

Nos. 17-1618; 17-1623 and 18-107

IN THE
Supreme Court of the United States

GERALD LYNN BOSTOCK, *Petitioner*,

v.

CLAYTON COUNTY, GEORGIA, *Respondent*.

ALTITUDE EXPRESS, INC., ET AL., *Petitioners*,

v.

MELISSA ZARDA, ET AL., *Respondents*.

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

v.

EQUAL OPPORTUNITY EMPLOYMENT COMMISSION, ET AL.,
Respondents.

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

**BRIEF FOR THE LEGAL AID SOCIETY
AS *AMICUS CURIAE* IN SUPPORT OF
THE EMPLOYEES**

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INTEREST OF THE *AMICUS CURIAE*¹

The Legal Aid Society (“Legal Aid”) is the nation’s oldest and largest private not-for-profit organization, providing free legal services to low-income individuals and families for over 140 years. In 2011, Legal Aid started its LGBT Law and Policy Initiative to combat poverty and homelessness among lesbian, gay, bisexual, and transgender (“LGBT”) people.² Through that initiative, and as an institutional provider of representation to low-income New Yorkers, Legal Aid has represented members of the LGBT community in thousands of cases and has served as counsel, or appeared as *amicus*, in numerous cases involving transgender-status and sexual-orientation discrimination. Legal Aid is thus well positioned to describe the nature and impact of discrimination against the LGBT community, including in the context of employment. To that end, Legal Aid participated as *amicus curiae* in one of the cases below, *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (en banc).

Legal Aid has a strong interest in ensuring that Title VII is interpreted in a manner that furthers the congressional purpose of leveling the playing field in the workplace for all Americans and combating the

¹ The parties in Nos. 17-1618, 17-1623, and 18-107 have consented to the filing of this *amicus* brief. Pursuant to Supreme Court Rule 37.6, *amicus* affirms that no counsel for a party authored any part of this brief, and that no person other than *amicus*, its members, or its counsel have made a monetary contribution intended to fund its preparation or submission.

² The LGBT community is thus defined in part by reference to sexual orientation (lesbian, gay, and bisexual) and in part by reference to transgender status (transgender).

economic harms of employment discrimination.³ Research shows that LGBT workers continue to experience precisely the kind of pervasive workplace discrimination and attendant economic harms that Title VII was designed to eliminate.⁴ The questions presented in these cases thus have profound implications for LGBT Americans, particularly the disadvantaged members of the community that Legal Aid represents.

SUMMARY OF THE ARGUMENT

This Court has for decades recognized that Title VII's prohibition against employment discrimination "because of . . . sex," 42 U.S.C. § 2000e-2(a)(1), encompasses discrimination that relies on sex stereotypes. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989). Case law, social science, and real-life experience of sexual minorities—as represented by Legal Aid's clients—all show that discrimination based on transgender status or sexual orientation by its nature implicates sex stereotyping—that is, discrimination for failure to conform to a sex stereotype—whatever other motives may be present. It therefore follows that un-

³ *See generally* H.R. Rep. No. 88-914, pt. 1, at 3 (1963), as reprinted in 1964 U.S.C.C.A.N. 2391, 2393 (General Statement) (declaring the intent of the Civil Rights Act of 1964 to "eradicate significant areas of discrimination on a nationwide basis").

⁴ *See, e.g.*, Andras Tilcsik, *Pride and Prejudice: Employment Discrimination Against Openly Gay Men in the United States*, 117 *Am. J. of Soc.* 586, 601 (2011); Sejal Singh et al., *Widespread Discrimination Continues to Shape LGBT People's Lives in Both Subtle and Significant Ways*, Center for American Progress (May 2, 2017), <https://tinyurl.com/ybxbzttt>; M.V. Lee Badgett et al., *New Patterns of Poverty in the Lesbian, Gay, and Bisexual Community*, The Williams Institute, at 9 (June 2013), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGB-Poverty-Update-Jun-2013.pdf>.

der *Price Waterhouse*, Title VII necessarily protects against discrimination on the basis of transgender status or sexual orientation.

The experiences of LGBT individuals who have been targets of discrimination provide a concrete demonstration of the inevitable link between sex stereotyping and transgender-status and sexual-orientation discrimination. Legal Aid's LGBT clients report that they often experience sex-based discrimination as young children, even before they identify as LGBT. This discrimination, which continues and intensifies through adolescence and into adulthood, follows the clients to the workplace and is inevitably predicated on sex stereotyping.

Extensive scholarship further documents the link between sex stereotyping and transgender-status and sexual-orientation discrimination that runs through the experiences of Legal Aid's LGBT clients. This literature explains that discrimination against LGBT individuals commonly seeks to enforce gender norms that are defined around assumptions of heterosexuality and non-transgender identity. Indeed, just as Legal Aid's LGBT clients report, empirical research shows that children use homophobic and transphobic bullying to police conformity with sex stereotypes among other children, well before puberty and before most individuals identify as LGBT. This policing of conformity with sex stereotypes extends into adolescence and young adulthood, and targets individuals regardless of their disclosed transgender status or sexual orientation. And the research indicates that the same policing of conformity with sex stereotypes that animates childhood and teen bullying motivates discrimination against adult LGBT Americans in the workplace.

Lower court precedent further confirms that requiring legal distinctions between employment decisions based on sex stereotyping (clearly prohibited by *Price Waterhouse*) and transgender-status or sexual-orientation discrimination is unworkable. Courts that have tried to parse the fine distinctions between discrimination against employees because they are LGBT and sex stereotyping have produced baffling and contradictory results—a fact that many lower courts have acknowledged, as they protest that circuit precedent that compelled such an inquiry led to line drawing that was not merely “difficult” but “arbitrary” and ultimately premised on “nothing more than artifice.” *Doe v. Casino*, No. CV 18-5289, 2019 WL 1585201, at *7 (E.D. Pa. Apr. 12, 2019). This Court should disavow an approach to Title VII that requires such arbitrary distinctions and instead recognize that Title VII prohibits all forms of sex discrimination motivated by sex stereotyping, including discrimination on the basis of transgender status or sexual orientation.

ARGUMENT

Title VII of the Civil Rights Act of 1964 (“Title VII”) makes it unlawful for an employer to

fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of . . . sex[.]

42 U.S.C. § 2000e-2(a)(1). At the time Title VII was enacted, the ordinary meaning of the term “sex” would have been understood to encompass cultural associa-

tions involving gender.⁵ Consistent with the statute’s plain text, this Court has long recognized that, under Title VII, “employment decisions cannot be predicated on mere ‘stereotyped’ impressions about the characteristics of males or females.” *City of Los Angeles, Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 (1978); *see also Price Waterhouse*, 490 U.S. at 239 (“Congress’ intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute.”).

The Court developed this understanding at length in *Price Waterhouse*, where it held that Title VII prohibits employers from making employment decisions on the basis of “sex stereotyping.” 490 U.S. at 250. As the Court explained, “[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.” *Id.* at 251 (quoting *Manhart*, 435 U.S. at 707 n.13) (plurality opinion); *accord id.* at 258–61 (White, J., concurring in the judgment); *id.* at 272 (O’Connor, J., concurring in the judgment) (recognizing that the plaintiff had showed her employer’s decisionmaking was tainted by “her failure to conform to the stereotypes” that the decision-makers had for men and women). Thus, under Title VII, “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype

⁵ See William N. Eskridge, Jr., *Title VII’s Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 Yale L.J. 322, 338 (2017) (citing *Webster’s New International Dictionary of the English Language* 2296 (2d unabridged ed. 1961)).

associated with their group[.]” *Price Waterhouse*, 490 U.S. at 251.

The principles established by this Court in *Price Waterhouse* should resolve these three cases, and they thoroughly undermine the employers’ suggestion here that the plaintiffs are seeking to “expand” or “transform” Title VII protections. *E.g.*, Pet. in 18-107 at 35. As explained in greater detail in the sections below, basic lived experience, social science, and case law all show that acts of discrimination on the basis of transgender status or sexual orientation are particular instances of discrimination based on sex stereotypes. Indeed, “[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes.” *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011). For that reason, discrimination against individuals who are transgender—“and therefore fail[] to act and/or identify” with the sex they were assigned at birth—“is no different from the discrimination directed against [the plaintiff] in *Price Waterhouse* who, in sex-stereotypical terms, did not act like a woman.” *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004). Likewise, “[s]exual orientation discrimination also is sex discrimination because it necessarily involves discrimination based on gender stereotypes”—*i.e.*, the stereotype that men should only be sexually attracted to women and vice versa. *Baldwin v. Foxx*, EEOC Decision No. 0120133080, 2015 WL 4397641, at *7 (July 15, 2015). In many ways, same-sex sexual orientation “represents the ultimate case of failure to conform to gender stereotypes.” *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 346 (7th Cir. 2017) (en banc).

I. Discrimination On The Basis Of Transgender Status Or Sexual Orientation Is A Form Of Sex Discrimination Based On Sex Stereotyping.

Both experience and scholarly research in the field strongly support a legal rule that recognizes that Title VII's prohibition against decision-making infected by sex stereotyping necessarily encompasses discrimination based on either transgender status or sexual orientation. In the sections below, Legal Aid describes how the experiences of its own LGBT clients demonstrates the inevitable connection between discrimination on the basis of transgender status or sexual orientation and the social enforcement of sex-based norms, and then provides an overview of the relevant scholarly literature that contextualizes and reinforces those lived experiences.

A. The Experiences of Legal Aid's LGBT Clients Demonstrate The Inevitable Overlap Between Sex Stereotyping And Discrimination On the Basis of Transgender Status Or Sexual Orientation.

The necessary connection between sex stereotyping and transgender-status and sexual-orientation discrimination is part of daily life for LGBT Americans, as the experiences of Legal Aid's LGBT clients illustrate. These individuals have suffered discrimination repeatedly and continuously, from childhood—in the playground and at home—to adulthood and the workplace. And they report that they regularly have been targeted for discrimination on the basis of sex stereotyping.

Many of Legal Aid's LGBT clients experience sex-based discrimination in early childhood, well before most of them have even identified as LGBT. For example, H.M., a transgender Legal Aid client who was identified as male in childhood, recalls being bullied in elementary school for failing to meet masculine sex stereotypes. Her classmates regularly called her a "fucking faggot" and taunted her by telling her to engage in homosexual acts. H.M.'s mother, concerned that she was too effeminate, forced her to play football, and insisted to others that H.M. was not gay.

Legal Aid's LGBT clients report that as their gender and sexual identities develop and they enter adolescence, this sex-based discrimination only intensifies. C.L., a 14-year-old transgender Legal Aid client, reports that after she identified as a woman at age 10, her mother began calling her a "faggot" and "sissy," and admonished her that she should not wear girl's clothes because "boys don't do that." Because C.L. was subjected to constant physical and verbal bullying by her classmates—in addition to being assaulted, she was regularly told that she was "not a real girl," that she was "just pretending" to be a woman, that she was "making a bad image of a real woman," and that she was a "faggot"—she was granted an emergency safety-transfer to another school. Similarly, I.K., a 15-year-old in foster care who identifies as bisexual, reports being subjected to a "constant stream of hostile homophobic language" and physical abuse from his peers at a residential treatment center, who focused on his effeminate behavior. As a result of continuous verbal and physical abuse, I.K. suffers from anxiety, is worried to leave his foster home, and needs an adult escort.

Some of Legal Aid's LGBT adolescent clients have lost their homes as a result of sex-based discrimination. Z.G., a transgender client whose assigned sex at birth was female, recalls that his relationship with his mother began to deteriorate when he entered puberty and began dating girls. His mother began subjecting him to regular verbal abuse and would hit Z.G. when he "wasn't acting like a girl." His mother's boyfriend called him a "faggot" and derided him for being "a girl who likes girls." After a fight during which his mother's boyfriend punched him in the face, Z.G. was thrown out of his home. He now moves between the shelter system and the homes of friends and girlfriends. Z.G. has been unable to finish school because he was often bullied and subjected to violence as a "sis-sy." He continues to be mocked because of his transgender status, small stature, and higher voice, and he is threatened with sexual assault and rape when others perceive him to be "really a girl."

Z.G.'s experience is not uncommon. Many of Legal Aid's young LGBT clients have become homeless as a result of similar discrimination, and they report that they continue to suffer from harassment, physical abuse, and death threats in homeless shelters because of their sexual orientation or transgender status. When they attempt to report this mistreatment, many staff at the shelters tell them that they should be used to it, given that they are not "normal" men or women.

This sex-based discrimination extends to clients' experiences as adults in the workplace. One Legal Aid client, an openly gay man, reports that his supervisor told him at their first supervision meeting that she wanted "to address [him] like a man," so as to suggest that she would not otherwise because he is gay. When

the client later on confronted the supervisor about further hostile behavior, she responded by waving her hands flamboyantly, in supposed imitation of the client, despite the fact that the gestures are not characteristic of the client's behavior. Legal Aid has also represented lesbian clients who are discriminated against by supervisors on account of their purportedly masculine behavior, as well as transgender clients who have been targets for workplace abuse. One such client, H.M., whose childhood experiences with sex-based discrimination are recounted above, has repeatedly been treated as an object of curiosity and ridicule at work on account of her transgender status. Co-workers openly struggle to categorize H.M.'s sex, comment about her sex, and even try to photograph her without her permission.

The experiences of Legal Aid's LGBT clients vividly illustrate the connection between sex stereotyping and discrimination based on transgender status or sexual orientation. This sex-based discrimination begins when the clients are children and before they have formed their own transgender identity or sexual orientation. And it continues and intensifies through adolescence into adulthood and employment.

B. Social Science Research Further Confirms That Discrimination On The Basis Of Transgender Status Or Sexual Orientation Is Rooted In Sex Stereotypes.

The experiences of Legal Aid's LGBT clients are not merely isolated anecdotes. A significant body of scholarship further confirms the common thread running through those experiences: Both transgender-

status and sexual-orientation discrimination are ultimately rooted in sex stereotyping.⁶ And as the stories of Legal Aid’s clients indicate, the literature confirms that this sex-based homophobic and transphobic discrimination begins in childhood, well before most LGBT persons identify as such, and continues into adulthood and the workplace.

As the literature recounts, society continues to enforce certain sex-based rules and roles against those seen as deviating from the norm.⁷ And for their part, discriminators do not typically differentiate between

⁶ See, e.g., Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 UCLA L. Rev. 471, 498 (2001) (“The sociological claim is that laws that discriminate on the basis of sexual orientation disadvantage women as well as lesbians, gay men, and bisexuals because these laws perpetuate a social system in which women play different social roles than men. The theoretical claim is that these laws are justified by sexism.”); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. Rev. 197, 219 (1994) (“Laws that discriminate against gays rest upon a normative stereotype: the bald conviction that certain behavior—for example, sex with women—is appropriate for members of one sex, but not for members of the other sex.”); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 Wis. L. Rev. 187, 187 (1988) (“[C]ontemporary legal and cultural contempt for lesbian women and gay men serves primarily to preserve and reinforce the social meaning attached to gender.”).

⁷ See Cary L. Klemmer et al., *Socially Assigned Gender Nonconformity and School Violence Experience Among Transgender and Cisgender Adolescents*, J. of Interpersonal Violence (2019) at 1, 4 (“The adaptation of behavior to embody social roles perpetuates gender stereotypes and places pressure on individuals to conform. . . . [T]hose who are nonconforming to social gender norm expectations encounter more psychological . . . and physical violence than those who conform to widely held social expectations of gender expression.”).

notions of how a “man” should act and how a “straight” man should act.⁸ Instead, transgender-status and sexual-orientation discrimination “is often, if not always, motivated by a desire to enforce heterosexually defined gender norms. In fact, stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women.” *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 200-01 (2d Cir. 2017) (Katzmann, C.J., concurring).

The research of legal theorists, social scientists, and other practitioners familiar with LGBT issues demonstrates how children and adolescents have internalized these sex-based roles and begin policing others at a very young age, and identifies inextricable connections between homophobia, transphobia, and sexism that manifests in sex stereotyping. Bullying, including homophobic bullying, begins in early childhood, long before puberty or the emergence of sexuality.⁹ Thus, even before children may recognize their own sexual orientation or transgender status, their peers may use homophobic slurs to police behavior according to gender norms—precisely the kind of sex-based childhood bullying Legal Aid clients such as H.M. have reported.

⁸ *Id.* at 10 (reports from study on bullying of socially assigned gender non-conforming adolescents showed that a majority of youth bullied for gender non-conforming traits were cisgender and heterosexual). “Cisgender” denotes a person whose sense of personal identity and gender corresponds with the sex assigned to them at birth.

⁹ S. Alexandra Marshall & M. Kathryn Allison, *Midwestern Misfits: Bullying Experienced by Perceived Sexual and Gender Minority Youth in the Midwestern United States*, *Youth & Soc’y* 2019, Vol. 51(3), 318-338 (2019).

Indeed, “homophobia and homophobic language are central to shaping contemporary heterosexual masculine identities.”¹⁰ As social science research indicates, in the elementary school years, “children learn and invest in the rules of normative masculine and feminine performance” and then “learn to use these social norms to police one another and battle for social position.”¹¹ That is, “elementary schools are, in fact, significant social contexts for the gender socialization of children.”¹² Children learn “how to be a ‘boy’ or ‘girl’” and, what’s more, they “learn to interpret and enforce social rules for ‘correct’ gender expression” as “shaped by . . . heterosexual relationships and desire.”¹³ Because bullied children are too young to engage in same-sex sexual relationships, “[b]oys’ regular misogynistic teasing and sexual harassment of girls, girls’ verbal policing of one another’s appearance and sexual reputations, and boys’ frequent homophobic teasing are examples of verbal aggression that . . . police the boundaries of acceptable gender.”¹⁴

¹⁰ C.J. Pascoe, *Notes on a Sociology of Bullying: Young Men’s Homophobia as Gender Socialization*, QED: A J. in GLBTQ Worldmaking, “The End of Bullying?” (Fall 2013), at 87, 88.

¹¹ Melissa J. Smith et al., *Binaries and Biology: Conversations with Elementary Education Professionals After Professional Development on Supporting Transgender Students*, 80 *The Educ. F.* 34, 37 (2016).

¹² *Id.* (citations omitted).

¹³ *Id.*

¹⁴ Elizabeth Payne & Melissa Smith, *LGBTQ Kids, School Safety, and Missing the Big Picture: How the Dominant Bullying Discourse Prevents School Professionals from Thinking about Systemic Marginalization or . . . Why We Need to Rethink LGBTQ Bullying*, 1 QED: A J. in GLBTQ Worldmaking 1, 21 (2013).

Evidence suggests that those who present as perceived gender or sexual minorities in school (lesbian, gay, bisexual, transgender, “queer,” or questioning) “but are not ‘out’ to their peers” are bullied more than their “heteronormative peers,” in part because “bullying is attributed to this recognition of deviance” from social norms in general, and gender norms in particular.¹⁵ For example, one participant in a study of Midwestern youth who were perceived as sexual or gender minorities noted, “People call me a lesbian and a dike because I play football at my high school.”¹⁶ Another participant, who was bullied due to “perceived sexual orientation,” reported that he was able to avoid bullying by adapting his behavior “to appear ‘more masculine’ as he learned ‘to walk a different way’ and ‘talk a certain way.’”¹⁷ And another participant, who identifies as transgender male now but did not at the time he was bullied, recalled, “To avoid shame and bruises, I grew out my hair and wore girls’ clothes. I was very uncomfortable. In middle and the beginning of high school I didn’t know what LGBT meant.”¹⁸

Such school-aged bullying is “deeply entrenched in the perpetuation of cultural norms and values—significantly, those norms that require a fixed relationship between (hetero) gender, sex and sexuality and the maintaining of ‘gender coherence’ through this

¹⁵ Marshall & Allison, *supra* note 9, at 322, 326–27 (2019) (“As a result of this gender non-conformity, the participants reported that heteronormative peers often made insinuations about their sexual orientation.”).

¹⁶ *Id.*

¹⁷ *Id.* at 327.

¹⁸ *Id.* at 329.

‘constellation.’”¹⁹ “Those who most successfully conform to gender expectations are ‘celebrated’ in their peer groups and in school culture,” whereas “[y]oung people who are viewed as having an inadequate gender performance or gender characteristics or a gender identity not normatively associated with their biological sex are more violently and publicly ‘marked,’ and denied access to social power and popularity.”²⁰ Moreover, those who “adapt[] their behavior or appearance to fit in with the heteronormative standards of the dominant group” typically experience less bullying or harassment.²¹

Bullying driven by sex stereotyping continues into adolescence as sexuality emerges and most young adults come to recognize their sexual orientation. According to a 2019 survey of more than 35,000 LGBT-identified youth ages 13–24, 71% of LGBT youth experienced discrimination on account of their gender identity or sexual orientation, and 20% experienced physical harm like that reported by Legal Aid clients I.K. and Z.G. as a result of their gender identity or sexual orientation.²² The study further found that the rate of attempted suicide is more than double for those who have experienced discrimination or physical harm on account of their gender identity or sexual orientation, compared to those who have not.²³ A similar 2012 sur-

¹⁹ Payne & Smith, *supra* note 14, at 1, 21.

²⁰ *Id.* at 22.

²¹ Marshall & Allison, *supra* note 9, at 331.

²² *National Survey on LGBTQ Youth Mental Health 2019*, The Trevor Project (2019), at 1, 4, <https://bit.ly/2WvhDJm>.

²³ *Id.* at 4.

vey of more 10,000 LGBT youth ages 13-17 found that LGBT youth are more than two times as likely as non-LGBT youth to say they have been verbally harassed and called names, and physically assaulted, kicked, or shoved at school.²⁴ Ninety-two percent of respondents in the same survey “say they hear negative messages about being LGBT,”²⁵ and 21% identified school bullying as the most important problem they face (with 26% most worried about non-accepting families), while their peers worry about grades and college.²⁶ But such bullies may not even know the sexual orientation of their victims, and there is little reason to believe it would make a difference to them. Rather, “many youths do not disclose their sexual orientations or gender identities” as a result of “high levels of homophobic reprisal” including from peers, parents, and other authority figures.²⁷

Perhaps it is not surprising then that “a majority of peer-to-peer aggression in U.S. public schools is some form of *gender policing*,”²⁸ and student victims of LGBT harassment “are often targeted for ‘failing to conform to stereotypical notions of masculinity and

²⁴ *Growing Up LGBT in America*, Human Rights Campaign (2012), at 16, <http://www.hrc.org/youth-report>.

²⁵ *Id.* at 18.

²⁶ *Id.* at 2.

²⁷ Angela Irvine, “*We’ve Had Three of Them*”: *Addressing the Invisibility of Lesbian, Gay, Bisexual and Gender Non-Conforming Youths in the Juvenile Justice System*, 19 Colum. J. of Gender & L. 675, 677 (2010).

²⁸ Payne & Smith, *supra* note 14, at 25–26 (emphasis in original).

femininity.”²⁹ Specifically, “overt acts of violence against LGBTQ youth (or those who are perceived to be) are . . . explicit effects of heteronormative school cultures that . . . privilege idealized (hetero) gender performances and create social benefits for peer-to-peer policing of non-normative sexualities and genders.”³⁰ One researcher reported the following remarks and social media posts from young men: “Since you were little boys you’ve been told, ‘hey, don’t be a little faggot.’ . . . Fag, seriously, it has nothing to do with sexual preference at all. . . . [A] faggot isn’t gay; its someone who acts like a woman.”³¹ Accordingly, “patterns of targeting indicate that youths’ understanding (and marking) of their LGBTQ and gender nonconforming peers is not based solely on sexual orientation, but rather from judgments about perceived tendencies to engage in forms of expression that run counter to gender conventions.”³²

Childhood bullying dynamics on these dimensions extend into adulthood.³³ “Gender norms start at an

²⁹ Melissa J. Smith & Elizabeth Payne, *Educator Evaluations of School Climate for LGBTQ Students: A Reiteration of the Bullying Discourse*, in *LGBTQ Voices in Education: Change the Culture of Schooling* 73, 73 (Veronica E. Bloomfield & Marni E. Fisher, eds., 2015) (citation omitted).

³⁰ *Id.* at 74 (citation omitted). The term “LGBTQ” used in the article refers to the categories of lesbian, gay, bisexual, transgender, and “queer” or “questioning.” The “Q” is added to refer to a broad range of identities that fall outside of societal norms concerning gender or sexual identity.

³¹ Pascoe, *supra* note 10, at 91–92 (emphasis added).

³² Payne & Smith, *supra* note 14 at 22 (quotation omitted).

³³ See Zachary A. Kramer, *The Ultimate Gender Stereotype: Equalizing Gender-Conforming and Gender-Nonconforming Homosexu-*

early age. The result is gay men and women are often discriminated against because of rejection of the traditional male and female roles.”³⁴ As students move from the schoolyard to the workplace, employment discrimination like that reported by Legal Aid’s LGBT clients takes the place of such bullying.³⁵ And in that context, as the experiences of Legal Aid’s clients bear out, sex stereotyping remains at the core of homophobic or transphobic workplace discrimination.³⁶ No

als Under Title VII, 2004 U. Ill. L. Rev. 465, 486–97 (2004) (discussing the nature of gender stereotypes in gay people); Anthony E. Varona et al., *En/Gendering Equality: Seeking Relief Under Title VII Against Employment Discrimination Based on Sexual Orientation*, 7 Wm. & Mary J. Women & L. 67, 84 (2000) (“[G]ay people, simply by identifying themselves as gay, are violating the ultimate gender stereotype—heterosexual attraction.”); Michael J. Higdon, *To Lynch a Child: Bullying and Gender Nonconformity in Our Nation’s Schools*, 86 Ind. L.J. 827, 836–43 (2011) (summarizing an extensive body of social science research to demonstrate the significant role that traditional gender stereotypes play in chronic childhood bullying).

³⁴ Major Velma Cheri Gay, *50 Years Later ... Still Interpreting the Meaning of “Because of Sex” Within Title VII and Whether It Prohibits Sexual Orientation Discrimination*, 73 A. F. L. Rev. 61, 98 (2015).

³⁵ See Ilan H. Meyer, *Experiences of Discrimination among Lesbian, Gay and Bisexual People in the US*, Williams Institute (2019) (“[A study from 2018] show[s] that compared to their heterosexual cisgender peers, LGB cisgender people are significantly more likely to report experiences of discrimination at work and when seeking housing. They were also more likely to report being bullied often in their youth.”).

³⁶ See Ken Corbett, *Faggot=Loser*, 2 Studies in Gender and Sexuality 2(1): 3–28 (2001) (discussing how homophobic harassment is equally rooted in definitions of masculinity as gay fear); Michael S. Kimmel, *Masculinity as Homophobia: Fear, Shame, and Silence*

matter how otherwise gender conforming a LGBT employee may appear to be, sex stereotyping remains bound up inextricably with the homophobic and transphobic discrimination that LGBT individuals encounter in the workplace.

II. Attempts To Distinguish Between Sex Stereotyping And Transgender-Status Or Sexual-Orientation Discrimination Lead To Absurd Results.

The history of Title VII litigation over the past several decades since *Price Waterhouse* further underscores the inextricable connection between sex stereotyping and discrimination on the basis of transgender status and sexual orientation. Attempts by some lower courts to distinguish between these overlapping forms of sex discrimination have proven completely unworkable, forcing courts to attempt to make distinctions between varieties of sex stereotyping that can only be described as arbitrary. This litigation experience further supports recognizing that Title VII's ban on discrimination based on sex prohibits discrimination on the basis of transgender status and sexual orientation, because it shows that attempts to limit the holding of *Price Waterhouse* to somehow exclude these forms of discrimination leads to "illogical" doctrinal distinctions and "untenable results." *Zarda*, 883 F.3d at 122 (citations omitted).

As summarized by the panel decision in *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 830 F.3d 698, 705 (7th Cir. 2016), for years, lower "courts [applying Title VII]

in the Construction of Gender Identity, 33 Readings For Diversity and Social Justice, 213-19 (2001) (same).

have been haphazardly, and with limited success, trying to figure out how to draw the line between” sex-stereotyping claims, on the one hand, and transgender-status or sexual-orientation claims, on the other. Such courts generally used two different approaches, but neither is consistent with the statute or this Court’s precedent.

First, some courts have struggled to “tease [transgender-status or sexual-orientation and sex-stereotyping evidence] apart” in order to isolate “only ... those portions of the claim that appear to address cognizable gender non-conformity discrimination.” *Hively*, 830 F.3d at 708; *see also Kay v. Indep. Blue Cross*, 142 F. App’x 48, 51 (3d Cir. 2005) (Rendell, J., concurring) (“The line between discrimination based upon gender stereotyping and that based upon sexual orientation is difficult to draw and in this case some of the complained of conduct arguably fits within both rubrics.”); *Schroer v. Billington*, 577 F. Supp. 2d 293, 305 (D.D.C. 2008) (“What makes [plaintiff’s] sex stereotyping theory difficult is that, when the plaintiff is transsexual, direct evidence of discrimination based on sex stereotypes may look a great deal like discrimination based on transsexuality itself . . .”). In doing so, courts have often been forced to “resort[] to lexical bean counting, comparing the relative frequency of epithets such as ‘ass wipe,’ ‘fag,’ ‘gay,’ ‘queer,’ ‘real man,’ and ‘fem’ to determine whether discrimination is based on sex or sexual orientation.” *Zarda*, 883 F.3d at 121–22 (collecting cases).

The resulting differences in outcomes can be truly head scratching, producing inexplicable variations even within the same circuit. For example, if a plaintiff presents evidence that he was subject to a hostile

work environment because he experienced sustained harassment by co-workers who told him he “looks like a faggot” and “his hair looks gay,” has he been subjected to discrimination only on the basis of his perceived sexual orientation, or has he also been the victim of sex stereotyping?³⁷ Does the answer change depending on whether the employee actually is gay? What about a male employee who is taunted both for being gay and for being “effeminate”?³⁸ There are no good answers

³⁷ Compare, *Coleman v. Caritas*, No. 16-3652, 2017 WL 2423794, at *1-2 (E.D. Pa. June 2, 2017) (dismissing a claim based on such evidence because it supposedly could only support a claim based on sexual-orientation discrimination), with *Senegal v. Yum! Brands, Inc.*, No. H-18-1734, 2019 WL 448943, at *5 (S.D. Tex. Feb. 5, 2019) (“[A]lthough the manager’s use of the term ‘fa—ot’ could have referred to [the plaintiff’s] sexual orientation . . . the manager could have used the term simply because the manager believed [the plaintiff’s] voice was not ‘manly’ enough.”), *Burnett v. Union R.R. Co.*, No. 17-101, 2017 WL 2731284, at *4 (W.D. Pa. June 26, 2017) (sustaining as cognizable sex-stereotyping claim allegations that employee had been called homophobic slurs and subject to harassment because he was perceived as gay), and *McMullen v. So. Cal. Edison*, No. EDCV 08-957-VAP, 2008 WL 4948664, at *6–7 (C.D. Cal. Nov. 17, 2008) (same).

³⁸ Compare, e.g., *Kay*, 142 F. App’x. at 51 (holding that because coworkers’ taunts that the plaintiff was “not a real man” were mixed with homophobic remarks, the plaintiff’s claim was improperly “based upon discrimination that is motivated by perceived sexual orientation”), and *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 257 & n.1 (1st Cir. 1999) (affirming the dismissal of a complaint alleging death threats, physical assault, and mockery from coworkers “using high-pitched voices or gesturing in a stereotypical way” because the plaintiff had used evidence that co-workers mocked his “supposedly effeminate characteristics . . . only as an example of discrimination because of sexual orientation”), with *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 287, 291 (3d Cir. 2009) (sustaining Title VII claim at summary judg-

because these are not good questions. Rather, as courts faced with such inquiries have recognized, the overall “lesson imparted by th[is] body of Title VII litigation” is “that no coherent line can be drawn between these ... sorts of claims.” *Christiansen v. Omnicom Grp., Inc.*, 167 F. Supp. 3d 598, 620 (S.D.N.Y. 2016); *see also Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1159 (C.D. Cal. 2015) (concluding that “the distinction” between such claims “is illusory and artificial”). Asking courts to draw such lines invites arbitrary and unfair results.

Second, faced with the impossible task of distinguishing between these overlapping legal theories, some courts have just given up, “throw[ing] out the baby with the bathwater” by rejecting Title VII claims anytime there is a hint that discrimination was motivated by transgender status or sexual orientation. *See Hively*, 830 F.3d at 706–08 (collecting cases). For example, in *Vickers v. Fairfield Medical Center*, 453 F.3d 757 (6th Cir. 2006), the plaintiff alleged that “he was discriminated against because his harassers objected to ‘those aspects of homosexual behavior in which a male participant assumes what Appellees perceive as a traditionally female-or less masculine-role,’” *id.* at 763. Yet despite the plaintiff’s “detailed” allegations that the defendants had “question[ed] his masculinity,” the Sixth Circuit affirmed dismissal of the complaint on the theory that “recognition of [plaintiff’s] claim would have the effect of *de facto* amending Title VII to encompass sexual orientation as a prohibited basis for discrimination.” *Id.* at 764. In other words, even as it

ment stage in case brought by plaintiff who was called “Princess” and “Rosebud” and, after being outed as gay, a “faggot”).

maintained the distinction between sexual-orientation and sex-stereotyping claims, the court admitted that the distinction was artificial. *See id.*; *see also Dawson v. Bumble & Bumble*, 398 F.3d 211, 213, 217–23 (2d Cir. 2005) (affirming grant of summary judgment against plaintiff who had alleged discrimination for “not conform[ing] to gender norms in that she does not meet stereotyped expectations of femininity and may be perceived as more masculine than a stereotypical woman,” because she had “conflat[ed]” sexual-orientation and sex-stereotyping claims).

But this second approach to the problem is completely unprincipled. There is no legal justification for holding that individuals lose the protections afforded by Title VII against adverse employment actions based on gender merely because, in their case, the particular stereotype can be given another label—*i.e.*, one rooted in stereotypes about transgender status or sexual orientation. *See Smith*, 378 F.3d at 575 (“Sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as ‘transsexual,’ is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.”); *Hively*, 853 F.3d at 350 (“It would require considerable calisthenics to remove ‘sex’ from ‘sexual orientation.’”).

The solution is for this Court to reject an approach to Title VII that requires lower courts to make angels-on-the-head-of-a-pin distinctions between related forms of discrimination based on sex stereotypes. This Court has recognized that “[w]e need not leave our common sense at the doorstep when we interpret” Title VII. *Price Waterhouse*, 490 U.S. at 241. The Court should

apply such common sense here, as informed by the lived experience of members of the LGBT community and social science scholarship, to recognize that because “Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes,” *id.* at 251 (citation omitted), Title VII necessarily prohibits discrimination on the basis of transgender status or sexual orientation.

CONCLUSION

The Court should hold that Title VII’s prohibition on discrimination “because of . . . sex” encompasses discrimination against employees because of their transgender status or sexual orientation, and should affirm the judgments of the Second and Sixth Circuits and reverse the judgment of the Eleventh Circuit.

Respectfully submitted.

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