *Arthur Andersen & Co.*, 566 F.2d 659, 662-663 (9th Cir. 1977). But these courts simply failed to consider the place of sex stereotyping in Title VII discrimination brought by LGBT individuals. *See, e.g.*, *Ulane*, 742 F.2d at 1085 (concluding Title VII only makes it "unlawful to discriminate against women because they are women and against men because they are men"); *Smith*, 569 F.2d at 327 (rejecting a claim because the plaintiff did not allege he "was discriminated against because he was a male, but because as a male, he was thought to have those attributes more generally characteristic of females and epitomized in the descriptive 'effeminate.' "). The myopic approach to sex in these cases "has been eviscerated by *Price Waterhouse*." *Smith* v. *City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004).

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drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." *Cent. Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) (internal quotation marks and citations omitted).

Moreover, the operation of stereotype and prejudice was obscured by the then-prevalent belief that "transsexuality" and "homosexuality" were mental illnesses or forms of immoral deviance. *Ulane*, 742 F.2d at 1085 (referring to transsexuality as "a sexual identity disorder"); *Holloway*, 566 F.2d at 662 n.3 (noting that some experts regarded "a request for a sex change [as] a sign of severe psychopathology"); *Smith*, 569 F.2d at 328 n.4 (quoting district court's statement that the plaintiff was not hired because he exhibited "effemina[cy]" which was thought to evince "sexual aberration"). Today, the medical community does not regard transgender identity as a psychological disorder (although some transgender individuals may suffer from gender dysphoria due to discrimination and other factors). Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 451-453 (5th ed. 2013) (defining gender dysphoria). Transgender identity is no longer regarded as implying any "impairment in judgment, stability, reliability, or general social or vocational capabilities." Am. Psychiatric Ass'n, Position Statement on Discrimination Against Transgender and Gender Diverse Individuals (July 2018). And "homosexuality" is no longer regarded as aberrational. *Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2596 (2015). These developments have laid bare the flawed interpretive move at the core of these decisions from the 1970s and 80s: They "superimpose classifications such as 'transsexual' on a plaintiff,"—classifications which at the time had a medical basis—"and then legitimize discrimination based on the plaintiff's gender nonconformity by formalizing the non-conformity into an ostensibly unprotected classification." *City of Salem*, 378 F.3d at 574.

After *Price Waterhouse* and the 1991 amendments, things began (at first gradually) to change. In *Centola* v. *Potter*, 183 F. Supp. 2d 403 (D. Mass. 2002) (Gertner, J.), the defendants contended that Title VII did not bar them from "continuously torment[ing]" a gay employee by "mocking his masculinity, portraying him as effeminate, and implying that he was a homosexual." *Id*. at 406. The court disagreed. "Sexual orientation harassment is often, if not always, motivated by a desire to enforce heterosexually defined gender norms"; "[t]he harasser may discriminate * * * because he thinks, 'real men don't date men,'" or because of his target's departure from "traditional concepts of masculinity and femininity." *Id*. at 410 & n.8 (citing Law, *Homosexuality and the Social Meaning of Gender*). Title VII therefore did not leave the defendants free to discriminate against gay and bisexual employees with impunity. Such discrimination, the Court concluded, could well violate the statute by penalizing employees for "fail[ing] to conform with sexual stereotypes about what 'real' men do or don't do." *Id*. at 410.

Two courts of appeals, sitting en banc, have now recognized that Title VII prohibits discrimination on the basis of sexual orientation. *See Zarda*, 883 F.3d 100; *Hively*, 853 F.3d 339. So has the EEOC: In *Baldwin* v. *Foxx*, No. 0120133080, 2015 WL 4397641 (E.E.O.C. July 15, 2015), it explained that "[d]iscrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms." *Id*. at *5. It "necessarily involves discrimination based on gender stereotypes," and relies on "deeper assumptions * * * about 'real' men and 'real' women." *Id*. at *7-8. And many scholars—including *amici*—have long under-

stood the ramifications of Title VII for gay people. *See supra* pp. 8-14.

The courts of appeals have likewise broadly recognized sex discrimination claims by transgender individuals in the wake of *Price Waterhouse*. *See Whitaker ex rel. Whitaker* v. *Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1048 (7th Cir. 2017); *City of Salem*, 378 F.3d at 574-575; *Barnes* v. *City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005); *Glenn* v. *Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011); *Rosa* v. *Park W. Bank & Tr. Co.*, 214 F.3d 213, 215-216 (1st Cir. 2000); *Schwenk* v. *Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000).[4]

In short, then, the argument that the *novelty* of Title VII claims based on sexual orientation or transgender status somehow renders them suspect is misguided in light of Title VII's statutory text and history. But the fact remains: Courts have been too slow to recognize the clear entailment of the text and history of Title VII. That, however, is no reason for

[4] Even the Tenth Circuit—the only circuit that has held, post-*Price Waterhouse*, that discrimination on the basis of transgender *status* is not *per se* actionable under Title VII—has left open the question whether a transgender person may bring a claim if penalized for "failure to conform to sex stereotypes" in the way they "act and appear." *Etsitty* v. *Utah Transit Auth.*, 502 F.3d 1215, 1223-24 (10th Cir. 2007). As explained above, the answer is clearly yes—*anyone* can bring a claim under Title VII if penalized for failure to conform to sex stereotypes, and transgender people are not somehow excepted from that protection. Because that is so, the distinction drawn by the Tenth Circuit—between transgender status and sex-stereotyping claims—is untenable and unworkable. *See supra* Part I.C.1; *cf.* Soucek, *Perceived Homosexuals*.

skepticism that this accelerating recognition is right. It is a familiar pattern in the story of equality in America that it often takes a long time for the full promise of a textual guarantee to be realized. It took nearly a century for courts to recognize that the Equal Protection Clause prohibits segregation and anti-miscegenation laws. That lamentable delay does not render the ultimate recognition any less correct. The same goes for the recognition that the Equal Protection Clause protects against gender discrimination. To borrow a phrase from Martin Luther King, Jr., the story of American equality is—to a large extent—the story of America learning to "[be] true to what [it] said on paper." Martin Luther King, Jr., *I See the Promised Land*, *in* A Testament of Hope: The Essential Writings and Speeches of Martin Luther King, Jr. 282 (James M. Washington, ed. 1986). And the story of Title VII fits that pattern.

Moreover, understanding the Title VII violation here in terms of improper sex stereotyping—as *amici*'s scholarship has for years—sheds light on why Title VII's promise has been unfulfilled as long as it has. As noted above, at the time the Civil Rights Act of 1964 was passed—and for many years thereafter—gay intimacy was criminalized and "homosexuality" was classified as a mental illness. *Zarda* Pet. App. 79-80; *see Hively*, 853 F.3d at 354 (Posner, J., concurring). In other words, a regime was in place that served as "an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." *Lawrence*, 539 U.S. at 575 (overruling *Bowers* v. *Hardwick*, 478 U.S. 186 (1986)). In such circumstances, it is hardly surprising that no one regarded discrimination against LGBT people as

enforcing sex stereotypes, rather than condemning or ostracizing those regarded as unnatural or deviant. Thus, while it has long been settled that Title VII proscribes discrimination against those who fail to conform to sex stereotypes, prejudice against LGBT individuals has obscured the way that discrimination against such individuals was bound up with sex stereotyping. Of course, the last quarter century has seen a revolution in the legal status of LGBT individuals—beginning with *Romer*, and continuing through *Lawrence*, *Windsor*, and *Obergefell*. LGBT individuals are no longer deviants or criminals but full and equal members of the polity. And in light of this new social and legal reality, it is time for this Court to recognize what Title VII provides: that discrimination against LGBT people in employment is discrimination on the basis of sex, and is therefore unlawful.

CONCLUSION

For the foregoing reasons, and those in plaintiffs' briefs, the judgments in Nos. 17-1623 and 18-107 should be affirmed, and the judgment in No. 17-1618 should be reversed.

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