No. 17-370

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

BRIEF FOR AMICI CURIAE GLBTQ LEGAL ADVOCATES & DEFENDERS, NATIONAL CENTER FOR LESBIAN RIGHTS, ANTI-DEFAMATION LEAGUE, FAMILY EQUALITY COUNCIL, FREEDOM FOR ALL AMERICANS, HUMAN RIGHTS CAMPAIGN, LEGAL AID SOCIETY, MAZZONI CENTER, OUTSERVE-SLDN, SERVICES AND ADVOCACY FOR GLBT ELDERS, AND THE TREVOR PROJECT IN SUPPORT OF PETITIONER

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INTERESTS OF AMICI CURIAE[1]

Through strategic litigation, public policy advocacy, and education, GLBTQ Legal Advocates & Defenders ("GLAD") works to create a just society free of discrimination based on gender identity and expression, HIV status, and sexual orientation. GLAD has litigated widely in both state and federal courts in all areas of the law in order to protect and advance the rights of lesbian, gay, bisexual, and transgender ("LGBT") people, as well as people living with HIV and AIDS. GLAD has an enduring interest in ensuring that employees receive full and complete redress for violation of their civil rights in the workplace.

The National Center for Lesbian Rights ("NCLR") is a national non-profit legal organization dedicated to protecting and advancing the civil rights of LGBT people and their families through litigation, public policy advocacy, and public education. Since its founding in 1977, NCLR has played a leading role in securing fair and equal treatment for LGBT people and their families in cases across the country involving constitutional and civil rights. NCLR has a particular interest in promoting equal opportunity for LGBT people in the workplace through legislation, policy, and litigation,

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[1] No counsel for a party authored this brief in whole or in part. Neither such counsel nor a party made a monetary contribution intended to fund the preparation or submission of this brief, and no person or entity other than amici, their members, or their counsel made such a monetary contribution. Counsel of record for the parties received timely notice of amici's intent to file this brief. Petitioner's letter consenting to the filing of this brief, and respondents' letter taking no position on amici's request for such consent, are on file with the Clerk.

and represents LGBT people in employment and other cases in courts throughout the country.

The Anti-Defamation League ("ADL") was founded in 1913 to combat anti-Semitism and other forms of prejudice, and to secure justice and fair treatment to all. Today, ADL is one of the nation's leading civil rights organizations. As part of its commitment to protecting the civil rights of all persons, ADL has filed amicus briefs in numerous cases addressing the unconstitutionality or illegality of discriminatory practices or laws.

Family Equality Council is a national organization working to ensure equality for the three million LGBT parents in this country and their six million children. Since its founding in 1979, Family Equality Council has worked to change attitudes, laws, and policies through advocacy and public education to ensure that all families, regardless of creation or composition, are respected, loved, and celebrated in all aspects of their life. Given the profound impact that employment discrimination has on an employee's family, Family Equality Council has an ongoing interest in ensuring that LGBT people have equal opportunities in the workplace and are fully protected from discrimination.

Freedom for All Americans is the bipartisan campaign to secure full nondiscrimination protections for LGBTQ people nationwide. Its work brings together Republicans and Democrats, businesses large and small, people of faith, and allies from all walks of life to make the case for comprehensive nondiscrimination protections that ensure everyone is treated fairly and equally at work and in our communities.

Human Rights Campaign, the largest national lesbian, gay, bisexual and transgender political organization, envisions an America where LGBT people are en-

sured of their basic equal rights, and can be open, honest, and safe at home, at work, and in the community. Among those basic rights is the right to be free from discrimination in employment.

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. Through its LGBT Law and Policy Initiative and its Employment Law Unit, Legal Aid assists and represents individuals who have experienced discrimination based on their sexual orientation. Legal Aid has represented members of the LGBT community in thousands of cases and has served as counsel, or appeared as amicus, in cases pertaining to gender and sexuality, and has seen first-hand the impact that sexual orientation discrimination has on low-income workers.

Mazzoni Center is the only health care provider in the Philadelphia region specifically targeting the unique health care needs of the LGBT community. Founded in 1979, Mazzoni Center has expanded over time to meet the unique needs of the LGBT community, now offering a full array of primary health care services, mental and behavioral health services, and direct legal services. Mazzoni's legal services team provides direct legal assistance and representation to LGBT Pennsylvanians in a range of areas, including employment law. Mazzoni's legal services program assists LGBT workers to understand and assert their needs and rights to be treated fairly and in the workplace, and to be able to live their lives and express their identity without fear of harassment or the termination of their employment.

OutServe-SLDN, Inc. is a non-partisan, non-profit legal services, watchdog, and policy organization that

provides legal assistance to and advocates on behalf of LGBT service members, veterans, and Department of Defense civilian personnel. OutServe-SLDN is the heir to the legacy of providing legal services to LGBT service members and veterans through direct representation of clients, impact litigation, and numerous amicus briefs. From representing over 12,000 service members during the era of "Don't Ask, Don't Tell" to leading the fight to repeal that policy, OutServe-SLDN has been on the frontlines in the fight for LGBT for nearly 25 years and currently has over 75,000 followers worldwide and over 7,000 active members serving and leading more than 80 chapters around the globe.

Services and Advocacy for Gay, Lesbian, Bisexual and Transgender Elders ("SAGE") is the country's oldest and largest organization dedicated to improving the lives of LGBT older adults. In conjunction with 27 affiliated organizations in 20 states and the District of Columbia, SAGE offers supportive services and consumer resources to LGBT older adults and their caregivers, advocates for public policy changes that address the needs of LGBT older people, and provides training for agencies and organizations that serve LGBT older adults. As part of its mission, SAGE provides services to LGBT older adults who seek to marry, grow old with, care for, and ultimately be recognized as the surviving spouse of the person they most love.

The Trevor Project is the leading national organization providing accredited crisis intervention and suicide prevention services to LGBTQ young people under age 25. Through extensive crisis intervention services over the phone, chat, and text, along with research, advocacy, and education, The Trevor Project aims to fulfill its mission to end suicide among LGBTQ young people.

REASONS FOR GRANTING THE PETITION

This Court has never addressed whether sexual orientation discrimination is discrimination "because of … sex" within the meaning of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a). In the absence of guidance from this Court, the courts of appeals have developed a fractured and unworkable approach to sex discrimination claims brought by gay, lesbian, and bisexual employees—one premised on a false distinction between discrimination based on sexual orientation and discrimination based on failure to conform to sex stereotypes. As amici explain here, that distinction is fundamentally arbitrary and impossible to apply with any degree of consistency or fairness. Unsurprisingly, the lower courts' attempt to maintain this distinction has sown widespread confusion, burdening the courts with the impossible task of deciding which side of this imaginary line any particular claim falls on. And gay, lesbian, and bisexual employees who are the victim of workplace discrimination are saddled with a set of rules that apply only to Title VII claims brought by them and not to Title VII claims brought by other employees.

For these reasons, lower courts have sensed the need to revisit their precedents. *See, e.g.*, *Hively* v. *Ivy Tech Cmty. Coll.*, 830 F.3d 698, 712-713 (7th Cir. 2016), *vacated*, 853 F.3d 339 (7th Cir. 2017) (en banc) ("[T]he district courts … are beginning to ask whether the sexual orientation-denying emperor of Title VII has no clothes. … The idea that the line between gender nonconformity and sexual orientation claims is arbitrary and unhelpful has been smoldering for some time …."); *Burnett* v. *Union R.R. Co.*, No. 17-101, 2017 WL 2731284, at *3 (W.D. Pa. June 26, 2017) ("recent jurisprudence … ha[s] raised the question of whether discriminating against an employee for failure to conform

to gender stereotypes isn't in fact the equivalent of discriminating against an employee because of his or her sexual orientation"); *see also Zarda* v. *Altitude Express, Inc.*, 855 F.3d 76, 80 (2d Cir. 2017) (noting "longstanding tension in Title VII caselaw"), *reh'd en banc* Sept. 26, 2017.

The Court should grant the petition and take advantage of the opportunity presented by this case to bring much-needed nationwide clarity, rationality, and fairness to Title VII. It should repudiate the untenable distinction between sex stereotyping and sexual orientation discrimination, and hold instead that discrimination based on sexual orientation is discrimination *because of sex* within the meaning of Title VII.

ARGUMENT

I. THE MAJORITY APPROACH IS PREMISED ON AN UNWORKABLE AND UNTENABLE DISTINCTION

In *Price Waterhouse* v. *Hopkins*, this Court confirmed that discrimination against an employee for failure to conform to sex stereotypes—including the employer's preconceived notions of "masculinity" and "femininity"—qualifies as discrimination "because of … sex" within the meaning of Title VII. 490 U.S. 228 (1989). The Court held that a female employee had a Title VII claim where she alleged that she was denied promotion because her employer found her too "macho" and "masculine," and where she was informed that "to improve her chances for partnership, … [she] should walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* at 235, 242 (quotation marks omitted).

The lower courts have struggled to square the *Price Waterhouse* decision with their preconception that Title VII does not recognize claims of sexual orientation discrimination. Most courts of appeals to consider the issue—including the Eleventh Circuit here—have concluded that, although gay, lesbian, and bisexual employees may assert a Title VII sex discrimination claim where they experienced discrimination for failing to conform to other sex stereotypes, they may not assert such a claim when that discrimination is based on their sexual orientation. *See, e.g.*, *Higgins* v. *New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Simonton* v. *Runyon*, 232 F.3d 33, 36, 38 (2d Cir. 2000); *Dawson* v. *Bumble & Bumble*, 398 F.3d 211, 217 (2d Cir. 2005); *Prowel* v. *Wise Bus. Forms, Inc.*, 579 F.3d 285, 290 (3d Cir. 2009); *Vickers* v. *Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006); *Medina* v. *Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005); *Evans* v. *Georgia Reg'l Hosp.*, 850 F.3d 1248, 1255 (11th Cir. 2017).

Accordingly, lower courts around the country faced with Title VII claims brought by gay, lesbian, and bisexual plaintiffs feel constrained (inappropriately) to discern whether a complaint asserts a discrimination claim based on sex stereotyping unrelated to sexual orientation—which is cognizable—or whether it asserts such a claim based on sexual orientation—which is not. *See, e.g.*, *Fabian* v. *Hospital of Cent. Conn.*, 172 F. Supp. 3d 509, 524 n.8 (D. Conn. 2016) ("a woman might have a Title VII claim if she was harassed or fired for being perceived as too 'macho,' but not if she was harassed or fired for being perceived as a lesbian, and courts and juries have to sort out the dif-

ference on a case-by-case basis").[2] In practice, lower courts have found this approach "unworkable," *Christiansen* v. *Omnicom Grp., Inc.*, 852 F.3d 195, 205 (2d Cir. 2017) (Katzmann, C.J., concurring), because the distinction between sexual orientation discrimination and sex stereotyping is inherently "artificial" and "illogical," *Philpott* v. *New York*, No. 16-6778, 2017 WL 1750398, at *2 (S.D.N.Y. May 3, 2017). Even while adhering to a rule premised on that distinction, the courts of appeals have recognized that the line between sexual orientation discrimination and sex stereotyping is at best "elusive," *Hively*, 830 F.3d at 705, "difficult to draw," *Prowel*, 579 F.3d at 291, and "imprecise," *Dawson*, 398 F.3d at 217-218.

Courts have found this line-drawing exercise difficult "for the simple reason that stereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality." *Dawson*, 398 F.3d at 218 (alterations omitted); *see Hamm* v. *Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1067 (7th Cir. 2003) (Posner, J., concurring) ("Hostility to effeminate men and to homosexual men, or to masculine women and to lesbians, will often be indistinguishable as a practical matter."). In practice, sexual orientation discrimination is difficult to separate from discrimination based on failure to conform to sex stereotypes because discrimination against gay, lesbian, and bisexual employees is "often, if not always, motivated by a desire to enforce heterosexually

[2] Only recently did the Seventh Circuit reverse similar circuit precedent and hold that "discrimination on the basis of sexual orientation is a form of sex discrimination" under Title VII. *Hively* v. *Ivy Tech Cmty. Coll.*, 853 F.3d 339, 341 (7th Cir. 2017) (en banc). The D.C. Circuit appears not to have decided the question.

defined gender norms." *Centola* v. *Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002); *Baldwin* v. *Foxx*, Appeal No. 0120133080, 2015 WL 4397641, at *7 & n.10 (EEOC July 15, 2015) (collecting cases).

Indeed, sexual orientation discrimination, by its nature, "is inherently rooted in gender stereotypes," *Christiansen*, 852 F.3d at 205-206 (Katzmann, C.J., concurring)—specifically, that men should be sexually attracted (exclusively) to women, and women should be sexually attracted (exclusively) to men. As one court explained,

> [S]tereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women. While one paradigmatic form of stereotyping occurs when co-workers single out an effeminate man for scorn, in fact, the issue is far more complex. The harasser may discriminate against an openly gay co-worker, or a co-worker that he perceives to be gay, whether effeminate or not, because he thinks … "real" men should date women, and not other men.

Centola, 183 F. Supp. 2d at 410; *see also*, *e.g.*, *Hively*, 830 F.3d at 705 ("Discrimination against gay, lesbian, and bisexual employees comes about because their behavior is seen as failing to comply with the quintessential gender stereotype about what men and women ought to do—for example, that men should have romantic and sexual relationships only with women, and women should have romantic and sexual relationships only with men."); *Boutillier* v. *Hartford Pub. Sch.*, 221 F. Supp. 3d 255, 269 (D. Conn. 2016) ("[S]tereotypes concerning sexual orientation are probably the most prominent of all sex related stereotypes."); *EEOC* v.

Scott Med. Health Ctr., P.C., 217 F. Supp. 3d 834, 841 (W.D. Pa. 2016) ("There is no more obvious form of sex stereotyping than making a determination that a person should conform to heterosexuality."); *Howell* v. *North Cent. Coll.*, 320 F. Supp. 2d 717, 723 (N.D. Ill. 2004) (same); *see also* Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 Am. U.L. Rev. 715, 725 & n.52 (2014) (surveying cases).

For that reason, discrimination based on sexual orientation cannot be separated from discrimination based on gender nonconformity, or sex discrimination itself. In short, "the line between sex discrimination and sexual orientation discrimination … does not exist." *Videckis* v. *Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1159-1160 (C.D. Cal. 2015); *see also Christiansen* v. *Omnicom Grp., Inc.*, 167 F. Supp. 3d 598, 620 (S.D.N.Y. 2016) ("The lesson imparted by the body of Title VII litigation concerning sexual orientation discrimination and sexual stereotyping seems to be that no coherent line can be drawn between these two sorts of claims."), *aff'd in part, rev'd in part*, 852 F.3d 195 (2d Cir. 2017) (per curiam); *Baldwin*, 2015 WL 4397641, at *5 ("Discrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms. 'Sexual orientation' as a concept cannot be defined or understood without reference to sex.").

II. THE MAJORITY APPROACH HAS SOWN CONFUSION AND INCONSISTENCY IN TITLE VII CASES BROUGHT BY LESBIAN, GAY, AND BISEXUAL EMPLOYEES

Because there is no coherent line between discrimination on the basis of sexual orientation and discrimination on the basis of non-conformity with sex stereotypes, lower courts presented with a Title VII discrim-

ination claim by a lesbian, gay, or bisexual employee have been forced to undertake the arbitrary and ultimately futile exercise of trying to discern which side of that non-existent line a claim falls on. The resulting "confusion" among the lower courts, *Christiansen*, 852 F.3d at 200, has predictably yielded a "confused hodgepodge" of different approaches for dealing with Title VII cases brought by gay, lesbian, and bisexual plaintiffs, *Hively*, 853 F.3d at 342.

Some courts have found that allegations of discrimination on the basis of sexual orientation suffice to establish sex stereotyping in violation of Title VII. *See, e.g.*, *Boutillier* v. *Hartford Pub. Sch.*, No. 13-1303, 2014 WL 4794527, at *2 (D. Conn. Sept. 25, 2014) (allegations that plaintiff "was subjected to sexual stereotyping during her employment on the basis of her sexual orientation" sufficient to state a claim under Title VII); *Terveer* v. *Billington*, 34 F. Supp. 3d 100, 116 (D.D.C. 2014) (allegation that plaintiff faced discrimination on the basis of his sexual orientation sufficed to state sex discrimination claim because plaintiff's "orientation as homosexual had removed him from [his employer's] preconceived definition of male"); *Scott Med. Health Ctr.*, 217 F. Supp. 3d at 841 ("[D]iscrimination on the basis of sexual orientation is, at its very core, sex stereotyping plain and simple; there is no line separating the two."); *Winstead* v. *Lafayette Cty. Bd. of Cty. Comm'rs*, 197 F. Supp. 3d 1334, 1346 (N.D. Fla. 2016) ("discrimination on the basis of sexual orientation is necessarily discrimination based on gender or sex stereotypes, and is therefore sex discrimination"); *see also Baldwin*, 2015 WL 4397641, at *7 n.10 (collecting cases).

Other courts have reached precisely the opposite conclusion, finding that homophobic slurs reflect sexual

orientation discrimination rather than sex-based harassment, and thus deny protection under Title VII altogether. *See, e.g.*, *Vickers*, 453 F.3d at 764 (rejecting claim that homophobic slurs and offensive touching amounted to sex stereotyping, reasoning that if plaintiff's claim were allowed to stand, "any discrimination based on sexual orientation would be actionable under a sex stereotyping theory … , as all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices"); *Magnusson* v. *County of Suffolk*, No. 14-3449, 2016 WL 2889002, at *8 (E.D.N.Y. May 17, 2016) ("Sexual orientation discrimination is not actionable under Title VII, and plaintiffs may not shoehorn what are truly claims of sexual orientation discrimination into Title VII by framing them as claims of discrimination based on gender stereotypes, as Plaintiff at times attempts to do here."), *aff'd*, 690 F. App'x 716 (2d Cir. 2017); *Burrows* v. *College of Cent. Florida*, No. 14-197, 2015 WL 4250427, at *9 (M.D. Fla. July 13, 2015) ("Plaintiff's claim, although cast as a claim for gender stereotype discrimination, is merely a repackaged claim for discrimination based on sexual orientation, which is not cognizable under Title VII."); *see also Hively*, 830 F.3d at 707 (collecting cases).

Some courts have tried to recast harassment plainly motivated by anti-gay bias—such as homophobic slurs or sexually aggressive behavior—as discrimination on the basis of sex stereotype non-conformity, while simultaneously rejecting the notion that sexual orientation discrimination is actionable under Title VII. For example, in *Schmedding* v. *Tnemec Co.*, the plaintiff was asked to perform sexual acts, given derogatory notes referring to his anatomy, called names such as "homo," and subjected to the exhibition of sexually inappropriate behavior by other employees. 187 F.3d 862, 865 (8th Cir. 1999). The

Eighth Circuit held that although "the harassment alleged by Schmedding includes taunts of being homosexual," it was not necessarily the case that he was "alleging harassment based on sexual orientation." *Id.* In other words, the court found, it was plausible the plaintiff was taunted as a homosexual in "an effort to debase his masculinity, not … because he is homosexual or perceived as being a homosexual," and thus he had a cognizable Title VII claim. *Id.*

Likewise in *Rene* v. *MGM Grand Hotel, Inc.*, an openly gay male employee whose male colleagues subjected him to verbal taunts and physically harassing behavior—including "whistling and blowing kisses at [him], calling him 'sweetheart' and 'muñeca' (Spanish for "doll"), telling crude jokes and giving sexually oriented 'joke' gifts, … forcing [him] to look at pictures of naked men having sex, … grabb[ing] him in the crotch and pok[ing] their fingers in his anus through his clothing"—brought a Title VII sexual harassment claim. 305 F.3d 1061, 1064 (9th Cir. 2002) (en banc). The district court held that the plaintiff failed to state a Title VII claim because "Title VII's prohibition of 'sex' discrimination applies only [to] discrimination on the basis of gender and is not extended to include discrimination based on sexual preference." *Id.* The Ninth Circuit reversed, holding that the plaintiff had a viable sexual harassment claim because he had been the victim of "physical conduct of a sexual nature." *See id.* At the same time, however, the Court declared "that an employee's sexual orientation is irrelevant for purposes of Title VII," as is the fact "[t]hat the harasser is, or may be, motivated by hostility based on sexual orientation." *Id.* at 1063-1064.

Still other courts have tried to parse complaints to tease apart disparaging comments based on the plaintiff's sex stereotype nonconformity from disparaging

comments based on the plaintiff's sexual orientation, which are then disregarded. *See, e.g.*, *Morales* v. *ATP Health & Beauty Care, Inc.*, No. 06-1430, 2008 WL 3845294, at *8 (D. Conn. Aug. 18, 2008) (comments "directed at Morales' sexual orientation … are not actionable under Title VII," but comments that "appear to be directed at Morales' failure to conform to societal stereotypes about how men should appear" are actionable); *Boutillier*, 221 F. Supp. 3d at 269 ("[S]exual orientation discrimination must be excluded from the equation when determining whether allegations or evidence of gender non-conformity discrimination are sufficient."); *Lugo* v. *Shinseki*, No. 06-13187, 2010 WL 1993065, at *10 (S.D.N.Y. May 19, 2010) ("The comments addressed to Lugo's perceived sexual orientation do not enter our analysis because Title VII does not prohibit harassment or discrimination because of sexual orientation." (quotation marks and citation omitted)).

Finally, some courts have rejected claims based on both sexual orientation and sex stereotyping, where the court has determined that allegations relating to sexual orientation predominate over allegations relating to sex stereotypes. *See, e.g.*, *Kay* v. *Independence Blue Cross*, 142 F. App'x 48, 51 (3d Cir. 2005) (comparing the relative frequency of comments such as "ass wipe," "fag," "gay," "queer," "real man" and "fem" to conclude that it was "clear that Kay's claim is based upon discrimination that is motivated by perceived sexual orientation" and therefore was not cognizable); *Trigg* v. *New York City Transit Auth.*, No. 99-4730, 2001 WL 868336, at *5-6 (E.D.N.Y. July 26, 2001) (concluding that employee who was called a "sissy" and instructed to act "more manly" did not have sex discrimination claim because, the court found, the amended complaint had alleged sex stereotyping in only four

paragraphs but was "rife with references to [his] sexual orientation"), *aff'd*, 50 F. App'x 458 (2d Cir. 2002).

This "confused hodge-podge of cases" demonstrates the fundamental arbitrariness of trying to separate discrimination based on perceived failure to conform to sex stereotypes from sexual orientation discrimination. *Hively*, 853 F.3d at 342. Only conclusive resolution of the issue by this Court can provide lower courts with the clarity they need to enforce Title VII consistently.

III. THE MAJORITY APPROACH UNIQUELY DISADVANTAGES LESBIAN, GAY, AND BISEXUAL PLAINTIFFS BRINGING TITLE VII CLAIMS

This Court's intervention is necessary not only to provide needed clarity, but also to ensure that Title VII is enforced even-handedly because, as courts have observed, the artificial distinction between sex stereotyping and sexual orientation discrimination that has developed in the lower courts has made Title VII claims "especially difficult for gay plaintiffs to bring." *Maroney* v. *Waterbury Hosp.*, No. 10-1415, 2011 WL 1085633, at *2 n.2 (D. Conn. Mar. 18, 2011).

As described above, allegations of discriminatory conduct on the basis of sexual orientation are routinely ignored (at best) or considered a basis for dismissal (at worst). *See also, e.g.*, *Schmedding*, 187 F.3d at 865 (concluding that "the best recourse is to remand the case to the district court with instructions that plaintiff be allowed to amend his complaint" "so as to delete" a reference to the phrase "perceived sexual preference"); *Trigg*, 2001 WL 868336, at *5-6 (dismissing employee's complaint on the ground that it was "rife with references to [his] sexual orientation"). For that reason, litigants face strong pressure to omit explicit references to sexual ori-

entation, such as homophobic slurs, from their complaints altogether. *See* Bovalino, *How the Effeminate Male Can Maximize His Odds of Winning Title VII Litigation*, 53 Syracuse L. Rev. 1117, 1134 (2003) (trend in the caselaw means that "gay plaintiffs bringing claims under Title VII should … de-emphasize any connection the discrimination has to homosexuality"); Ryan, *A "Queer" by Any Other Name: Advocating a Victim-Centered Approach to Title VII and Title IX Same-Sex Sexual Harassment Claims*, 13 B.U. Pub. Int. L.J. 227, 241 (2004) (noting that Title VII caselaw "invites … conjecture into whether the plaintiff would have prevailed had he hidden his homosexuality from the court").

But those facts are often integral to showing the discriminatory treatment, even under the widely accepted sex stereotyping theory. *See* Schultz, *Reconceptualizing Sexual Harassment*, 107 Yale L.J. 1683, 1786 (1998) (noting that "[t]he allegation that a man is gay is often an accusation that he does not live up to one's expectations of masculine competence" and thus "the harassers' remarks about sexual orientation provide clear[] evidence" of discrimination based on sex stereotypes). Thus, the reliance of many courts on this artificial distinction puts gay, lesbian, and bisexual people in a lose-lose situation: plead the full story and risk dismissal on the ground that the complaint invokes a theory that is not cognizable under Title VII (sexual orientation discrimination), or plead the abridged, stylized version that fits into the cognizable theory (sex stereotyping) but risk dismissal on the ground that the complaint simply does not adequately show discriminatory treatment. No other category of Title VII plaintiff faces this trap. *See* Barber, *Re-Orienting Sexual Harassment: Why Federal Legislation Is Needed To Cure Same-Sex Sexual Harassment Law*, 52 Am. U.L. Rev. 493, 516-

517 & n.150 (2002) ("If the thought exists that the plaintiff is homosexual, regardless of the reality, courts often conclude that the harassment must be motivated by that thought, and thus conclude that such sexual orientation harassment does not fall within Title VII's reach. This begs the question: how can any employee get over this hurdle and find protection under Title VII if the mere perception of homosexuality is enough to defeat a sexual harassment claim?").

This approach, in which a sex stereotype nonconformity claim can "be tainted with any hint of a claim that the employer also engaged in sexual orientation discrimination," has led to an "odd state of affairs in the law." *Hively*, 830 F.3d at 707, 711. Gay, lesbian, and bisexual plaintiffs who "meet society's stereotypical norms about how gay men or lesbian women look or act—i.e. that gay men tend to behave in effeminate ways and lesbian women have masculine mannerisms"—can state a Title VII claim, while those who fail to conform to the norm of heterosexuality but "otherwise conform to gender stereotyped norms in dress and mannerisms mostly lose their claims for sex discrimination under Title VII." *Id.* at 711. In other words, stereotypical "gays … receive[] protection, while those … who [are] more discreet [see] their cases dismissed." Soucek, 63 Am. U.L. Rev. at 774-775 (surveying cases).

The result is that gay, lesbian, and bisexual plaintiffs must tie themselves in knots to state a cognizable Title VII sex discrimination claim—and are met with varying degrees of success, notwithstanding virtually identical underlying facts. *Compare Dawson*, 398 F.3d at 215-218 (lesbian hair salon assistant alleging that she faced harassment for her failure to conform to the sex stereotype of dating men—including facing taunts that she should "act in a manner less like a man and more

like a woman" and "needed to have sex with a man"—did not state cognizable Title VII claims); *Vickers*, 453 F.3d at 762 (rejecting claim that homophobic slurs and offensive touching amounted to sex discrimination), *with Boutillier*, 2014 WL 4794527, at *2 (allegations that plaintiff, a lesbian woman, "was subjected to sexual stereotyping during her employment on the basis of her sexual orientation" sufficient to state a claim under Title VII); *Heller* v. *Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1217-1220 (D. Or. 2002) (allegations that lesbian woman faced harassment on the basis of her sexual orientation, including homophobic slurs, sufficient to state cognizable Title VII claim).[3]

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[3] Although lower courts have begun to question the majority approach, recognition that the substantive law unfairly disfavors gay, lesbian, and bisexual employees has been slow to materialize at the circuit level. One former judge sees this phenomenon as an instance of "Losers' Rules," whereby employers—who are "repeat players" in employment discrimination cases—tend to settle strong cases and litigate weak ones. *See* Gertner, *Losers' Rules*, 122 Yale L.J. Online 109, 109-110 (2012), *at* http://yalelawjournal.org/forum/losers-rules. This phenomenon skews the decisional law that develops in the courts of appeals, as courts "produce judicial interpretations of rights that favor the repeat players' interests," and those skewed interpretations are compounded over time in the lower courts, which are bound to apply circuit precedent. *Id.* Recent experience indicates that this phenomenon has played out in this context. Where a district court has ruled that a plaintiff alleged a cognizable Title VII claim relating to discrimination premised on his or her sexual orientation, the defendant has routinely settled before the court of appeals could decide the case. *See*, *e.g.*, *Boutillier* v. *Hartford Pub. Sch.*, No. 13-1303 (D. Conn.) (parties settled after court denied motion to dismiss); *Winstead* v. *Lafayette Cty. Bd. of Cty. Comm'rs*, No. 16-54 (N.D. Fla.) (same); *Terveer* v. *Billington*, No. 12-1290 (D.D.C.) (same); *Centola* v. *Potter*, No. 99-12622 (D. Mass.) (parties settled after court granted summary judgment motion in employee's favor).

Running the gantlet of the majority rule is made even more difficult by the fact it contradicts the judgment of the federal agency principally responsible for enforcing Title VII—the Equal Employment Opportunity Commission ("EEOC")—which has concluded that claims based on sexual orientation are indeed cognizable under Title VII. *Baldwin*, 2015 WL 4397641, at *10 ("allegations of discrimination on the basis of sexual orientation necessarily state a claim of discrimination on the basis of sex"). Because courts police judicial complaints for consistency with prior EEOC complaints, *see, e.g.*, *Giddens* v. *Community Educ. Ctrs., Inc.*, 540 F. App'x 381, 390 (5th Cir. 2013); *Flannery* v. *Recording Indus. Ass'n of Am.*, 354 F.3d 632, 638-640 (7th Cir. 2004), lesbian, gay, and bisexual Title VII plaintiffs must choose between optimizing their chances with the EEOC and optimizing their chances in subsequent litigation, should there be any. This is complicated further still by the fact that the Department of Justice, which enforces Title VII against state and local employers, has recently aligned itself with the majority rule and contrary to the EEOC. *See* Br. for the United States as *Amicus Curiae* Supporting Defendants-Appellees at 1, *Zarda* v. *Altitude Express, Inc.*, No. 15-3755 (2d Cir. July 26, 2017), 2017 WL 3277292, at *6 ("discrimination because of sexual orientation is not discrimination because of sex under Title VII" (capitalization altered)).

In sum, gay, lesbian, and bisexual people who wish to bring a Title VII claim—even under the accepted theory of discrimination based on sexual stereotyping—are disadvantaged in a way that no other type of Title VII plaintiff is.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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