No. 17-___

IN THE

Supreme Court of the United States

JAMEKA K. EVANS,

Petitioner,

v.

GEORGIA REGIONAL HOSPITAL, ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the prohibition in Title VII of the Civil Rights Act of 1964 against employment discrimination "because of . . . sex" encompasses discrimination based on an individual's sexual orientation.

PARTIES TO THE PROCEEDING

Petitioner, plaintiff below, is Jameka K. Evans.

Respondents, defendants below, are Georgia Regional Hospital at Savannah, Charles Moss, Lisa Clark, and Jamekia Powers.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jameka K. Evans respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (Pet. App. 1a-54a) is published at 850 F.3d 1248. The Eleventh Circuit's order denying rehearing en banc (Pet. App. 68a-69a) is unpublished. The order of the district court (Pet. App. 55a) is unpublished but is available at 2015 WL 6555440. The report and recommendation of the magistrate judge (Pet. App. 56a-67a) is unpublished but is available at 2015 WL 5316694.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 2017. Pet. App. 1a. The court of appeals denied a timely petition for rehearing en banc on July 6, 2017. Pet. App. 68a-69a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

42 U.S.C. § 2000e-2(a)(1) provides in pertinent part: "It shall be an unlawful employment practice 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 such individual's race, color, religion, sex, or national origin."

INTRODUCTION

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination "because of" an individual's "sex." 42 U.S.C. § 2000e-2(a)(1). This provision is designed "to strike at the entire spectrum of disparate treatment of men and women in employment," *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986))—even forms of gender discrimination beyond those with which Congress was principally concerned "when it enacted Title VII," *id.* at 79. And "recognizing that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged," this Court has declared that discriminating against lesbian, gay, and bisexual people based on a "disapproval of their relationships" "diminish[es] their personhood" and "works a grave and continuing harm" that must be remedied. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602-04 (2015).

Yet it remains unresolved whether Title VII's ban on sex discrimination permits an employer to fire (or otherwise discriminate against) lesbian, gay, and bisexual people based on their sexual orientation. Earlier this year, the Seventh Circuit held that "[t]he logic of the Supreme Court's decisions, as well as the common-sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex," dictate that Title VII prohibits discrimination based on sexual orientation. *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 350-51 (7th Cir. 2017) (en banc). But in this case, the Eleventh Circuit refused to follow suit, citing

decades-old case law from several circuits and asserting that only "the Supreme Court" can bring Title VII into line with society's contemporary understandings concerning sexual orientation and sex discrimination. Pet. App. 12a.

This Court should carry out that task without delay. Ours is a national economy, and basic protections in the workforce should not depend on geography. More fundamentally, lesbian, gay, and bisexual Americans will not enjoy true legal equality until their sexual orientation is irrelevant not only to their right to enter into consenting relationships and to marry but also to their ability to maintain jobs and pursue their livelihoods. It cannot be that Title VII allows an employer to fire Sharon for exercising her constitutional right to marry her girlfriend while retaining her co-worker Samuel after he marries his.

STATEMENT OF THE CASE

1. From 2012 to 2013, petitioner Jameka Evans worked as a security officer at Georgia Regional Hospital at Savannah (the "Hospital"). Petitioner, who describes herself as a gay female, presented herself at work in stereotypically "male" ways—for example, she wore a male uniform, had a short haircut, and wore male shoes. Pet. App. 3a, 58a.

During her time at the Hospital, petitioner's supervisors "harassed her because of her perceived homosexuality, and she was otherwise punished because [of her] status as a gay female." Pet. App. 58a.[1] Among other things, Evans suffered harassment

[1] Because this case comes to the Court on a dismissal of the complaint for failure to state a claim, all factual allegations must be accepted as true. Pet. App. 8a.

intended to make her employment unbearable, received less desirable work schedules, and was singled out for alleged rule infractions. *Id.* 3a-4a. In addition, petitioner was passed over for a promotion in favor of "a less qualified individual" who is not gay and does not otherwise transgress gender norms. *Id.*

2. Petitioner filed an internal complaint about her most troublesome supervisor, Charles Moss, with Lisa Clark in the Hospital's human resources department. As part of its investigation of these allegations, a Senior Human Resources Manager, Jamekia Powers, inquired about petitioner's sexual orientation. Pet. App. 3a. Prior to that point, petitioner had not discussed her sexual orientation with the manager. The question alerted petitioner to the fact that "her sexuality was the basis of her harassment." *Id.* When the unbearable discriminatory working conditions persisted, petitioner left her job.

3. After exhausting her remedies with the Equal Employment Opportunity Commission ("EEOC" or "Commission"), Pet. App. 58a-59a n.4, petitioner timely filed a *pro se* complaint against the Hospital, Moss, Clark, and Powers in the United States District Court for the Southern District of Georgia, *id.* 2a. In her complaint, petitioner specifically alleged that she was subjected to workplace discrimination because her "status as a gay female did not conform to . . . gender stereotypes associated with women." *Id.* 58a. Petitioner also alleged she was targeted for

harassment for otherwise "failing to carry herself in a 'traditional woman[ly] manner.'" *Id.* 3a.[2]

Prior to service of the complaint, petitioner's motion was referred to a magistrate judge. The magistrate recommended that the complaint be dismissed with prejudice for failure to state a claim upon which relief could be granted. *See* 28 U.S.C. § 1915(e)(2)(B)(ii). In the magistrate's view, petitioner's claim of discrimination based on her sexual orientation failed because Title VII "was not intended to cover discrimination against homosexuals." Pet. App. 59a. Furthermore, the magistrate perceived Evans's claim of discrimination based on sex stereotypes as no different from her claim based on sexual orientation. As the magistrate put it, "to say that an employer has discriminated on the basis of gender non-conformity is just another way to claim discrimination based on sexual orientation." *Id.* 61a.

Petitioner, still proceeding *pro se*, filed timely objections to the magistrate judge's report and recommendation. Pet. App. 6a. She also argued that, as a *pro se* litigant, she should have been granted an opportunity to amend her complaint. *Id.* In support of her objections, Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") sought and was granted leave to file a brief as *amicus curiae*. *Id.*

The district court adopted the magistrate judge's report and recommendation without addressing any of petitioner's objections. Pet. App. 7a. The district court then dismissed petitioner's case with prejudice and

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[2] Petitioner also alleged that she was subjected to unlawful retaliation, but the court of appeals later deemed that claim waived, Pet. App. 17a, and petitioner does not press it here.

appointed Lambda Legal as counsel to represent her on appeal. *Id.*

4. Petitioner appealed, and the EEOC filed a supportive *amicus* brief, maintaining that sexual orientation discrimination "fall[s] squarely within Title VII's prohibition against discrimination based on sex." EEOC CA11 Br. 1.

A divided panel of the Eleventh Circuit affirmed in part and reversed in part.

Rejecting the position advanced by petitioner and the EEOC, the majority held that petitioner could not "state[] a claim under Title VII by alleging that she endured workplace discrimination because of her sexual orientation." Pet. App. 11a. The majority noted that circuit precedent from 1979 dictated that "[d]ischarge for homosexuality is not prohibited by Title VII." *Id.* 11a (quoting *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979)). And the panel deemed itself bound to follow that precedent "unless and until it is overruled by [the Eleventh Circuit] en banc or by the Supreme Court." Pet. App. 12a (citation omitted).

At the same time, the panel held that "discrimination based on gender nonconformity is actionable." Pet. App. 9a. The court of appeals therefore vacated the part of the district court's order dismissing that claim and ordered that petitioner be granted "leave to amend such claim." Pet. App. 11a.

In a concurring opinion, Judge William Pryor defended the rule that Title VII does not cover discrimination based on sexual orientation. According to Judge Pryor, Title VII prohibits discriminating against someone because their "behavior" does not conform to sex stereotypes, but the statute does not

preclude discrimination based on the "status" of being lesbian, gay, or bisexual. Pet. App. 22a-23a.

In an opinion concurring in part and dissenting in part, Judge Rosenbaum disagreed with the majority's holding that sexual orientation discrimination is not a form of sex discrimination. Pet. App. 27a-54a. She explained that since *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the law has been clear that "Title VII precludes discrimination on the basis of every stereotype of what a woman supposedly should be." Pet. App. 27a. Thus, "when a woman alleges, as Evans has, that she has been discriminated against because she is a lesbian, she necessarily alleges that she has been discriminated against because she failed to conform to the employer's image of what women should be—specifically, that women should be sexually attracted to men only." *Id.*

Judge Rosenbaum also recognized that an employer who discriminates against a woman who is attracted to women, but not against a man who is attracted to women, "treats women and men differently 'because of . . . sex.'" Pet. App. 35a n.9. Finally, Judge Rosenbaum criticized the concurrence's attempt to distinguish between conduct and status as "mak[ing] no sense from a practical, textual, or doctrinal point of view." *Id.* 39a.

5. Petitioner sought reconsideration en banc of the panel's holding regarding sexual orientation discrimination. She urged the Eleventh Circuit to adopt the view taken by Judge Rosenbaum and the EEOC—the same view the Seventh Circuit accepted in *Hively v. Ivy Tech Community College*, 853 F.3d 339 (7th Cir. 2017) (en banc). The Eleventh Circuit denied the petition without comment. Pet. App. 68a.

REASONS FOR GRANTING THE PETITION

The federal courts of appeals are irreconcilably divided on whether Title VII prohibits sexual orientation discrimination as part of its ban on sex discrimination. Likewise, the two federal agencies charged with enforcing Title VII have taken opposite positions on whether sexual orientation discrimination is a form of sex discrimination. This intractable conflict over the scope of Title VII has created uncertainty for employees and employers alike, compounding pervasive discrimination suffered by lesbian, gay, and bisexual individuals. Only this Court can resolve the disagreement on this important issue, and it is vital that the Court do so now.

I. The courts of appeals and federal agencies that enforce Title VII are divided over whether the statute covers discrimination based on sexual orientation.

Title VII mandates that "gender must be irrelevant to employment decisions." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989) (plurality opinion). Employers cannot rely "upon sex-based considerations." *Id.* at 242.

This mandate plays out in three related ways. First, Title VII forbids "treatment of a person in a manner which but for that person's sex would be different." *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978) (citation omitted). Second, this Court has held that gender stereotyping—for example, refusing to promote a woman because she is too "aggressive"—falls within Title VII's prohibition against sex discrimination. *Price Waterhouse*, 490 U.S. at 250 (plurality opinion). Indeed, "[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." *Manhart*, 435 U.S. at 707 n.13 (quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971)). Third, Title VII prohibits discrimination against an employee based on the interaction of a protected aspect of the employee's identity with the identity of a person with whom the employee associates. An employer, for example, commits this forbidden "associational" discrimination when it treats an employee in an interracial relationship differently from other employees married to persons of the same race. *See, e.g.*, *Holcomb v. Iona Coll.*, 521 F.3d 130, 132 (2d Cir. 2008); *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986); *cf. Loving v. Virginia*, 388 U.S. 1, 11 (1967) (punishing a person for marrying someone of a different race constitutes race discrimination).

Federal courts and federal agencies applying these doctrinal constructs are split over whether they dictate that Title VII covers discrimination based on sexual orientation.

A. The courts of appeals are divided.

1. In an en banc decision earlier this year, the Seventh Circuit held by an 8-3 vote that "discrimination on the basis of sexual orientation is a form of sex discrimination." *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 341 (7th Cir. 2017) (en banc). The Seventh Circuit concluded that all three ways of conceptualizing Title VII's prohibition against sex discrimination "end up in the same place": "that a person who alleges that she experienced employment discrimination on the basis of her sexual orientation

has put forth a case of sex discrimination for Title VII purposes." *Id.* at 345, 351-52.

First, the Seventh Circuit explained that sexual orientation discrimination necessarily involves sex-based considerations because the discrimination endured by a woman based on her attraction to women is not suffered by any man with an identical attraction to women. *Hively*, 853 F.3d at 345.

Second, the Seventh Circuit reasoned that a woman's being a lesbian "represents the ultimate case of failure to conform to the female stereotype (at least as understood in a place such as modern America, which views heterosexuality as the norm and other forms of sexuality as exceptional)." *Hively*, 853 F.3d at 346. In other words, sexual orientation discrimination is a form of unlawful sex stereotyping because it rests on the assumption that people should pursue romantic relationships with (or be attracted to) only members of a different sex. Just as employers may not reject women from jobs in "traditionally male workplaces, such as fire departments," based on sex stereotypes, employers may not act "based on assumptions about the proper behavior for someone of a given sex" with respect to the sex of their romantic partner. *Id.*

Third, the Seventh Circuit concluded that sexual orientation discrimination "is discrimination based on an associational theory." It explained that this Court in *Loving* had "recognized that equal application of a law that prohibited conduct only between members of different races did not save it." *Hively*, 853 F.3d at 348. "So too, here. If we were to change the sex of one partner in a lesbian relationship, the [employment] outcome would be different. This reveals that the discrimination rests on distinctions drawn according

to sex." *Id.* at 349; *see also id.* at 359 (Flaum, J., concurring).

Also earlier this year, the majority of a Second Circuit panel likewise determined that: (1) "sexual orientation discrimination is sex discrimination for the simple reason that such discrimination treats otherwise similarly-situated people differently solely because of their sex"; (2) sexual orientation discrimination is sex discrimination "because such discrimination is inherently rooted in gender stereotypes"; and (3) sexual orientation discrimination is sex discrimination because it treats similarly situated people differently because of their sex, viewed in relation to the sex of the individuals with whom they associate (or to whom they are attracted). *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 202-05 (2d Cir. 2017) (Katzmann, C.J., joined by Brodie, J., concurring). The Second Circuit has since granted en banc review in another case to consider the issue. *See Zarda v. Altitude Express, Inc.*, 855 F.3d 76 (2d Cir. 2017); Order, *Zarda v. Altitude Express, Inc.*, No. 15-3775 (2d Cir. May 25, 2017) (ECF No. 271).

2. "Almost all" of the remaining circuits have weighed in on the issue—some quite recently—and have held (or strongly suggested) that Title VII permits employment discrimination based on sexual orientation. *Hively*, 853 F.3d at 341-42 (citing *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 290 (3d Cir. 2009); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996) (dicta); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979); *Kalich v. AT&T Mobility, LLC*, 679 F.3d 464, 471 (6th Cir. 2012); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) (dicta); and

Medina v. Income Support Div., 413 F.3d 1131, 1135 (10th Cir. 2005)); *see also DeSantis v. Pac. Tel. & Tel. Co., Inc.*, 608 F.2d 327, 329-30 (9th Cir. 1979); Pet. App. 11a-16a (Eleventh Circuit's decision below). A common sentiment in these decisions is that in passing Title VII, "Congress had only the traditional notions of 'sex' in mind." *DeSantis*, 608 F.2d at 329. These courts similarly stress that "Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation." *Medina*, 413 F.3d at 1135 (citations omitted).

The Eleventh Circuit's 2-1 decision here cements the conflict with the Seventh Circuit and ensures that only this Court can resolve it. The Eleventh Circuit panel refused to revisit circuit precedent that Title VII does not reach discrimination against lesbian, gay, or bisexual individuals "unless and until it is overruled by this court en banc or by the Supreme Court." Pet. App. 12a, 14a (citation omitted). Judge William Pryor concurred to defend the decades-old Eleventh Circuit rule as a matter of first principles. *Id.* 19a-26a. Then, presented with a petition for rehearing en banc that asked the Eleventh Circuit to follow the Seventh Circuit's and the EEOC's lead, the Eleventh Circuit denied the petition without a single vote in favor of rehearing. *Id.* 68a-69a.

B. Federal agencies are divided.

Title VII empowers both the EEOC and the United States Department of Justice to enforce Title VII, depending on the identity of employers. Just like the courts of appeals, these federal agencies have split over how to interpret Title VII in this context.

1. The EEOC exercises significant enforcement powers with respect to Title VII claims. First and

foremost, the EEOC investigates charges that employers have engaged in discrimination in violation of Title VII. The Commission also issues findings and conciliates charges of discrimination under the statute.

Moreover, the EEOC may bring actions directly against private employers. *See, e.g.*, *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015). In this capacity, the EEOC has invoked Title VII's prohibition on sex discrimination to sue private employers who discriminate on the basis of sexual orientation. *See, e.g.*, *EEOC v. Scott Med. Health Ctr., P.C.*, 217 F. Supp. 3d 834 (W.D. Pa. 2016).

The EEOC also directly adjudicates discrimination claims by federal employees. "[I]f aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint," a federal employee may file a federal lawsuit. 42 U.S.C. § 2000e-16(c). But the federal government as employer may not appeal a final EEOC decision in an employee's favor to federal court.

Acting in its capacity as the adjudicator of federal employment cases, the Commission has held—consistent with its stance respecting private employers—that "allegations of discrimination on the basis of sexual orientation necessarily state a claim of discrimination on the basis of sex." *Baldwin v. Foxx*, No. 0120133080, 2015 WL 4397641, at *10 (EEOC July 16, 2015). This means that in EEOC enforcement proceedings against private and federal government employers, the Commission treats sexual orientation discrimination as a form of sex discrimination prohibited by Title VII.

2. The Department of Justice has taken the opposite position. While the EEOC has investigative and conciliatory authority respecting discrimination claims against state or local governments, the Attorney General makes the decision whether to bring an enforcement action against such a "government, governmental agency, or political subdivision." 42 U.S.C. § 2000e-5(f)(1).

In direct contrast to the EEOC, the Department of Justice recently announced, through an *amicus* brief, that it does not believe that Title VII prohibits sexual orientation discrimination. *See* Brief for the United States as *Amicus Curiae* Supporting Defendants-Appellees at 1, *Zarda v. Altitude Express, Inc.*, No. 15-3775 (2d Cir. July 26, 2017), 2017 WL 3277292. According to that brief, "discrimination because of sexual orientation is not discrimination because of sex under Title VII," *id.* at 6 (capitalization altered), and employers are free under federal law to fire or otherwise discriminate against employees and job applicants based on their sexual orientation.

That the federal agencies charged with enforcement of Title VII have staked out wholly contradictory positions regarding the scope of Title VII's prohibition on sex discrimination further reinforces the need for this Court's guidance. The protection that public employees have from sex-based discrimination should not depend on whether they work for the federal or a state or local government.

II. The question presented is exceptionally important.

For three overarching reasons, it is critical that this Court swiftly resolve the conflict over whether Title VII covers discrimination based on sexual orientation.

1. The current geographic checkerboard of Title VII's coverage is untenable for employees and employers alike. Take, for example, a gay person who lives in Michiana, Michigan. The current divide in the circuits means that if that person takes a job in his own neighborhood, he can be fired at any time based on his sexual orientation. If he commutes to a less desirable position in Michigan City, Indiana, he will enjoy job security impossible to obtain at home. Federal law should not put people in such a bind.

Nor should federal law place employees in a quandary over whether to accept a promotion or divulge their sexual orientation. Yet at present, a lesbian or bisexual employee working in Indianapolis, Indiana, who is offered a promotion that will require her to relocate to Indianola, Mississippi, is forced to choose between Title VII protection and advancing her career. Furthermore, lesbian, gay, and bisexual employees who are entitled to insurance and other forms of employment benefits for their spouses might be wary of telling their employers about their marital status, for fear of revealing their sexual orientation and subjecting themselves to termination on that basis.

Federal law should not leave national employers unsure of their legal obligations either. If, for instance, an airline has hubs in both Chicago and Miami (as American Airlines does), the human resources offices

in both cities should be able to advise management, train supervisors, and inform employees of their rights in the same way. The same goes for a company such as Boeing that designs and builds airplanes in Chicago and Atlanta, or a company such as Kohler that manufactures plumbing and other products in both Kohler, Wisconsin and Huntsville, Alabama. And so on. Yet the current state of affairs precludes such clarity.

2. Intervention by this Court is particularly warranted to relieve courts and litigants from having to adjudicate cases like this under the guise of "gender nonconformity" claims.

Like many other appellate courts that foreclose Title VII claims based directly on sexual orientation, the Eleventh Circuit allows lesbian, gay, and bisexual employees to allege that they have been subjected to disparate treatment because their personal appearances or mannerisms do not "conform to a gender stereotype." Pet. App. 10a-11a. "Numerous district courts throughout the country," however, have "found this approach to gender stereotype claims unworkable." *Christiansen v. Omnicom Grp.*, 852 F.3d 195, 205 (2d Cir. 2017) (Katzmann, C.J., concurring). The result is a "contradictory" and "confused hodge-podge of cases" attempting "to extricate the gender nonconformity claims from the sexual orientation claims." *Hively v. Ivy Tech Comm. Coll.*, 853 F.3d 339, 342 (7th Cir. 2017) (en banc) (citation omitted); *see also, e.g.*, *Boutillier v. Hartford Pub. Sch.*, 221 F. Supp. 3d 255, 269 (D. Conn. 2016) (requirement to exclude "sexual orientation discrimination . . . from the equation when determining whether allegations or evidence of gender non-conformity discrimination are sufficient is inherently unmanageable").

The core problem, as the Seventh Circuit has explained, is that it requires "considerable calisthenics to remove the 'sex' from 'sexual orientation.'" *Hively*, 853 F.3d at 350. Indeed, as several district courts have emphasized, "the line between sex discrimination and sexual orientation discrimination . . . does not exist, save as a lingering and faulty judicial construct." *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1159-60 (C.D. Cal. 2015); *see also Philpott v. New York*, ___ F. Supp. 3d ___, 2017 WL 1750398, at *2 (S.D.N.Y. May 3, 2017) ("I decline to embrace an 'illogical' and artificial distinction between gender stereotyping discrimination and sexual orientation discrimination, and in so doing, I join several other courts throughout the country."); *EEOC v. Scott Med. Health Ctr., P.C.*, 217 F. Supp. 3d 834, 841 (W.D. Pa. 2016) ("[T]he Court finds discrimination on the basis of sexual orientation is, at its very core, sex stereotyping plain and simple; there is no line separating the two.").

Circuit precedent forbidding Title VII claims based on sexual orientation but allowing "gender nonconformity" claims thus leaves district courts—not to mention litigants and their lawyers—utterly flummoxed. And lacking any logical compass, district courts often simply dismiss "gender nonconformity" claims from lesbian, gay, and bisexual plaintiffs. For instance, one court recently concluded that a plaintiff was impermissibly "attempting to bring a Title VII claim based on sexual orientation" because the complaint identified the plaintiff as a "male homosexual" and referred to the phrase "sexual orientation at least twice." *Garvey v. Childtime Learning Ctr.*, No. 5:16-CV-1073 (TJM/ATB), 2016 WL 6081436, at *3 (N.D.N.Y. Sept. 12, 2016). Even when

strong evidence of gender-based motivation exists, courts have pointed to the use of explicitly anti-gay epithets, such as "fag" or "queer," by a harasser to justify dismissing sex stereotyping claims. *See, e.g.*, *Kay v. Indep. Blue Cross*, 142 Fed. Appx. 48, 51 (3d Cir. 2005).

And even when courts entertain "gender nonconformity" claims from lesbian, gay, and bisexual plaintiffs, this creates problems. Forcing all sexual orientation discrimination claims into a sex stereotyping pigeonhole "creates an uncomfortable result in which the more visibly and stereotypically gay or lesbian a plaintiff is in mannerisms, appearance, and behavior, and the more the plaintiff exhibits those behaviors and mannerisms at work, the more likely a court is to recognize a claim of gender non-conformity which will be cognizable under Title VII as sex discrimination." *Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698, 709-10 (7th Cir. 2016) (panel opinion) (collecting examples).

Conversely, "[p]laintiffs who do not look, act, or appear to be gender non-conforming but are merely known to be or perceived to be gay or lesbian do not fare as well in the federal courts." *Hively*, 830 F.3d at 710 (gathering examples). Likewise, if a male employee is harassed with taunts stereotypically associated with gay men but not necessarily with women, he too may see his claim dismissed. *See, e.g.*, *Anderson v. Napolitano*, No. 09-60744-CIV, 2010 WL 431898, at *6 (S.D. Fla. Feb. 8, 2010) (because lisping and being "too flamboyant" are not stereotypes associated with women, co-workers' harassment of a gay employee by speaking at him with a lisp and calling him "too flamboyant" did not support a claim of sex discrimination).

In short, "gender nonconformity" claims are "especially difficult for gay plaintiffs to bring." *Maroney v. Waterbury Hosp.*, No. 3:10-CV-1415 (JCH), 2011 WL 1085633, at *2 n.2 (D. Conn. Mar. 18, 2011). They are even harder for district courts to adjudicate. Litigants and courts should not be required to cram cases involving discrimination based on sexual orientation into this box.

3. Finally, it is important for this Court to address the question presented in light of the discrimination lesbian, gay, and bisexual people face in employment. This Court has repeatedly acknowledged the "long history of disapproval" of gay people that has led to their "subordinat[ion]," *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015), and to "discrimination both in the public and in the private spheres," *Lawrence v. Texas*, 539 U.S. 558, 575 (2003). *See also United States v. Windsor*, 133 S. Ct. 2675, 2694-95 (2013) (same); *Lawrence*, 539 U.S. at 581 (O'Connor, J., concurring) (describing the employment-related consequences of anti-sodomy laws). As the United States recently advised this Court:

> Employers and co-workers continue to discriminate against lesbian and gay people in the workplace. A set of 15 studies conducted since the mid-1990s has found that significant percentages of lesbian, gay, and bisexual people have experienced workplace discrimination, including being fired or refused employment; being denied promotion or given unfavorable performance reviews; being verbally or physically abused or experiencing workplace vandalism; and receiving unequal pay or benefits.

Brief for United States as *Amicus Curiae* Supporting Petitioners at 6, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556).

This pervasive discrimination exacts a heavy toll. Many lesbian, gay, and bisexual employees must "hide their identities, are paid less, and have fewer employment opportunities" than their co-workers. Brad Sears & Christy Mallory, *Employment Discrimination Against LGBT People: Existence and Impact*, *in* Gender Identity and Sexual Orientation Discrimination in the Workplace: A Practical Guide 40-13 (Christine Michelle Duffy ed., 2014), http://tinyurl.com/01Evans. "Research has also documented that [anti-gay] discrimination, as the expression of stigma and prejudice, also exposes" lesbian, gay, and bisexual individuals "to increased risk for poorer physical and mental health." *Id.* These problems are especially acute in states lacking explicit local protections against sexual orientation employment discrimination—which often are where sexual orientation stigma and economic disadvantages run highest. *See* Amira Hasenbush et al., Williams Inst., The LGBT Divide: A Data Portrait of LGBT People in the Midwestern, Mountain, and Southern States 1-7, 22 (2014), http://tinyurl.com/011Evans.

A decision from this Court clarifying that Title VII's prohibition against sex discrimination applies to sexual orientation discrimination will ease these burdens. Title VII's "'primary objective,' like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm." *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998) (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975)); *see also Romer v. Evans*, 517 U.S. 620, 627 (1996) (noting that legal rules shape "transactions and

relations" between individuals "in both the private and governmental spheres"). And studies confirm that workplace discrimination wanes when legal rules clearly prohibit it. *See* Laura G. Barron & Michelle Hebl, *The Force of Law: The Effects of Sexual Orientation Antidiscrimination Legislation on Interpersonal Discrimination in Employment*, 19 Psychol. Pub. Pol'y & L. 191, 200-02 (2013).

Conversely, the current legal landscape, which leaves lesbian, gay, and bisexual people in large swaths of the country unprotected, sends a strong message that it is acceptable to discriminate against employees based on their constitutionally protected love for a person of the same sex.

III. This case offers an ideal vehicle to resolve the issue.

This case is in a perfect posture for this Court to decide whether Title VII's ban on sex discrimination encompasses sexual orientation discrimination. The case comes to this Court on review of a complaint's sufficiency, cleanly presenting a clear-cut question of law. And judges at the district court and appellate level have thoroughly ventilated the arguments for and against Title VII coverage. *Compare* Pet. App. 27a-54a (Rosenbaum, J., concurring in part and dissenting in part), *with id.* 19a-26a (William Pryor, J., concurring), *and id.* 56a-67a (magistrate judge's opinion).

That the Eleventh Circuit granted petitioner leave to amend her complaint to allege that a "decision" to "present herself in a masculine manner" caused the adverse employment actions, Pet. App. 10a, only reinforces the propriety of using this case to resolve the question presented. As noted above, there is no

way to know exactly how the district court might attempt to manage such a "gender nonconformity" claim under the Eleventh Circuit's artificial construct. But, almost by definition, the construct seems designed to limit petitioner's ability to plead, obtain discovery, and prove that her sexual orientation led to adverse action against her in violation of Title VII. It would be much better to get the overall law right before going down those litigation pathways and potentially having to start all over again.

Finally, it is worth noting that the very fact that this case has made it to this Court is a plus. Previous cases involving the rights of lesbian, gay, and bisexual people have shown that losers in such cases are not always willing to seek appellate review, and winners are not always interested in defending their victories. *See, e.g.*, *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2660 (2013); *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014) (state officials refused to defend district court decision upholding state constitutional amendments banning same-sex couples from marriage); *Whitewood v. Wolf*, 992 F. Supp. 2d 410 (M.D. Pa. 2014) (defendants declined to appeal decision invalidating equivalent state law).

Those same phenomena are playing out regarding the question presented here as well. The employer that lost in *Hively v. Ivy Tech Community College*, 853 F.3d 339 (7th Cir. 2017) (en banc), announced immediately that it would not seek certiorari. Cristian Farias, *Losing Employer Won't Ask Supreme Court to Overturn Landmark Gay Rights Ruling*, HuffPost (Apr. 5, 2017), http:// tinyurl.com/0111Evans. Similarly, after the U.S. District Court for the District of Columbia held (in the absence of D.C. Circuit authority on the issue) that an individual could pursue

a Title VII claim for discrimination based on sexual orientation, *see Terveer v. Billington*, 34 F. Supp. 3d 100, 116 (D.D.C. 2014), the defendant settled the case in lieu of taking an appeal, *see* Order Approving Joint Stipulation of Dismissal, *Terveer v. Billington*, No. 1:12-CV-01290-CKK (D.D.C. Dec. 11, 2015) (ECF No. 69). In short, if this Court were to pass on this case, another opportunity to resolve whether Title VII covers discrimination based on sexual orientation may not reach the Court for a long while.

IV. The Eleventh Circuit's decision is wrong.

The Eleventh Circuit's decision here, and the decisions of other courts of appeals holding that Title VII does not reach discrimination on the basis of sexual orientation, cannot be reconciled with either the text of the statute or this Court's decisions construing it. Simply put, it is discrimination "because of . . . sex" for an employer to treat female employees, like petitioner, who are attracted to women differently from male employees who are attracted to women. The three strands of this Court's decisions confirm this point.

1. Discriminating against lesbian, gay, or bisexual employees inherently involves treating them adversely based on their sex. For more than forty years, it has been settled that Title VII forbids an employer from having "one hiring policy for women and another for men." *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (per curiam). One way to articulate this "simple test" is that it forbids any "treatment of a person in a manner which but for that person's sex would be different." *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978) (citation omitted).

It is straightforward to see how discrimination against a lesbian or bisexual female employee fails this but-for test. If, for example, a female employee can show that her employer provides spousal health-insurance benefits to a male employee married to a woman but has fired her because she is married to a woman, then she has "prove[d] that the employer relied upon sex-based considerations in coming to its decision." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989) (plurality opinion). The female employee would have been treated differently had she been a man.

2. Discrimination based on sexual orientation rests on impermissible sex stereotyping. This Court's decision in *Price Waterhouse* makes clear that Title VII does not permit employers to "evaluate employees by assuming or insisting that they match[] the stereotype associated with their group." 490 U.S. at 251 (plurality opinion). Such assumptions and demands, when they result in adverse employment consequences for workers who do not fit the stereotypes, constitute discrimination because of sex.

Discrimination on the basis of sexual orientation is rooted in stereotypes about what it means to be a man or to be a woman and about how men and women should conduct their lives. It rests on the idea that women should not be attracted to women and that men should not be attracted to men. "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, 205 (2d Cir. 2017) (Katzmann, C.J., concurring) (citation omitted); *see also Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 346 (7th Cir. 2017) (en banc). As this Court explained last Term, "[f]or close to a half century" it

has been the law that "overbroad generalizations about the different talents, capacities, or preferences of males and females" constitute sex discrimination. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1692 (2017) (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996), and citing *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643, 648 (1975)).

3. Discrimination on the basis of sexual orientation constitutes "associational" discrimination forbidden by Title VII. In *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983), this Court held that an employment practice premised on the sex of an employee's spouse can constitute sex discrimination. The practice at issue there was the denial of spousal pregnancy benefits in an employer's healthcare plan. Title VII had been amended to provide that discrimination on the basis of pregnancy is discrimination "because of sex." Because, at the time, "the sex of the spouse [was] always the opposite of the sex of the employee," male employees were being subjected to discrimination because they had female spouses. *Id.* at 684.

In a similar vein, every circuit to have addressed the question, including the Eleventh Circuit, has held that discrimination based on the race of a person with whom an employee has a relationship constitutes a form of discrimination "because of . . . race" prohibited by Title VII. In *Parr v. Woodmen of the World Life Insurance Co.*, 791 F.2d 888 (11th Cir. 1986), for example, the Eleventh Circuit held that "[w]here a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of *his* race." *Id.* at 892; *see also Holcomb v. Iona Coll.*, 521 F.3d 130, 138 (2d Cir. 2008); *Tetro v.*

Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc., 173 F.3d 988, 994 (6th Cir. 1999); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 589 (5th Cir. 1998), *opinion reinstated on reh'g en banc sub nom. Williams v. Wal-Mart Stores, Inc.*, 182 F.3d 333 (5th Cir. 1999).

The logic of the cases involving race is inescapable here: treating an employee differently because of the sex of the person to whom he or she is married, or with whom he or she has an intimate relationship, is discrimination because of sex. *See Hively*, 853 F.3d at 347-48; *id.* at 359 (Flaum, J., concurring); *Christiansen*, 852 F.3d at 204 (Katzmann, C.J., concurring). Title VII "treats each of the enumerated categories exactly the same." *Price Waterhouse*, 490 U.S. at 243 n.9 (plurality opinion). So just as "[c]hanging the race of one partner made a difference in determining the legality of" the marriage at issue in *Loving v. Virginia*, 388 U.S. 1 (1967), the employer in a case involving discrimination based on sexual orientation would have acted differently "if we were to change the sex of one partner." *Hively*, 853 F.3d at 348-49.

4. Neither the absence of the explicit phrase "sexual orientation" in Title VII nor congressional inaction after enactment of Title VII, Pet. App. 25a, undercuts treating discrimination on the basis of sexual orientation as "because of . . . sex." Petitioner does not ask this Court to add a new protected category to the list provided by Congress. Rather, as the EEOC has explained, she asks only that she be provided the same protection against sex discrimination that applies in any other case where an employer "has 'relied on sex-based considerations' or 'take[n] gender into account' when taking the challenged employment

action." *Baldwin v. Foxx*, No. 0120133080, 2015 WL 4397641, at *4 (EEOC July 16, 2015) (quoting *Price Waterhouse*, 490 U.S. at 239, 241-42 (plurality opinion)). Petitioner's claim rests on the fact that if she were a man, or if she dressed and behaved in a more stereotypically feminine way, or if she were attracted to men rather than to women, respondents would have treated her differently. This is sex discrimination, pure and simple. Title VII nowhere carves out lesbian, gay, and bisexual people from its categorical protection against sex discrimination.

To be sure, in 1964 when it enacted Title VII, Congress was not thinking about discrimination against lesbian, gay, or bisexual people. Nor, of course, was it thinking about male-on-male sexual harassment. But as this Court explained in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), "statutory prohibitions often go beyond the principal evil" targeted by the Congress that enacted them "to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Id.* at 79. Discrimination against individuals on the basis of their sexual orientation, like the same-sex sexual harassment at issue in *Oncale*, "meets the statutory requirements" for sex discrimination prohibited by Title VII, *id.* at 80. Courts cannot "rewrite the statute so that it covers only what [they] think is necessary to achieve what [they] think Congress really intended." *Lewis v. City of Chicago*, 560 U.S. 205, 215-17 (2010). They must instead apply the statute as written.

Nor does congressional inaction support excluding claims of discrimination on the basis of sexual orientation that fit within one or more of the three

categories already recognized by this Court. As this Court has repeatedly cautioned, "subsequent legislative history" provides "a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns . . . a proposal that does not become law." *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990). Given the multitude of reasons the various proposals to add "sexual orientation" to Title VII might not have been adopted, the congressional inaction over the years here has "no persuasive significance." *United States v. Wise*, 370 U.S. 405, 411 (1962); *see also Christiansen*, 852 F.3d at 206 (Katzmann, C.J., concurring).

5. The Eleventh Circuit's decision in this case also ignores the enormous change in the understanding of sexual orientation worked by this Court's decisions in *Romer v. Evans*, 517 U.S. 620 (1996), *Lawrence v. Texas*, 539 U.S. 558 (2003), *United States v. Windsor*, 133 S. Ct. 2675 (2013), and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). As this Court observed in *Lawrence*, "times can blind us to certain truths." 539 U.S. at 579. One of those truths is that subjecting lesbian, gay, and bisexual employees to adverse treatment fits firmly within the contours of Title VII's prohibition on discrimination because of sex. When this Court "held in *Lawrence* [that] same-sex couples have the same right as opposite-sex couples to enjoy intimate association," *Obergefell*, 135 S. Ct. at 2600, it was squarely articulating a fundamental basis for holding that discrimination against lesbian, gay, and bisexual people is sex discrimination: it denies them rights due to their sex and the sex of the person with whom they form a couple.

As Justice O'Connor explained, one of the consequences of the legal regime that existed prior to

this Court's decisions recognizing the equal dignity of lesbian, gay, and bisexual individuals was "legally sanction[ed] discrimination" against them in areas such as "employment." *Lawrence*, 538 U.S. at 582 (O'Connor, J., concurring). *Romer*, *Lawrence*, *Windsor*, and *Obergefell* "reflect a shift in the perception, both of society and of the courts, regarding the protections warranted for same-sex relationships and the men and women who engage in them." *Christiansen v. Omnicom Grp., Inc.*, 167 F. Supp. 3d 598, 619 (S.D.N.Y. 2016), *aff'd in part and rev'd in part*, 852 F.3d 195 (2d Cir. 2017). As the Seventh Circuit's recent en banc decision put it, "[t]he goalposts have been moving over the years, as the Supreme Court has shed more light on the scope of the language that already is in the statute: no *sex* discrimination." *Hively*, 853 F.3d at 344. It is time for this Court to resolve the uncertainty in the lower courts and ensure that Title VII's protection against sex discrimination protects lesbian, gay, and bisexual employees to the same extent it protects all other workers.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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