No. 15-15234

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JAMEKA K. EVANS,

Plaintiff - Appellant,

v.

GEORGIA REGIONAL HOSPITAL, et al.,

Defendants - Appellees.

On Appeal from the United States District Court
for the Southern District of Georgia, No. 4:15-cv-00103-JRH-GRS
The Honorable J. Randal Hall

CORRECTED MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION; ACLU OF GEORGIA; 9to5, NATIONAL ASSOCIATION OF WORKING WOMEN; A BETTER BALANCE; CALIFORNIA WOMEN'S LAW CENTER; COALITION OF LABOR UNION WOMEN; EQUAL RIGHTS ADVOCATES; GENDER JUSTICE; LEGAL VOICE; NATIONAL ASSOCIATION OF WOMEN LAWYERS; NATIONAL ORGANIZATION FOR WOMEN FOUNDATION; NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES; NATIONAL WOMEN'S LAW CENTER; SOUTHWEST WOMEN'S LAW CENTER; WOMEN EMPLOYED; WOMEN'S LAW CENTER OF MARYLAND, INC.; and WOMEN'S LAW PROJECT IN SUPPORT OF PLAINTIFF-APPELLANT'S PETITION FOR REHEARING EN BANC

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Cir. R. 26.1-1, *amici curiae* hereby state that the Certificate of Interested Persons and Corporate Disclosure Statement filed by Plaintiff-Appellant with her Petition for Rehearing En Banc was complete, with the exception of the following persons or entities:

American Civil Liberties Union, *amicus curiae*

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California Women's Law Center, *amicus curiae*

Coalition of Labor Union Women, *amicus curiae*

Equal Rights Advocates, *amicus curiae*

Gender Justice, *amicus curiae*

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Southwest Women's Law Center, *amicus curiae*

Women Employed, *amicus curiae*

Women's Law Center of Maryland, Inc., *amicus curiae*

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Dated: April 13, 2017

s/ Lenora M. Lapidus

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MOTION

Pursuant to Rule 29(b)(2) of the Federal Rules of Appellate Procedure and 11th Cir. R. 29-3, the American Civil Liberties Union; ACLU of Georgia; 9to5, National Association of Working Women; A Better Balance; California Women's Law Center; Coalition of Labor Union Women; Equal Rights Advocates; Gender Justice; Legal Voice; National Association of Women Lawyers; National Organization for Women Foundation; National Partnership for Women & Families; National Women's Law Center; Southwest Women's Law Center; Women Employed; Women's Law Center of Maryland, Inc.; and Women's Law Project move for leave to file the attached *amici curiae* brief in support of Plaintiff-Appellant's petition for rehearing en banc.

1. The ACLU Foundation of Georgia is the Georgia affiliate of the American Civil Liberties Union (ACLU), a nationwide, nonprofit, nonpartisan organization with over one million members dedicated to defending the principles embodied in the Constitution and our nation's civil rights laws. The ACLU Foundation of Georgia has more than 22,000 members and supporters throughout Georgia.

2. Proposed *amici curiae* are well positioned to submit an *amicus* brief in this case. *Amici* are a coalition of civil rights groups and public interest organizations committed to preventing, combating, and redressing sex

discrimination and protecting the equal rights of women in the United States. *Amici* have a vital interest in ensuring that Title VII of the Civil Rights Act of 1964's promise of equal employment opportunity effectively protects all people from invidious discrimination "because of sex."

3. The ACLU and the ACLU of Georgia have long fought to ensure the equal rights of women and LGBT people. *See Obergefell v. Hodges*, 125 S. Ct. 2584 (2015) (holding that the Constitution guarantees the fundamental right to marry to same-sex couples); *United States v. Windsor*, 133 S. Ct. 2675 (2013) (holding that the federal government cannot discriminate against married same-sex couples for the purpose of determining federal benefits and protections); *White Cty. High Sch. Peers Rising in Diverse Educ. v. White Cty. Sch. Dist.*, No. 2:06-CV-29-WCO, 2006 WL 1991990 (N.D. Ga. July 14, 2006) (granting preliminary injunction in favor of students who sought to form a Gay-Straight Alliance club). Through its Women's Rights Project, co-founded in 1972 by Ruth Bader Ginsburg, the ACLU has been a leader in legal advocacy aimed at ensuring sex equality, and has participated as counsel or *amicus* in virtually every Supreme Court case interpreting Title VII's sex discrimination provision. *See, e.g.*, *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338 (2015) (failure to accommodate physical effects of pregnancy on same basis as other medical conditions violates Title VII); *United Auto Workers v. Johnson Controls, Inc.*, 499 U.S. 187 (1991) (finding

discriminatory employer's "fetal protection" policy banning fertile women from lead-exposed jobs); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (adverse action premised on employee's failure to conform to sex stereotype constitutes sex discrimination); *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (striking height and weight requirements for Alabama prison guards that had unlawful disparate impact on women).

4. **9to5, National Association of Working Women** is a 43-year-old national membership organization of women in low-wage jobs dedicated to achieving economic justice and ending discrimination. **A Better Balance** is a national legal advocacy organization dedicated to promoting fairness in the workplace and helping employees meet the conflicting demands of work and family. **California Women's Law Center** (CWLC) is a statewide, nonprofit law and policy center dedicated to advancing the civil rights of women and girls through impact litigation, advocacy and education. The **Coalition of Labor Union Women** is the national women's organization within the labor movement which is leading the effort to empower women in the workplace, advance women in their unions, encourage political and legislative involvement, organize women workers into unions and promote policies that support women and working families. **Equal Rights Advocates** is a national non-profit legal organization dedicated to protecting and expanding economic and educational access and opportunities for

women and girls. **Gender Justice** is a nonprofit advocacy organization based in the Midwest that works to eliminate gender barriers based on sex, sexual orientation, gender identity, or gender expression. **Legal Voice** is a nonprofit public interest organization in the Pacific Northwest that works to advance the legal rights of women and girls through litigation, legislation, and public education on legal rights. The **National Association of Women Lawyers** is the oldest women's bar association in the United States and the leading national voluntary organization devoted to the interests of women lawyers and women's rights. The **National Organization for Women (NOW) Foundation** is a 501(c)(3) entity affiliated with the National Organization for Women, the largest grassroots feminist activist organization in the United States with chapters in every state and the District of Columbia. The **National Partnership for Women & Families** (formerly the Women's Legal Defense Fund) is a national advocacy organization that develops and promotes policies to help achieve fairness in the workplace, reproductive health and rights, quality health care for all, and policies that help women and men meet the dual demands of work and family. The **National Women's Law Center** is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's legal rights and opportunities since its founding in 1972. The **Southwest Women's Law Center** (SWLC) is a legal, policy and advocacy law center that utilizes law, research and creative

collaborations to create opportunities for women and girls in New Mexico to fulfill their personal and economic potential. **Women Employed**'s mission is to improve the economic status of women and remove barriers to economic equity. The **Women's Law Center of Maryland, Inc.** is a nonprofit, membership organization established in 1971 with a mission of improving and protecting the legal rights of women, particularly regarding gender discrimination, employment law, family law, and reproductive rights. The **Women's Law Project** is a non-profit, Pennsylvania-based women's legal advocacy organization whose mission is to create a more just and equitable society by advancing the rights and status of all women throughout their lives.

5. The proposed brief would aid this Court by supplementing Plaintiff-Appellant's argument that Title VII prohibits discrimination on the basis of sexual orientation by situating the issue within the history of the Supreme Court's expansive interpretation of what constitutes discrimination "because of sex."

6. Proposed *amici curiae* have contacted the parties' counsel, and all active participants in the case consent to the filing of the attached *amici curiae* brief. The filing of this brief will neither delay these appellate proceedings nor unduly prejudice any party.

WHEREFORE, proposed *amici curiae* respectfully request that this Court grant this motion for leave to file the attached brief in support of Plaintiff-Appellant's petition for rehearing en banc.

Dated: April 13, 2017

Respectfully submitted,

s/ Lenora M. Lapidus

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CERTIFICATE OF COMPLIANCE

1. This motion complies with the length limitation of Fed. R. App. P. 27(d)(2) because it contains 1,101 words, excluding the parts of the motion exempted by Fed. R. App. P. 27(a)(2)(B).

2. This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman type style.

Dated: April 13, 2017

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CERTIFICATE OF SERVICE FOR ELECTRONIC FILINGS

I hereby certify that on April 13, 2017, I electronically filed the foregoing Motion of American Civil Liberties Union; ACLU of Georgia; 9to5, National Association of Working Women; A Better Balance; California Women's Law Center; Coalition of Labor Union Women; Equal Rights Advocates; Gender Justice; Legal Voice; National Association of Women Lawyers; National Organization for Women Foundation; National Partnership for Women & Families; National Women's Law Center; Southwest Women's Law Center; Women Employed; Women's Law Center of Maryland, Inc.; and Women's Law Project for Leave to File an *Amici Curiae* Brief in Support of Plaintiff-Appellant's Petition for Rehearing En Banc with the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Lenora M. Lapidus

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Women's Law Center of Maryland, Inc., *amicus curiae*

Women's Law Project, *amicus curiae*

Dated: April 10, 2017

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STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court of the United States and the following precedent of this circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court: *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); and *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011). I express a belief, based on a reasoned and studied professional judgment, that this appeal involves the following question of exceptional importance: Whether employers are free to discriminate against lesbian, gay, and bisexual people without violating Title VII's prohibition against discrimination "because of sex."

Dated: April 10, 2017

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STATEMENT OF THE ISSUE

Whether the panel erred in following a 1979 decision of the former Fifth Circuit that "discharge for homosexuality is not prohibited" notwithstanding Title VII's prohibition against discrimination "because of sex."

INTERESTS OF *AMICI CURIAE*[1]

Amici are a coalition of civil rights groups and public interest organizations committed to preventing, combating, and redressing sex discrimination and protecting the equal rights of women in the United States. More detailed statements of interest are contained in the accompanying appendix.

STATEMENT OF THE FACTS

The facts are adequately set forth in the panel opinion.

ARGUMENT AND AUTHORITIES

This appeal presents the momentous issue of whether employers are free to discriminate against lesbian, gay, and bisexual people without violating Title VII's prohibition against discrimination "because of sex." Initially, Title VII was a vehicle for striking down employer policies and practices that literally excluded

[1] Pursuant to Rule 29(b)(4) of the Federal Rules of Appellate Procedure and 11th Cir. R. 29-2, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and that no person other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. This brief is filed with the consent of all parties.

women. It soon became clear, however, that discrimination "because of sex" means much more than getting rid of "men only" signs (or, for that matter, "women only" signs). Sex discrimination occurs whenever an employer takes an employee's sex into account when making an adverse employment decision. Courts have applied this principle to countless forms of employer bias, from cases involving a ban on hiring mothers of preschool-aged children to the failure to promote a Big Eight accounting firm partnership candidate because she was "macho." Time and again, courts have refused to allow generalizations about men and women – or about certain types of men and women – to play any role in adverse employment decisions.

This rich history of courts' interpretations of Title VII, in addition to the reasons stated by Plaintiff-Appellant, inform why discrimination against lesbian, gay, and bisexual employees is discrimination "because of sex." Indeed, many of the rationales now advanced by employers to exclude lesbian, gay, and bisexual employees from Title VII were also made by employers, and rejected by the courts, in cases involving equal opportunity for women.

This case presents an opportunity for the Court to correct its outdated and unworkable interpretation of Title VII's prohibition against sex discrimination. In 1979, a panel of the former Fifth Circuit held in *Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979), that employment discharge on the basis of sexual orientation is

not prohibited by Title VII. But the Supreme Court subsequently held that employment decisions on the basis of sex stereotyping plainly violate Title VII. *See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Sex stereotyping encompasses discrimination on the basis of sexual orientation, as a number of courts have found in the years since *Price Waterhouse*. Continued reliance on *Blum*'s outdated categorical exclusion has led to cramped attempts to distinguish between sex stereotyping that does not implicate sexual orientation, which is prohibited by Title VII, and sex stereotyping that relates to an employee's sexual orientation, as the Seventh Circuit recently concluded in an *en banc* decision revisiting – and reversing – pre-*Price Waterhouse* decisions. *See Hively v. Ivy Tech. Cmty. Coll. of Ind.*, No. 15-1720, 2017 WL 1230393 (7th Cir. Apr. 4, 2017) (*en banc*). This Court should now hold, as the *en banc* Seventh Circuit, federal district courts, and administrative agencies have done, that there is no coherent line between such forms of sex stereotyping discrimination and that sexual orientation discrimination is discrimination "because of sex."

I. Since Title VII's enactment, courts consistently have adopted an expansive interpretation of what constitutes discrimination "because of sex."

This Court should revisit the former Fifth Circuit's decision in *Blum v. Gulf Oil Corp.* that discrimination on the basis of sexual orientation is not sex-based discrimination prohibited by Title VII. In doing so, this Court should take into

account the Supreme Court's expansive interpretation of the phrase "because of sex" during the past fifty years.

Title VII of the Civil Rights Act of 1964 forbids employers from making adverse decisions about hiring, firing, or the terms and conditions of employment because of sex. 42 U.S.C. § 2000e-2(a)(1). Unlike the prohibition against discrimination because of race, the prohibition against discrimination because of sex was added to the bill at the last minute, with few hours of floor debate and without congressional hearings. 110 Cong. Rec. 2577-84 (1964).

Since Title VII's enactment, this sparse record has been invoked to justify limiting Title VII's coverage solely to barriers that explicitly disadvantage women. Indeed, many have presumed that such distinctions were the only kind of discrimination "because of sex" that concerned legislators in 1964. This interpretation is simply incorrect. As one prominent scholar has explained: "Contrary to what courts have suggested, there was no consensus among legislators in the mid-1960s that the determination of whether an employment practice discriminated on the basis of sex could be made simply by asking whether an employer had divided employees into two groups perfectly differentiated along biological sex lines." Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307, 1320, 1328 (2012).

Given this history, it was left largely to the judiciary to define "because of sex." Courts have interpreted the plain meaning of Title VII's prohibition against sex discrimination to cover a wide range of employer assumptions about women and men alike. As the Supreme Court said nearly forty years ago, "'[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." *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978) (internal citation omitted). The half-century of precedent has dismantled not just distinctions *between* men and women, but also those *among* men and *among* women – distinctions that for generations had confined individuals to strict sex roles at work, and in society.

In *Price Waterhouse*, the Supreme Court famously held that when an employer relies on sex stereotypes to deny employment opportunities, it acts "because of sex." The Court considered the Title VII claim of Ann Hopkins, who was denied promotion to partner because she was deemed "macho." 490 U.S. at 235. To be promoted, Hopkins was told to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.*

Price Waterhouse confirms that employees who fail to conform to all manner of sex stereotypes are protected by Title VII, and the stereotype concerning

to whom men and women "should" be romantically attracted is encompassed within this principle. Ann Hopkins's case was hardly the only instance in which an employer's stereotype-based decision-making was found to violate Title VII. Quite the opposite.

Among the earliest Title VII cases were those addressing – and disapproving of – the literal exclusion of women from employment because of longstanding assumptions about the kinds of jobs for which women (and men) were suited – physically, temperamentally, and even morally. Prior to Title VII's enactment, it was routine for newspapers to separate "help wanted" advertisements into "male" and "female" sections, but the EEOC and courts found that practice illegal under the new law. *See Am. Newspaper Publishers Ass'n v. Alexander*, 294 F. Supp. 1100 (D.D.C. 1968). Indeed, Title VII was enacted at a time when the workforce was divided into "women's jobs" and "men's jobs," stemming largely from state "protective laws" restricting women's access to historically male-dominated fields, but also from the resulting cultural attitudes about the sexes' respective abilities and preferences. Just as sex-specific job listings were found to violate Title VII, so too were a variety of other policies and practices that had the purpose or effect of judging employees by sex and not qualifications. *See, e.g.*, *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971) (finding airline's women-only rule for flight attendants unlawful discrimination); *Weeks v. S. Bell Tel. & Tel. Co.*, 408

F.2d 228 (5th Cir. 1969) (prohibiting employer policy against women working as switchmen on grounds that job required heavy lifting). The Supreme Court ultimately ruled that the use of physical criteria that disproportionately exclude women applicants violate Title VII if they are premised on the flawed assumption that "bigger is better" for dangerous jobs. *See Dothard v. Rawlinson*, 433 U.S. 321 (1977).

The prohibition against discrimination "because of sex" has long been understood to ban discrimination against men as well, even though discrimination against men was not specifically discussed during the little floor debate prior to Title VII's passage. As the Supreme Court noted, "[p]roponents of the legislation stressed throughout the debates that Congress had always intended to protect *all* individuals from sex discrimination in employment." *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 681 (1983).

Title VII's prohibition against sex discrimination also has been read to forbid discrimination against subsets of employees of a particular gender, even where other members of that gender were treated favorably, recognizing the diverse forms of sex-based bias that are impermissible under Title VII. *See, e.g.*, *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (*per curiam*) (invalidating employer's ban on hiring mothers of preschool-aged children, despite high hiring rates of women generally); *Jefferies v. Harris Cty. Cmty. Action Ass'n*, 693 F.2d

589 (5th Cir. 1982) (Black woman could bring sex-based Title VII claim despite evidence that employer treated white females favorably); *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir. 1971) (airline's policy of employing only unmarried female flight attendants violated Title VII).

The initial rejection and later recognition of sexual harassment as sex discrimination offers another useful lens into courts' ever-widening understanding of discrimination "because of sex." Initially, judges wrote off adverse employment actions against women who had spurned their supervisors' advances as "controvers[ies] underpinned by the subtleties of an inharmonious personal relationship." *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); *see, e.g.*, *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163 (D. Ariz. 1975) (supervisor's sexual harassment was motivated not by plaintiff's sex but by a "personal proclivity, peculiarity or mannerism"), *rev'd*, 562 F.2d 55 (9th Cir. 1977). These courts buttressed their narrow readings of Title VII by referencing the limited debate that preceded Congress's addition of the sex provision. *See, e.g.*, *Corne*, 390 F. Supp. at 163.

The jurisprudential tide began to turn in the late 1970s (as evidenced in part by the appellate reversals of the above-cited decisions), and in 1980 the EEOC updated its Guidelines on Discrimination Because of Sex to declare that sexual

harassment of a female employee could not be disentangled from her sex. 29 C.F.R. § 1604.11(a) (1980). The 1980 Guidelines recognized that it is not "personal" to disadvantage a female employee because of her supervisor's sexual conduct toward her; it is illegal.

The Supreme Court continued this evolution in 1986, when it ruled that severe or pervasive conduct that creates a sexually hostile work environment violates Title VII by altering the "terms, conditions, or privileges" of employment. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 63-67 (1986). The *Vinson* Court furthermore took it as a given that sexual harassment was sex discrimination; its analysis centered on whether a plaintiff's "voluntary" acquiescence to sexual demands and her failure to lodge a formal complaint negated her Title VII claim. As the Court put it, "[*w*]ithout *question*, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." *Id.* at 64 (emphasis added).

Roughly a decade later, the Court extended *Vinson* – unanimously – to encompass same-sex sexual harassment, even though "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII." *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998). In so doing, the Court reaffirmed the straightforward test for whether discrimination had occurred: whether the conduct at issue met Title

VII's "statutory requirements," *i.e.*, whether the harassment occurred because of the employee's sex. *Id.* at 80. As explained below, the same straightforward test applies to discrimination against lesbian, gay, and bisexual employees.

II. *Blum* should be reconsidered in light of the Supreme Court's expansive interpretation of discrimination "because of sex."

Blum was wrongly decided because it ignored the meaning of sex discrimination discussed above. This Court should now revisit that decision in light of the history of Title VII jurisprudence, which makes plain that the prohibition against sex discrimination protects all employees, including lesbian, gay, and bisexual people. Employers who take sexual orientation into account necessarily take sex into account, because sexual orientation turns on one's sex in relation to the sex of people to whom one is attracted. *See, e.g.*, *Isaacs v. Felder Servs., LLC*, 143 F. Supp. 3d 1190, 1193-94 (M.D. Ala. 2015). And bias against lesbian, gay, and bisexual people turns on the sex-role expectation that women should be attracted to only men (and not women) and vice versa. *See, e.g.*, *Videckis v. Pepperdine Univ.*, 100 F. Supp. 3d 927, 936 (C.D. Cal. 2015). There is no principled reason to create an exception from Title VII for sex discrimination that involves sexual orientation, as the *en banc* Seventh Circuit, the EEOC, a growing number of district courts, and the dissenting judge here recognized. *See Hively*, 2017 WL 1230393; *see generally* Br. of Amicus Curiae EEOC, *Evans v. Ga. Reg'l Hosp.*, No. 15-15234 (11th Cir. Jan. 11, 2016). While the panel felt

constrained to follow *Blum*'s flawed analysis, Plaintiff-Appellant's petition for rehearing presents an opportunity to correct that decision's erroneous reasoning.

Furthermore, the underpinning of *Blum* is utterly weak: *Blum* relied wholly on *Smith v. Liberty Mutual Insurance Co.*, 569 F.2d 325 (1978), which in turn relied on *Willingham v. Macon Telegraph Publishing Co.*, 507 F.2d 1084 (5th Cir. 1975) (*en banc*), a decision that did not involve sexual orientation discrimination. Rather, *Willingham* involved a male plaintiff whose employment application was rejected because he wore long hair. In ruling that the male applicant did not have a Title VII claim, the former Fifth Circuit concluded: "We perceive the intent of Congress to have been the guarantee of equal job opportunity for males and females." *Id.* at 1090. At that time, *Price Waterhouse* had not yet been decided.

Today, however, it is beyond cavil that *Willingham*'s narrow interpretation of Title VII is inconsistent with *Price Waterhouse*, in which the Supreme Court held that sex means *more than* the fact of being a man or a woman and encompasses the full range of gender expression in the workplace. *See Glenn v. Brumby*, 663 F.3d 1312, 1318 n.5 (11th Cir. 2011) (*Price Waterhouse* has "eviscerated" the notion that Title VII does not protect gender non-conformity).

This Court should no longer adhere to pre-*Price Waterhouse* precedent and reasoning but rather should apply the principles mandated by the Supreme Court to determine whether sexual orientation claims are covered by Title VII. For the

reasons discussed above, applying those principles leads to the straightforward conclusion that sexual orientation discrimination is a form of sex discrimination prohibited by Title VII.

CONCLUSION

This Court should rehear the case en banc and hold that sexual orientation discrimination is sex discrimination prohibited by Title VII.

Dated: April 10, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the length limitation of Fed. R. App. P. 28(b)(4) because it contains 2,589 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman type style.

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CERTIFICATE OF SERVICE FOR ELECTRONIC FILINGS

I hereby certify that on April 10, 2017, I electronically filed the foregoing Brief of *Amici Curiae* American Civil Liberties Union; ACLU of Georgia; 9to5, National Association of Working Women; A Better Balance; California Women's Law Center; Coalition of Labor Union Women; Equal Rights Advocates; Gender Justice; Legal Voice; National Association of Women Lawyers; National Organization for Women Foundation; National Partnership for Women & Families; National Women's Law Center; Southwest Women's Law Center; Women Employed; Women's Law Center of Maryland, Inc.; and Women's Law Project in Support of Plaintiff-Appellant's Petition for Rehearing En Banc with the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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APPENDIX: INTERESTS OF *AMICI CURIAE*

The **American Civil Liberties Union** is a nationwide, nonprofit, nonpartisan organization with over one million members dedicated to defending the principles embodied in the Constitution and our nation's civil rights laws. The ACLU has long fought to ensure that lesbian, gay, bisexual, and transgender people are treated equally and fairly under law. The **ACLU of Georgia** is one of the ACLU's statewide affiliates with more than 22,000 members and supporters throughout Georgia.

9to5, National Association of Working Women is a 44 year-old national membership organization of women in low-wage jobs dedicated to achieving economic justice and ending all forms of discrimination. Our membership includes transgender individuals. 9to5 has a long history of supporting local, state and national measures to combat discrimination. The outcome of this case will directly affect our members' and constituents' rights and economic well-being, and that of their families.

A Better Balance is a national legal advocacy organization dedicated to promoting fairness in the workplace and helping employees meet the conflicting demands of work and family. Through its legal clinic, A Better Balance provides direct services to low-income workers on a range of issues, including employment discrimination based on pregnancy and/or caregiver status. A Better Balance is

also working to combat LGBTQ employment nondiscrimination through its national LGBT Work-Family project. The workers we serve, who are often struggling to care for their families while holding down a job, are particularly vulnerable to retaliation that discourages them from complaining about illegal discrimination.

California Women's Law Center (CWLC) is a statewide, nonprofit law and policy center dedicated to advancing the civil rights of women and girls through impact litigation, advocacy and education. CWLC's issue priorities include gender discrimination, reproductive justice, violence against women, and women's health. Since its inception in 1989, CWLC has placed an emphasis on eliminating all forms of gender discrimination, including discrimination based on sexual orientation. CWLC remains committed to supporting equal rights for lesbians and gay men, and to eradicating invidious discrimination in all forms, including eliminating laws and policies that reinforce traditional gender roles. CWLC views sexual orientation discrimination in the workplace as a form of illegal gender discrimination that is harmful to our state and country, and needs to be eradicated.

The **Coalition of Labor Union Women** is a national membership organization based in Washington, DC with chapters throughout the country. Founded in 1974 it is the national women's organization within the labor

movement which is leading the effort to empower women in the workplace, advance women in their unions, encourage political and legislative involvement, organize women workers into unions and promote policies that support women and working families. During our history we have fought against discrimination in all its forms, particularly when it stands as a barrier to employment or is evidenced by unequal treatment in the workplace or unequal play.

Equal Rights Advocates is one of the oldest public interest law firms specializing in litigation efforts to eliminate gender discrimination and secure equal rights. Begun in 1974 as a teaching law firm focused on sex-based discrimination, ERA has evolved into a legal organization with a multi-faceted approach to addressing issues of gender discrimination, including impact litigation, public policy initiatives, and legislative advocacy. ERA has represented clients in numerous individual and class sex discrimination cases under Title VII, including *AT&T Corp. v. Hulteen*, 556 U.S. 701 (2009) and *Wal-Mart Stores v. Dukes*, 564 U.S. 338 (2011), and has appeared as amicus curiae in a number of Supreme Court cases involving the interpretation of Title VII, including *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986) and *Ledbetter v. Goodyear*, 550 U.S. 618 (2007). ERA has long viewed sexual orientation discrimination as a pernicious and legally impermissible form of sex discrimination, and seeks to participate in this case to highlight the inextricability of women's rights and civil rights for LGBTQ people.

Gender Justice is a nonprofit advocacy organization based in the Midwest that works to eliminate gender barriers based on sex, sexual orientation, gender identity, or gender expression. Gender Justice targets the root causes of gender discrimination, such as cognitive bias and stereotyping. We believe that courts should take an expansive, and inclusive, interpretation of what constitutes discrimination "because of sex." Consistent with that view, we represent the transgender plaintiff in *Rumble v. Fairview Health Services*, No. 0:14-cv-02037-SRN-FLN (D. Minn.), whose right to sue under the Affordable Care Act, Section 1557, was recognized by the court in 2015.

Legal Voice is a nonprofit public interest organization in the Pacific Northwest that works to advance the legal rights of women and girls through litigation, legislation, and public education on legal rights. Since its founding in 1978, Legal Voice has been at the forefront of efforts to combat sex discrimination in the workplace, in schools, and in public accommodations. We have served as counsel and as amicus curiae in numerous cases involving workplace gender discrimination throughout the Northwest and the country. Legal Voice serves as a regional expert advocating for legislation and for robust interpretation and enforcement of anti-discrimination laws to protect women and LGBTQ people. Legal Voice has a strong interest in ensuring that Title VII is interpreted to cover discrimination based on sexual orientation and sex stereotyping.

The **National Association of Women Lawyers** (NAWL) is the oldest women's bar association in the United States and the leading national voluntary organization devoted to the interests of women lawyers and women's rights. Founded in 1899, NAWL has a long history of serving as an educational forum and an active voice for the concerns of women. As part of its mission, NAWL promotes the interests of women and families by participation as *amicus curiae* in cases of interest. NAWL supports women's constitutional rights to liberty and equality under the Due Process and Equal Protection Clauses and seeks for those rights to be protected. NAWL recognizes that discrimination in any form impedes the advancement of women and other vulnerable populations. For those reasons, NAWL has an interest in ensuring that individuals of all sexual identities be protected. We support the position that discrimination against anyone based on sexual orientation is discrimination within the intent, meaning, and spirit of Title VII.

The **National Organization for Women (NOW) Foundation** is a 501(c)(3) entity affiliated with the National Organization for Women, the largest grassroots feminist activist organization in the United States with chapters in every state and the District of Columbia. NOW Foundation is committed to advancing equal opportunity, among other objectives, and works to assure that women and LGBTQIA persons are treated fairly and equally under the law. As an education

and litigation organization dedicated to eradicating sex-based discrimination, we believe that the Civil Rights Act of 1964, Title VII provision prohibiting sex discrimination extends to sexual orientation.

The **National Partnership for Women & Families** (formerly the Women's Legal Defense Fund) is a national advocacy organization that develops and promotes policies to help achieve fairness in the workplace, reproductive health and rights, quality health care for all, and policies that help women and men meet the dual demands of their jobs and families. Since its founding in 1971, the National Partnership has worked to advance women's equal employment opportunities and health through several means, including by challenging discriminatory employment practices in the courts. The National Partnership has fought for decades to combat sex discrimination, including on the basis of sex stereotypes, and to ensure that all people are afforded protections against discrimination under federal law.

The **National Women's Law Center** is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's legal rights and opportunities since its founding in 1972. The Center focuses on issues of key importance to women and their families, including economic security, employment, education, health, and reproductive rights, with special attention to the needs of low-income women and women of color, and has participated as

counsel or amicus curiae in a range of cases before the Supreme Court and the federal Courts of Appeals to secure the equal treatment of women under the law, including numerous cases addressing the scope of Title VII's protection. The Center has long sought to ensure that rights and opportunities are not restricted for women or men on the basis of gender stereotypes and that all individuals enjoy the protection against such discrimination promised by federal law.

The **Southwest Women's Law Center** (SWLC) is a legal, policy and advocacy law center that utilizes law, research and creative collaborations to create opportunities for women and girls in New Mexico to fulfill their personal and economic potential. Our mission is: (1) to eliminate gender bias; and (2) to utilize the provisions of Title IX to protect women against violence in schools and on college campuses and to protect the rights of LGTB individuals. We collaborate with community members, organizations, attorneys and public officials to ensure that the interests of all individuals are protected.

Women Employed's mission is to improve the economic status of women and remove barriers to economic equity. Since 1973, the organization has assisted thousands of working women with problems of discrimination and harassment, monitored the performance of equal opportunity enforcement agencies, and developed specific, detailed proposals for improving enforcement efforts, particularly on the systemic level. Women Employed believes that barring

discrimination "because of sex" encompasses discrimination against an employee because of his/her sexual orientation because women's rights and LGBT rights are inextricable.

The **Women's Law Center of Maryland, Inc.** (WLC) is a non-profit, membership organization established in 1971 with a mission of improving and protecting the legal rights of women, particularly regarding gender discrimination, employment law, family law and reproductive rights. Through its direct services and advocacy, the Women's Law Center seeks to protect women's legal rights and ensure equal access to resources and remedies under the law. The Women's Law Center is participating as an amicus in *Evans v. Georgia Regional Hospital*, because it agrees with the proposition that sex, gender, and sexual orientation are intrinsically intertwined, particularly in the realm of discrimination. The concerns and struggles of the LGBTQ community impact all women, regardless of sexual orientation.

The **Women's Law Project (WLP)** is a non-profit women's legal advocacy organization with offices in Philadelphia and Pittsburgh, Pennsylvania. Founded in 1974, WLP's mission is to create a more just and equitable society by advancing the rights and status of all women throughout their lives. To this end, we engage in high impact litigation, policy advocacy, and public education. For over forty

years, WLP has challenged discrimination rooted in gender stereotyping and based on sex.