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 PHILOSOPHY PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF THE EMPLOYEES

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INTERESTS OF *AMICI CURIAE*[1]

Amici, whose names and affiliations are set forth in the attached Appendix, are a group of distinguished philosophy and law professors who have studied and published on social and political philosophy, legal philosophy, philosophy of gender, and metaphysics. Their research, knowledge, and experience show that discrimination on the basis of same-sex attraction or gender nonconformity is essentially based on policing sex-specific stereotypes. As a result, *amici* explain, such discrimination constitutes a form of discrimination on the basis of sex.

SUMMARY OF THE ARGUMENT

1. The concept of "sex" is inextricably tied to the categories of same-sex attraction and gender nonconformity. Both categories are partially defined by sex and cannot logically be applied to any individual without reference to that individual's sex. It is simply not possible to identify an individual as being attracted to the same sex without knowing or presuming that person's sex. Likewise, it is not possible to identify someone as gender nonconforming (including being transgender) without reference to that person's known or presumed sex and the associated social meanings. It follows that discrimination on the basis of same-sex

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[1] Counsel of record for respondents received timely notice of the intent to file this brief and consent to its filing. Counsel of record for petitioners have given blanket consent to the filing of amicus briefs in this matter. No counsel for a party authored this brief in whole or in part. No person other than *amici* and their counsel, and no party or counsel for a party, made a monetary contribution intended to fund the preparation or submission of this brief.

attraction or gender nonconformity is inherently discrimination "because of sex."

2. It is conceptually incorrect to state that discrimination against persons who are same-sex attracted or gender nonconforming is "sex-neutral." If an employer decides to terminate an employee on the basis of same-sex sexual attraction (i.e., a particular sexual orientation) or gender nonconformity (e.g., being transgender), the employer must first presume the employee's specific sex, and then account for the social meanings, expectations, and stereotypes *specific to* the employee's *particular* presumed sex category. But for the concept of sex, the judgment that an employee violated one of the expectations and stereotypes specific to their sex would be impossible.

3. Title VII prohibits discrimination not simply based on the categories "man" and "woman," but because of sex. The philosophical underpinnings of antidiscrimination laws represent a societal commitment to alter socially restrictive categories such that they no longer serve as the basis for denying equal treatment or limiting freedoms based on sex. To permit discrimination against individuals who fall into categories that are partially defined by sex would violate the fundamental rationale behind antidiscrimination laws. Moreover, it would require this Court to define "sex" in a way that is illogically constrained and harmful to groups that have historically been the targets of discrimination.

ARGUMENT

I. AN ACTION TAKEN "BECAUSE OF SAME-SEX SEXUAL ATTRACTION" OR "BECAUSE OF GENDER NONCONFORMITY" IS AN ACTION TAKEN "BECAUSE OF SEX."

Title VII of the Civil Rights Act of 1964 makes it unlawful "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual…because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Even if one defines "sex" as perceived or assumed physiological sex features,[2] "sex" partially defines "same-sex sexual attraction" and "gender nonconformity." That is, the categories are unintelligible without reference to sex. Therefore, to discriminate on the basis of same-sex sexual attraction or gender nonconformity necessarily is to discriminate because of sex. The most logical and reasonable reading of Title VII is that the term "sex" is included in the statute not merely to prohibit discriminatory acts that are taken exclusively and narrowly on the basis of physical sex features, but rather to prohibit discriminatory acts taken on the basis of the social meanings (e.g., generalizations, expectations, and stereotypes) associated with specific physical sex features. These sex-specific social meanings extend to sexual attractions and gender presentation.

[2] Such physical elements might include, for example, ovaries, gonads, genitalia, gametes, and presence of and/or specific concentrations of hormones.

A. Sex Partially Defines "Same-Sex Sexual Attraction" and "Gender Nonconformity."

1. "Same-Sex Sexual Attraction" and "Sex."

Terminating an employee because of same-sex sexual attraction is plainly a termination based on the employee's sex, because the employee's sex partially defines his or her same-sex attraction. This is true even if one adopts a narrow reading of the word "sex" to mean only "biologically *male* or *female*." *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 145 (2d Cir. 2018) (Lynch, J., dissenting) (citing *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 362-63 (7th Cir. 2017) (Sykes, J., dissenting)). Being male is *essentially* part of what it is to be a "male attracted to males," and being female is *essentially* part of what it is to be a "female attracted to females."[3] This is not only true for "gay" and "straight" persons, but "bisexual" persons as well; a bisexual person is same- *and* other-sex attracted (e.g., a "male attracted to males and females"). Being male or female is not merely a *background condition* for having same-sex sexual attraction in the way that being human is merely a background condition for having the potential for sexual attraction. One's sex is an *essential* part of what defines that person's having same-sex sexual attraction.

An apt analogy illustrating this point is the concept of being a "wife" which is also a category partially

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[3] This fact literally is encoded in prefixes of sexual orientation terms such as "hetero-" and "homo-"—referring to "different" and "same" *sex* attraction. Gender nonconforming is only *non*conforming with respect to a *particular* gender. Both terms define themselves *relative to* sex and their social meanings/roles.

defined by sex. Under traditional precepts, a wife must be both (i) a woman and (ii) married. So if an employee was terminated for "being a wife," that termination would be "because of sex," which partially defines the category of "wife." *See, e.g.*, *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1197-98 (7th Cir. 1971) (finding an employment policy that singles out married women is a form of discrimination under Title VII and holding that "so long as sex is a factor in the application of the rule, such application involves a discrimination based on sex" (internal citations omitted)). So too, sex partially defines same-sex sexual attraction, because for a male to be "same-sex attracted" is to be (i) a male and (ii) attracted to males. As philosopher Robin Dembroff points out, "[C]ases of sexual orientation discrimination can be easily re-described in terms of gender or sex discrimination by holding fixed that multiple individuals share the same…attractions, and yet some are discriminated against simply because they have a particular sex or gender in addition to those attractions." Robin A. Dembroff, *What is Sexual Orientation?*, 16 PHILOSOPHER'S IMPRINT, Jan. 2016 at 20. Terminating an employee for "being a male attracted to males" is thus to terminate that person because of sex.

2. "Gender Nonconformity" and "Sex."

Terminating or discriminating against an employee because of gender nonconformity is also an employment action taken because of sex. A person is gender nonconforming if the person's behavior, appearance, or identification does not conform to prevalent cultural stereotypes about what is appropriate for individuals

with that person's presumed sex. "Gender nonconformity," then, is partially defined in terms of sex.[4]

To make the conceptual point clear, consider, by way of analogy, the category "religiously nonobservant." A person is religiously nonobservant when the individual's religious practices do not conform to what is expected of a person of that religion. To act on a person's "religious nonobservance," one must refer to both (i) the individual's religious status and (ii) the individual's actions vis-a-vis the institutionalized rituals of the presumed or disclosed religion. A person's religious practices alone do not determine whether that person is religiously nonobservant, because these practices do so only in relation to institutionalized expectations specific to particular religions. If we only know the person's religious status, but have no information about the person's behavior, we cannot determine if the person is acting in an *observant* manner. If we only know the person's actions and not the person's religious status, we cannot determine if the individual is *religiously* observant; those actions are only relevant in relation to institutionalized expectations specific to particular religions. Therefore, to discriminate on the basis of "religious nonobservance" is to discriminate on the basis of religion. *See Smith v. City of Phila. Dep't of Licenses & Inspections*, 285 F. Supp. 3d 846, 854 (E.D. Pa. 2018) (claims of discrimination under Title VII on the basis of nonobservance

[4] Merriam-Webster defines gender-nonconforming as "exhibiting behavioral, cultural, or psychological traits that do not correspond with the traits typically associated with one's sex: having a gender expression that does not conform to gender norms." See MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/gender%20nonconforming (last visited June 20, 2019).

survived summary judgment even when both parties were Catholic).

So too with gender nonconformity. If an employee is terminated for being gender nonconforming, the employer necessarily acted on "sex" because "gender nonconformity" is determined only with reference to both (i) presumed sex and (ii) the sex-specific stereotypes and expectations that the employer applies to persons with that presumed sex (and to which the employee did not conform). As such, the very concept of "gender nonconformity" cannot be applied to an employee without reference to both (i) sex and (ii) sex-specific stereotypes and expectations.

In one of the cases before the Court, the employee, Aimee Stephens, was terminated for being gender nonconforming because she was (i) presumed to have a male sex and (ii) identified and presented herself as a woman. *E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 569(6th Cir. 2018). Aimee Stephens is a transgender woman—that is, she was assigned "male" at birth and now identifies as a woman. But this fact is not essential to the case. An employee who was assigned "female" at birth and identifies as a woman, for example, should have no less recourse to a claim of discrimination if she is terminated for not wearing makeup, having short hair, or otherwise not conforming to traditional gender stereotypes. Requiring employees to conform to sex-specific stereotypes limits the dignity, freedom, and equality of employees.[5]

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[5] *See* Elizabeth Anderson, *Recent Thinking about Sexual Harassment: A Review Essay*, 34 Phil. & Pub. Aff., 284-312 (2006) (reviewing CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1979) (stating that "gender policing" is motivated by "the desire to keep separate spheres for men and

Discrimination based on gender nonconformity, therefore, constitutes discrimination because of sex.

3. Discrimination because of Same-Sex Sexual Attraction or because of Gender Nonconformity is Sex-Specific Discrimination.

Notwithstanding the arguments above, the positions taken by the opposing side in the cases before the Court argue that an action taken because of same-sex sexual attraction or gender nonconformity is not taken because of sex because such actions do not discriminate against men or women as such. *See, e.g.*, *Zarda*, 883 F.3d at 160 (Lynch, J., dissenting) (claiming that when an employer is hostile to gay men, not men in general, the animus is not against a protected group, "but against an (alas) *unprotected* group…gay men.").

This argument is flawed for several reasons. First, Title VII does not extend protections from unlawful termination or discrimination only to specific "protected groups." Race, sex, national origin, and other prohibited bases of discrimination are exhaustive forms of categorization; every person can be assigned a status *vis-a-vis* each of these categories. *See McDonald v. Santa Fe Trail Transportation*, 427 U.S. 273, 278 (1976) (finding that "any individual" is protected under Title VII's prohibition against racial discrimination); *see also Oncale v. Sundowner Offshore Services*, 523 U.S. 75, 78 (1998) ("Title VII's prohibition of discrimination because of…sex protects men as well as women" (internal citations and quotations omitted)). Because everyone can be assigned to a sex category (whether

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women, with the masculine sphere maintaining a monopoly on dominant traits.")).

that group is "male," "female," "intersex," or some other designation), everyone is in a protected group.

The question is thus not whether an individual is part of a "protected group," but rather which characteristics, capacities, freedoms, or other aspects of being so assigned to such a group are protected under Title VII. Many forms of sex discrimination do not necessarily take the form of animus towards a particular sex. *See UAW v. Johnson Controls, Inc.,* 499 U.S. 187, 188 (1991) ("[T]he absence of malevolent motive does not convert a facially discriminatory policy into a neutral policy with discriminatory effect."). For example, sexual harassment of a female employee, or a preference for hiring women as flight attendants who project "an image of feminine spirit, fun and sex appeal," arguably do not stem from or result in animus toward women. *Wilson v. Sw. Airlines Co*., 517 F. Supp. 292, 294 (N.D. Tex. 1981). Nevertheless, these actions are prohibited under Title VII because they violate the equality, dignity, and freedom irrespective of sex that Title VII was designed to protect. *See* Anderson at 287-88 reviewing CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1979) (arguing that discrimination targeting lesbian, gay, and bisexual persons as well as gender nonconforming persons, is a form of sexual harassment); *see also infra,* Section II.

Second, the argument that bias against persons who are same-sex attracted or gender nonconforming is sex-neutral bias relies on a sleight of hand that simply adjusts the level of abstraction at which the bias is described. Simply because an employer's policy can be described at a level of abstraction that appears category-neutral (i.e., applicable to all races, religions, sexes, etc.) does not mean that the policy is *in fact* category-neutral. Consider a hypothetical employer

who fires a Jewish employee who does not observe Yom Kippur. When asked to explain his reasons, the employer responds that he would have terminated anyone who is religiously nonobservant, saying: "I'm not firing you for being Jewish, I'm firing you for being nonobservant. My policy is religion-neutral." The employer's statement is conceptually incorrect because the category "religiously nonobservant" is unintelligible without reference to religion. Simply because the employer's policy can be described at a level of abstraction that appears to be "religion-neutral" (if by that one means applicable to all religious statuses), it is *in fact* not religion-neutral. This is clear because the employer cannot apply the 'no religiously nonobservant employees' policy without reference to a given employee's presumed or disclosed religious status.

The same is true of sexual orientation and gender nonconformity. An employer with a rule against hiring employees who are "same-sex attracted or gender nonconforming" cannot identify the people he seeks to exclude without reference to a potential employee's presumed sex. This sets the category of same-sex attracted or gender nonconforming apart from a truly sex-neutral category, such as "employees without high school diplomas," which *can* be applied without reference to an employee's presumed or disclosed sex.[6]

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[6] The fact that categories are not sex-neutral if one must logically reference sex to designate membership does not imply that policies are "discrimination because of sex" only if application of the policy logically requires reference to sex. For example, excluding employees on the basis of primary caregiving for school-age children or on the basis of some amorphous qualifications that have a disparate impact on one sex group may be instances of discriminatory policies that can be applied without reference to sex status. However, because the social mechanism that produces the disparate impact still runs through

Of course, all gender stereotype enforcement could be described as "sex-neutral" (if by that one means applicable to all sexes) if the stated basis for such enforcement were sufficiently abstract. Suppose an employer terminates *anyone* who violates presentational sex stereotypes, meaning that the employer terminates anyone who does not present the characteristics society traditionally associates with the gender the person is presumed to be. This policy is not sex-neutral even though it can be applied to individuals of all sexes because the only way to apply it is to reference an employee's presumed sex. *See, e.g.*, *Wilson*, 517 F. Supp at 295 (holding that a policy of only employing women who were "attractive" when "dressed in high boots and hot-pants" disadvantages men and women). Knowing that an employee wears makeup, for example, does not yet tell the employer whether the employee is thereby violating or adhering to presentational sex stereotypes. *See Price Waterhouse v. Hopkins,* 490 U.S. 228, 235, 251 (1989) (holding that a woman advised by her employer to "wear make-up, have her hair styled, and wear jewelry" suffered sex discrimination). So too in the case of sexual orientation and gender nonconformity. Reference to an employee's sexual attractions or gender presentation does not yet reveal whether the employee is same-sex attracted or gender nonconforming. Firing employees based on same-sex attraction or gender nonconformity *requires*

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sex-specific roles, it still amounts to sex-based discrimination. In other words, it is a matter of sociological fact that a higher percentage of primary caregivers for school-age children are women as opposed to men. Hence, this category of sex-based discrimination would harm men and women, because women are disadvantaged for having a role that conforms to gender stereotypes and men are disadvantaged for having a role that violates gender stereotypes.

reference to their presumed sex, and is therefore sex-specific discrimination.

B. The Word "Sex" in Title VII Means Social Meanings Associated with Sex, which Include Expectations and Stereotypes About Sexual Attraction and Gender Presentation.

Title VII prohibits discrimination because of same-sex attraction or gender nonconformity. The most logical and reasonable reading of the word "sex" in the statute extends to the social meanings (e.g. generalizations, expectations, and stereotypes) associated with physical sex features. Attraction to persons of a different sex and gender-conforming presentation are some of the most predominate and salient stereotypes associated with sex features in our society. Therefore, to act on these expectations and stereotypes is to act on sex.

1. "Sex" Means Sex Features and Their Social Meanings.

To read the meaning of "sex" in Title VII to extend only to a person's physical sex features would mean that "discrimination . . . because of sex" *only* occurs when someone is treated in a discriminatory manner because of these physical characteristics and nothing more. But this interpretation is flawed. This Court has long recognized that legal questions about sex more often than not extend beyond questions about physical sex features and include questions about "[o]verbroad generalizations about the different talents, capacities, or preferences of males and females." *United States v. Virginia*, 518 U.S. 515, 533 (1996). Acting on reasons that reference the "talents, capacities, or preferences of males and females" invokes not just "sex" as a

physical trait, but the social expectations, generalizations, and stereotypes associated with physical sex features.[7]

The meaning of the word "sex" thus does not merely describe physical sex features, but includes the social meanings of these features.[8] The social meaning of sex encompasses expectations, generalizations, and stereotypes concerning sexuality, gender presentation, affect, personality, social activities, reproductive and family role, mannerisms, and capacities associated with physical sex features.[9]

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[7] As the Court has noted in the equal protection context, acknowledging physical differences cannot be an excuse "for denigration of the members *of either sex* or for artificial constraints on an individual's opportunity." *Virginia*, 518 U.S. at 533 (1996) (emphasis added); *see also Craig v. Boren*, 429 U.S. 190, 198-99 (1976) (finding that an Oklahoma statute prohibiting "the sale of 'nonintoxicating' 3.2% beer to males under the age of 21 and to females under the age of 18" violated the Equal Protection Clause because it rested on "outdated misconceptions concerning the role of females in the home rather than in the 'marketplace and world of ideas.'").

[8] See Jennifer M. Saul, *Politically Significant Terms and Philosophy of Language*, *in* OUT FROM THE SHADOWS: ANALYTICAL FEMINIST CONTRIBUTIONS TO TRADITIONAL PHILOSOPHY 195 (Sharon L. Crasnow & Anita M. Superson eds., 2012); Esa Diaz-Leon, *Women as a Politically Significant Term: A Solution to the Puzzle*, 31 HYPATIA, no. 2, 2016, at 245-58; Talia M. Bettcher, *Trapped in the Wrong Theory: Rethinking Trans Oppression and Resistance*, 39 SIGNS: J. WOMEN CULTURE & SOC'Y, no. 2, 2014, at 383-406; *see also* Monique Witted, *One is Not Born a Woman*, *in* LESBIAN AND GAY STUDIES READER 103-09 (Henry Abelove, Michele Barale, & David Halperin eds., 1993) ("[Sex features are] in themselves as neutral as any others but marked by the social system.").

[9] These stereotypes can be "descriptive" (expressing social or cultural generalization about the currently held or "naturally occurring" preferences or roles of people by virtue of being in a

For example, in *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, the employer required female employees to provide documents confirming their infertility if those women were likely to be exposed to lead at work. The plaintiffs challenged this policy because lead exposure can be dangerous to both male and female reproductive systems. This Court concluded that the employer's requirement was discriminatory. If the word "sex" extends *only* to physical sex features, this policy would *not* be discrimination on the basis of sex because the adverse action was not strictly due to the employees' sex features—it did not apply to infertile persons with the same sex features. Rather, the policy rested on generalizations about the fertility of people with female sex features and sex-specific social expectations of women's reproductive roles. *Id.* at 188 ("The policy is not neutral, because it does not apply to male employees in the same way as it applies to females, despite evidence about the debilitating effect of lead exposure to the male reproductive system.").

The fact that the word "sex" signifies something beyond physical features can be seen clearly in cases of other protected categories under Title VII, such as race. For example, the termination of a person racially classified as white for being married to a person racially classified as Black is not to act on "race" merely as a physical, genetic, ancestral, or biological status.[10] Rather, to do so is to act on social meanings

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sex category) or "prescriptive" (expressing moral or social imperatives about how people ought to be by virtue of being in a sex category). William N. Eskridge, Jr., *Theories of Harassment 'Because of Sex,' in* Directions in Sexual Harassment Law 127 (2003).

[10] *See generally* JOSHUA GLASGOW ET AL., WHAT IS RACE?: FOUR PHILOSOPHICAL Views (forthcoming 2019); K. Anthony Appiah, *Race, Culture, Identity: Misunderstood Connections*, *in* K.

associated with physical markers of race, namely that persons presumed to be in the racial category "white" should not be married to persons perceived or assumed to be in the racial category "Black." In fact, the law has been concerned with racial classification in the context of equal protection or statutory protections *precisely because* racial classification implied (among other things) that one ought to only love and associate within that category. *See*, *e.g.*, *Holcomb v. Iona Coll.*, 521 F.3d 130, 138 (2d Cir. 2008) (employer may violate Title VII if it takes action against an employee because of association with a person of another race).

Similarly, reading "sex" to include social meanings and expectations associated with physical sex features comports with how this Court has previously interpreted the term "sex" in Title VII. *See, e.g.*, *Price Waterhouse*, 490 U.S. at 251 ("[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."); *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 708 (1978) ("Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.").

2. The Social Meanings of Sex Include Expectations and Stereotypes about Sexual Attraction and Gender Presentation.

Sexuality and gender presentation are two of the most salient aspects of the social meanings of sex (i.e., the generalizations, expectations, and stereotypes

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ANTHONY APPIAH & AMY GUTMANN, COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE 30, 76-80 (1996).

that attach to sex). The facts in the cases now before the Court illustrate this. It was only because of prevailing stereotypes and expectations concerning men's and women's attire, comportment, self-description, and sexual attractions that the employers in question terminated employees for being same-sex attracted or for being gender nonconforming. In each of those terminations, it is indisputable that the employer acted on the basis of: (i) a presumption about the employee's sex; and (ii) beliefs about what attire, comportment, self-description, and sexual attractions, etc. are appropriate *given* the employee's presumed sex (see (i)).

a. Presumed Sex and Gender Presentation.

Many of the generalizations, expectations, and stereotypes that attach to sex concern sex-marking presentation, which include but are not limited to mannerism, attire, self-description, hairstyle, and speech patterns. These sex-marking presentations are pervasive in our society and start as early as pink- or blue-themed baby showers.[11] As the philosopher Talia

[11] *See* MARILYN FRYE, THE POLITICS OF REALITY: ESSAYS IN FEMINIST THEORY 23-24 (1983) ("We announce [our sexes] in a thousand ways. We deck ourselves from head to toe with garments and decorations which serve like badges and buttons to announce our sexes. For every type of occasion there are distinct clothes, gear and accessories, hairdos, cosmetics and scents, labeled as 'ladies" or 'men's' and labeling us as females or males, and most of the time most of us choose, use, wear or bear the paraphernalia associated with our sex. It goes below the skin as well. There are difference styles of gait, gesture, posture, speech, humor, taste and even of perception, interest and attention that we learn as we grow up to be women or to be men… Even infants in arms are color coded.").

Bettcher observes, most people assume that gender presentation is the public "appearance" of the "reality" of one's private sex features.[12] Talia M. Bettcher, *Evil Deceivers and Make Believers: On Transphobic Violence and the Politics of Illusion*, 22 HYPATIA, no. 3, 2007, at 48. It is only in light of this assumption that expressions such as "'a man who dresses like a woman', 'a man who lives as a woman', and even 'a woman who is biologically male'" make sense. *Id*. Bettcher's observation plays out in the present cases. The employer in *Harris Funeral* admitted that he terminated Aimee Stephens for not displaying the gender appearance that he considered "appropriate" for someone with male-coded sex features. He even went so far as to describe Stephens's gender presentation as being a "denial" of her sex. 884 F.3d at 569. That statement demonstrates that the only reason the employer terminated Ms. Stephens was because given (i) her presumed sex, she violated (ii) his beliefs about what attire, comportment, self-description, and sexual attractions, etc. are appropriate for persons with that sex.

b. Presumed Sex and Sexual Attraction.

Other generalizations, expectations, and stereotypes that attach to sex concern sexual roles and attractions. "[R]omantic and sexual orientation toward persons not of one's own sex… is so ubiquitous a part of human

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[12] Gender presentation is not only evaluated based on presumed sex features—it is used to signal these features to others. *See Price Waterhouse*, 490 U.S. at 235 (discussing how an employee hoping to obtain a promotion was told to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry" (internal citation omitted)).

interactions and relations as to be almost invisible, and so natural-seeming as to appear unquestionable. Indeed, the 1970 edition of The Shorter Oxford English Dictionary defines 'heterosexual' as 'pertaining to or characterized by the normal relation of the sexes.'" Christine Overall, *Heterosexuality and Feminist Theory*, 20 CANADIAN J. OF PHIL. 1, 1 (2017). This Court has already recognized that some of the most socially salient beliefs and expectations about sex have concerned accepted sexual roles, relations, and attractions. *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015) (noting opponents of marriage equality believe *same sex* marriage would demean a "timeless institution"); *United States v. Windsor,* 570 U.S. 744, 763 (2013) (discussing that marriage between man and woman considered by most as essential to definition of term, its role and function throughout the history of civilization); *Lawrence v. Texas,* 539 U.S. 558, 571 (2003) (recognizing prior decision upholding anti-sodomy laws based on premise "for centuries there have been powerful voices to condemn homosexual conduct as immoral.").

To terminate an employee because that person is assumed to hold or have expressed same-sex sexual attraction means that the employer acted on the basis of (i) the employee's presumed sex, and a perceived violation of (ii) the employer's beliefs about what sexual attractions are appropriate for persons of that sex.

In sum, the public meaning of the word "sex" includes not only physiological sex features but also the social meanings, or the generalizations, expectations, and stereotypes attached to these features. Because expectations of different-sex sexual attraction and gender conforming presentation are both publicly salient components of these meanings, termination

because of same-sex attraction or gender nonconformity is termination because of sex.

II. AN ACTION THAT IS DISCRIMINATORY "BECAUSE OF SAME-SEX ATTRACTION" OR "BECAUSE OF GENDER NONCONFORMITY" IS "DISCRIMINATION... BECAUSE OF SEX."

If the Court accepts that an action taken because of same-sex sexual attraction or because of not conforming to gender expectations is an action taken "because of sex," it must recognize that such acts are "*discrimination* because of sex." Several arguments against this conclusion have been presented to courts in recent years. They have proposed that, by definition, an act or policy taken because of same-sex or gender nonconformity cannot be an instance of sex discrimination because:

- An employer is "not excluding gay men because they are men and lesbians because they are women," *Hively*, 853 F.3d at 365 (Sykes, J., dissenting);
- "[H]eterosexuality is not a *female* stereotype; it is not a male stereotype; it is not a sex-specific stereotype at all," *Id.* at 370;
- The proximate motive for firing a gay person is, "sexual orientation, not [his/her/their] sex," *Id.*;
- Actions deemed discriminatory must be limited by "the public meaning of the words adopted by Congress in light of the social problem it was addressing when it chose those words." *Zarda*, 883 F.3d at 162 (Lynch, J., dissenting).

However, as discussed below, these arguments lack a logical foundation.

A. Acts That Are "Discrimination Because of Sex" Need Not Categorically Disadvantage Men or Women.

An action need not categorically and exclusively disadvantage all persons designated in one sex category or another to violate Title VII. For example, sexual harassment is a form of sex discrimination. *See Barnes v. Costle*, 561 F.2d 983, 995 (D.C. Cir. 1977) (finding that sexual harassment claims fall under Title VII); *Henson v. City of Dundee*, 682 F.2d 897, 901 (11th Cir. 1982) (concluding that "a hostile or offensive atmosphere created by sexual harassment can, standing alone, constitute violation of Title VII.").

Shortly after the passage of Title VII, several courts held that sexual harassment was not discrimination "because of sex" because either not all members were subject to the harassment (say, only "attractive" or feminine dressing women), or because persons of a different sex also were or could be subject to harassment. *See Corne v. Bausch & Lomb, Inc.*, 390 F. Supp 161, 163 (D. Ariz. 1975) *vacated*, *Corne v. Bausch & Lomb, Inc.*, 562 F.2d 55 (9th Cir. 1977); *see also Tomkins v. Public Service Elec. & Gas Co.*, 422 F. Supp 553, 556 (D. N.J. 1976) (holding that sexual harassment and sexually motivated assault do not constitute sex discrimination under Title VII), *rev'd*, *Tomkins v. Public Service Elec. & Gas Co.*, 568 F.2d 1044 (3rd Cir. 1977). It is not evident that they were wrong to do so, and that sexual harassment is discrimination because of sex. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64 (1986); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1068 (9th Cir. 2002) (finding that sexual harassment of a gay man constituted sex discrimination under Title VII); *see also* William N. Eskridge, Jr., *Title VII's Statutory History and the Sex Discrimina-*

tion Argument for LGBT Workplace Protections, 127 Yale L. J. 322 (2017); Rosa Ehrenreich, *Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment*, 88 Geo. L. J. 1-64 (1999).

There is no definitional requirement that an act or practice must be applied in a manner that disadvantages *all* persons in a sex category in order to recognize it as an instance of discrimination. Rather, an act or policy is recognized as discrimination when it is wrongful, disadvantageous, or harmful to the equal status of persons classified by 'sex'. As Issa Kohler-Hausmann explained, what unifies practices deemed discriminatory is that they "act[] on or reproduce[] an aspect of the category in a way that is morally objectionable…. [discrimination] is a thick ethical concept that—to express the distinctive wrongfulness of the action vis-à-vis the category—must rest upon an account of the system of social meanings or practices that constitute the categories at issue." Issa Kohler-Hausmann, *Eddie Murphy and the Dangers of Counterfactual Causal Thinking About Detecting Racial Discrimination*, 113 Nw. U. L. Rev. 1163, 1172 (2019). For example, sexual harassment—which does not exclusively and categorically disadvantage men or women—is sex discrimination because it demeans the dignity or equal status of worker through social meanings about sex, namely sexuality. *See* Anderson at 287-88 ("Sexual autonomy theories view sexual harassment as an oppressive enforcement of conventional sexist and homophobic norms of gender and sexuality. It forces people to conform to these norms, and punishes anyone who deviates: masculine women, effeminate men, gays and lesbians, transsexuals, and anyone else who expresses an unconventional sexuality or sexual identity.").

Indeed, this Court has recognized in several cases that acts or policies that do not exclusively and categorically disadvantage men or women can be instances of sex discrimination when the act violates the equal status of workers through sex. *See*, *e.g.*, *Oncale*, 523 U.S. at 78 (1998) ("Title VII's prohibition of discrimination 'because of . . . sex' protects men as well as women."); *Meritor*, 477 U.S. at 67 ("[A] requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets." (internal citations omitted)).

B. Stereotypes Concerning Sexual Attraction and Gender Presentation Are Sex-Specific.

One can grant for the purposes of argument that harmful sex stereotypes must be sex-specific, and stereotypes regarding same-sex attraction and gender nonconformity unquestionably remain harmful sex stereotypes. The employer who has a policy of dismissing employees who are "religiously nonobservant" could also claim that his policy is not religious discrimination because it does not single out certain religious subgroups for disadvantage or differential treatment. But as discussed in Section I(A)(c), there is no way to apply that policy without reference to particular religious status. What makes such a policy discriminatory is that it wrongly limits expression and belief with respect to religious status.

Every sex-specific stereotype can be pitched at a higher level of abstraction and achieve the same seemingly "gender-neutral" character. Consider the stereotypes that women ought not be aggressive, or that men ought not be empathetic. Both can be pitched

as the single imperative that people ought to be gender conforming. The real question to ask, however, is whether firing a person for violating a sex-specific stereotype *wrongfully* limits a person's freedom and dignity in the specific capacities and manner that the stereotype demands—here, because of sex. Erin Beeghly, *Discrimination and Disrespect,* THE ROUTLEDGE HANDBOOK OF THE ETHICS OF DISCRIMINATION 83-96 (2017); s*ee also* Anderson at 284-312. There are compelling reasons to believe that it does. Philosopher Adam Hosein argues that a basic liberal commitment to protecting persons' freedoms requires protecting those who do not conform or who seek to change sex-specific roles that involve stereotypes and customs. Adam Hosein, *Freedom, Sex Roles, and Anti-Discrimination Law*, 34 LAW AND PHIL. 485 (2015). Similarly, Katherine Franke writes that, "workplace policies and practices…that have the purpose or effect of reinforcing or perpetuating an orthodoxy that masculinity is the proper and natural expression of male agency or that femininity is the proper and natural expression of female agency clearly violate Title VII…for reasons of gender-based autonomy or agency." Katherine M. Franke, *What's Wrong with Sexual Harassment*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW 179 (Catharine A. MacKinnon & Reva B. Siegel eds., 2003).

C. Redescribing the Proximate Motives for Termination as "Sexual Orientation" Animus Does Not Insulate the Termination from Being Discriminatory Because of Sex.

One can always redescribe the proximate motive of an act or policy that invokes generalizations, expectations, and stereotypes that attach to sex in way that obfuscates the fact that the reason was dependent

upon sex. For example, in many early cases rejecting sexual harassment as a form of sex discrimination, courts identified the motives of sexual harassment as "personal urge,"[13] "sex misconduct"[14] or "sexual desire"[15]—and argued that these things were distinct and removed from the meaning of "sex" in the statute.[16] But later courts held that these redescriptions of the proximate motives of sexual harassment as "sexual desire" or "urge" were insufficient to insulate a *quid pro quo* or hostile work environment as instances of sex discrimination. Those courts recognized that what made these forms of sex-reliant conduct sex discrimination was either that they subjected a person to adverse workplace conditions because of a sex-specific stereotype (i.e., women should be available as sex objects at the workplace, or men should act in a "masculine" fashion or be sexually humiliated) or that they were a way to express animus

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[13] *Corne*, 390 F. Supp. at 163. ("In the present case, Mr. Price's conduct appears to be nothing more than a personal proclivity, peculiarity or mannerism. By his alleged sexual advances, Mr. Price was satisfying a personal urge.").

[14] *Miller v. Bank of America,* 418 F. Supp. 233, 234-235 (N.D. Cal. 1976), *rev'd*, 600 F.2d 211, 213 n.1 (9th Cir. 1979).

[15] "While sexual desire animated the parties, or at least one of them, the gender of each is incidental to the claim of abuse." *Tomkins*, 422 F. Supp at 556.

[16] "The substance of plaintiff's complaint is that she was discriminated against, not because she was a woman, but because she refused to engage in a sexual affair with her supervisor. This is a controversy underpinned by the subtleties of an inharmonious personal relationship. Regardless of how inexcusable the conduct of plaintiff's supervisor might have been, it does not evidence an arbitrary barrier to continued employment based on plaintiff's sex." *Barnes v. Train*, No. 1828-73, 1974 WL 10628, at *1 (D.D.C. Aug. 9, 1974), *rev'd sub nom. Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977).

against people of certain sex-defined categories (such as "attractive woman" or "effeminate man").[17]

The same applies here. Terminating someone for same-sex attraction or for gender nonconformity is sex-reliant conduct that constitutes sex discrimination. Such action subjects a person to adverse workplace conditions based on a sex-specific stereotype (i.e., persons perceived as male should not be attracted to men, or persons perceived as male should not be feminine) or expresses animus against people of certain sex-defined categories (i.e., those who are gay, bisexual, transgender, or otherwise gender nonconforming).

D. It Is Not the Case That an Act or Policy Cannot Be "Discrimination…Because of Sex" Under Title VII Unless it Was Publicly Recognized as Such in 1964.

Some argue that Title VII's prohibition against "discrimination because of sex" does not extend to discrimination against same-sex attracted or gender nonconforming persons because, historically, it has not been interpreted to extend in this way. There are three versions of such an argument. We do not address

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[17] It is inaccurate to say that sexual harassment constitutes sex discrimination because "[s]exual harassment in the workplace quite literally imposes conditions of employment on one sex that are not imposed on the other." *Zarda*, 883 F.3d at 161 (Lynch, J. dissenting). A harasser could sexually harass people perceived to be gender conforming feminine women based on the stereotype that such gender-presenting people should be available as sexual objects, and sexually harass people perceived to be gender nonconforming males based on the stereotype that such gender nonconforming people deserved to be humiliated. What makes such behavior discriminatory because of sex is how it relies on and invokes sex-based meanings to create disadvantageous terms and conditions of employment.

these arguments from the perspective of a particular school of statutory interpretation, but rather from the philosophical perspective of evaluating the logic, coherence, and implications of such arguments. Eskridge, *Theories of Harassment* at 159-60 ("Title VII does not announce its statutory goal(s)… As with the definition of sex, therefore, the policies animating the evolving statute are complex and constructed over time rather than simple and received at the statute's birth.").

The first version is pitched in terms of the "original public meaning" of the noun "sex" in 1964. The question presented in the present cases does not simply concern the historical or current meaning the noun "sex." Rather, the question is what counts as an instance of "discrimination because of sex." As we have argued in Section (I)(B), "discrimination because of sex" must include discrimination because of generalizations, expectations, and stereotypes attached to sex.

The second version of the argument holds that the set of acts, practices, and policies that the law authorizes courts to find discriminatory on the basis of sex is limited to the set of acts, practices, and policies that were considered by the public to be discriminatory on the basis of sex in 1964. For example: If, in 1964, it was widely socially accepted that it was not sex discrimination to bar a female person from being a military JAG lawyer, then the statute would preclude finding this action to be sex discrimination in 2019. This argument suggests that the purpose of a statute prohibiting sex discrimination is to *freeze in time* the precise content of social judgments about what counted as sex discrimination when the statute was

passed.[18] But such an interpretation is incompatible with most widely-shared understanding of the function of antidiscrimination legislation, which is that they aim to change the social meanings of socially restrictive categories such that they no longer serve as the basis for unequal treatment or autonomy-limiting rules.[19]

A third version of this argument says that the political motivation for including "sex" in Title VII was concern only for the status of *women*, and that sexual orientation or gender presentation stereotypes do not

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[18] This Court now recognizes many forms of sex-based conduct that were not widely recognized in 1964 as instances of discrimination because of sex; therefore this argument is untenable. *See, e,g.*, *Oncale*, 523 U.S. at 79 ("[S]tatutory 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.").

[19] *See* ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY 8 (1996) (showing that the "antidiscrimination project" is necessarily an endeavor in which the state actively undertakes the goal of cultural transformation that "seeks to reconstruct social reality to eliminate or marginalize the shared meanings, practices, and institutions that unjustifiably single out certain groups of citizens for stigma and disadvantage."); Robert C. Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CALIF. L. REV. 1, 17, 20 (2000) (explaining that antidiscrimination "would not require us to imagine a world of sexless individuals, but would instead challenge us to explore the precise ways in which Title VII should alter the norms by which sex is given social meaning."); Jack M. Balkin and Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 9 (2003); Eskridge , *Title VII's Statutory History* at 342 (suggesting "Title VII guarantees individual employees a merit-based workplace where their opportunities will not be impeded by their biological sex (or that of their intimate associates), descriptive or prescriptive gender stereotyping, or sexualized harassment.").

harm the status of women or perpetuate misogyny. This argument fails for two reasons. First, even if the statute is solely concerned with the subordination and exclusion of women, it remains the case that "discrimination because of sex" must extend to discrimination based on same-sex attraction and gender nonconformity. Policing gender stereotypes against *both* women and men is a sexist practice that maintains male superiority in the workplace. As Elizabeth Anderson argues, requiring persons presumed to be male to conform to masculine norms (including attraction only to women) and persons presumed to be female to conform to feminine norms (including attraction only to men) reinforces "the dominance of masculine norms in the workplace, and separate spheres for men and women."[20]

Second, a correct understanding of sex discrimination includes acts that threaten the equality of persons across *all* sex classifications.[21] Thus, it is proper to examine whether the particular sex-specific stereotypes at issue in the cases before the Court are harmful to the equal status of persons classified on the basis of sex.[22] We think they manifestly are. As

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[20] Anderson at 307. *See also* Christopher N. Kendall, *Gay Male Liberation Post* Oncale*: Since When Is Sexualised Violence Our Path to Liberation?, in* Directions in Sexual Harassment Law 221-43 (Catharine A. MacKinnon & Reva B. Siegel eds., 2003); Andrew M. Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1995).

[21] Title VII does not protect a specific class; all persons are potentially classifiable by the category sex so everyone is in a "protected class," requiring us to establish a relation of *equality* of persons irrespective of sex.

[22] CATHARINE MACKINNON, *Difference and Dominance: On Sex Discrimination*, *in* FEMINISM AND POLITICS 295 (Anne Phillips ed. 1998) (proposing that the question of differential treatment be

discussed in section I(A)(c), all sex-specific stereotypes designate the conduct, presentation, or other ways of being in the world deemed appropriate for people based merely on their presumed sex. The particular sex-specific stereotypes at issue in these cases condition employment on conforming one's presentation, attire, affect, and intimate affairs to these stereotypes. Forcing such conformity undercuts the equal status of persons classified on the basis of sex.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully urge this Court to reverse the judgment of the Eleventh Circuit and uphold the judgments of the Second Circuit and the Sixth Circuit.

Respectfully Submitted,

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framed as a question of "the distribution of power" between the sexes.)

APPENDIX

APPENDIX

List of *Amici Curiae*

Robin Dembroff is an Assistant Professor of Philosophy at Yale University. Dembroff specializes in metaphysics, philosophy of language, and philosophy of gender and sexuality. In particular, Dembroff's work focuses on the relationships between social categories (such as gender and sexual orientation), concepts, and language. Dembroff was instrumental in constructing this brief with respect to both its philosophical content and presentation.

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