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 OF *AMICI CURIAE* ANTI-DISCRIMINATION SCHOLARS IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

Amici curiae are scholars of anti-discrimination law. For decades, they have published scholarship demonstrating that sexual orientation discrimination is a form of sex discrimination that violates Title VII of the Civil Rights Act of 1964. *Amici* submit this brief to explain the basis for this widespread scholarly consensus, describe the extent to which it has been embraced by judges in recent years, and urge the

Court to grant certiorari and reverse the judgment below.[1]

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[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for party, or person other than *amici curiae* or counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties were notified of *amici curiae*'s intent to submit this brief at least 10 days before it was due. Petitioners have consented to the brief in a letter that has been lodged with the Clerk of the Court. The named respondents have filed a letter stating that they are not parties to the case and accordingly their consent is not required to file an *amicus* brief. The title and institutional affiliation of each *amicus* are provided for identification purposes only, and do not purport to represent the schools' institutional views.

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INTRODUCTION AND SUMMARY OF ARGUMENT

Nearly thirty years ago, this Court declared that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group." *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 251 (1989) (plurality op.). Under Title VII, an em-

ployer may not refuse to promote a woman because it thinks her more "aggressive" than a woman should be, or fire a man because it deems him insufficiently "masculine" for his sex. *Id.* at 256. Such demands for gender conformity are discrimination "because of *** sex," which Title VII categorically bars. 42 U.S.C. § 2000e-2(a)(1).

For almost three decades, scholars have recognized that discrimination on the basis of sexual orientation violates this bedrock command. Gay men, lesbians, and bisexuals do not conform to traditional notions of how members of each sex should behave. In their love and partnerships, their desires and sexual conduct, sometimes even in their affect, appearance, or interests, people who are gay, lesbian, or bisexual blur the crisply separated gender roles that society has long imposed. Discrimination based on sexual orientation both relies on and reinforces those gender stereotypes. An employer who engages in such discrimination does not treat people equally based on sex; instead, it maintains and perpetuates a rigid differentiation between the sexes—one that has, moreover, long operated to the particular detriment of women.

In the years following Title VII's enactment, lower courts were slow to recognize this insight—in part, perhaps, because this Court still permitted laws that served as "an invitation to subject homosexual persons to discrimination." *Lawrence* v. *Texas*, 539 U.S. 558, 575, 577 (2003). But in the past decade and a half, judges have rapidly come around to the longstanding scholarly consensus that discrimination based on sexual orientation is a form of sex discrimination. Numerous district courts, judges on three courts of appeals, and the Equal Employment Oppor-

tunity Commission ("EEOC") have all embraced this commonsense view.

It is time for this Court to do the same. After three decades of scholarly and judicial consideration, this issue has more than adequately percolated. Delay would serve no purpose: Nearly every circuit locked into a position on this issue years ago, and some—including the court below—have made plain they will not revisit their interpretation of the statute absent this Court's intervention. Waiting would only perpetuate a legal regime in which individuals can claim Title VII's protection, at most, for "acting" or "appearing" gay, but not for *being* gay—an absurd and counterproductive rule that Congress assuredly did not intend.

This Court has previously recognized that "times can blind," and that longstanding interpretations of legal texts that "demean[ed] the lives of homosexual persons" could not, on reflection, "withstand careful analysis." *Lawrence*, 539 U.S. at 575, 579. The circuit precedents permitting employers to discriminate against gay men and lesbians are similarly infirm. An employer who punishes a lesbian because she does not act as women ostensibly should—because, that is, she loves and partners with women and not only with men—discriminates "because of * * * sex." Title VII flatly bars that discrimination. The Court should grant certiorari and say so.

ARGUMENT

I. SEXUAL ORIENTATION DISCRIMINATION IS SEX DISCRIMINATION.

A. For Decades, Scholars Have Recognized That Sexual Orientation Discrimination Violates Title VII.

1. Title VII provides in categorical terms that employers may not engage in discrimination "because of * * * sex." 42 U.S.C. § 2000e-2(a)(1). This mandate is, and was intended to be, a broad one. When Congress enacted Title VII in 1964, women suffered pervasive discrimination in the workplace. They were often the targets of overt discrimination, which relegated women to lower-paying jobs thought fitting for wives and mothers, while reserving better and more secure jobs for men. Vicki Schultz, *Taking Sex Discrimination Seriously*, 91 Denv. U. L. Rev. 995, 1027-28 (2015). And they were victims as well of deeply ingrained and stifling social expectations about their proper role and behavior: That women should prioritize marriage and motherhood over employment, *id.* at 1010, and that they should dress, act, speak, and conduct themselves in ways deemed traditionally "appropriate" for their sex. Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 Harv. L. Rev. 1307, 1328-29 (2012).

In enacting Title VII, Congress sought to "strike at the *entire spectrum* of disparate treatment of men and women resulting from sex stereotypes." *County of Washington* v. *Gunther*, 452 U.S. 161, 180 (1981) (quoting *City of Los Angeles, Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 707 n.13 (1978)). It aimed to prohibit policies that confined women to a narrow

set of jobs and required that they conform to traditional notions of how women should behave. *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (per curiam). Congress also sought to "protect * * * male employees" from equivalent restrictions, which likewise restricted men's liberty and reinforced the traditional hierarchy of gender roles. *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. 669, 681-682 (1983).

Accordingly, this Court has held that Title VII bars not only formal sex discrimination but all outmoded stereotypes about how each sex should behave. An employer may not, for example, refuse to promote a woman because it deems her more "aggressive" than a woman should be. *Price Waterhouse*, 490 U.S. at 256. And it may not, by the same token, fire a man because he is deemed too soft-spoken or effeminate for his sex. *See Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).

2. For decades, scholars have concluded that discrimination on the basis of sexual orientation necessarily violates this prohibition.

On its face, sexual orientation discrimination denies a person employment opportunities because of his or her sex. Firing a woman like Jameka Evans because she is a lesbian means firing her because she is a woman who loves and partners with women, when a man who loves and partners with women would not similarly be punished. *See* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. Rev. 197, 208 (1994) [hereinafter "*Sex Discrimination*"]. Discrimination of this nature is inextricably linked with the employee's sex. It would be impossible for

an employer to discriminate against Evans in this way without knowing that she is a woman and disapproving of the 'type' of woman that she is. *Id.* at 211; *see also* Cass R. Sunstein, *Homosexuality and the Constitution*, 70 Ind. L.J. 1, 18 (1994).

That is enough to establish a violation of Title VII: The statute flatly bars employers from singling out an employee for worse treatment because of her sex or the sex of those with whom she associates. Pet. 23-24, 25-26; *see* Koppelman, *Sex Discrimination*, at 219. By demanding that men must have a sexual and romantic preference for women, and women for men, an employer impermissibly assigns each sex a "proper" role, dictates the "proper" sex for its romantic and sexual partners, and punishes men and women for departing from those expectations. *See* Catharine A. MacKinnon, Sex Equality 1352-55 (3d ed. 2016).

The obvious root and effect of this discrimination makes the Title VII violation more serious still. For discrimination against gay men and lesbians arises out of and penalizes their departure from traditional and stereotypical notions of how each sex should behave—the very sort of rigid gender role-typing this Court has recognized Title VII was designed to eradicate. *See Price Waterhouse*, 490 U.S. at 256.

Gay men, lesbians, and bisexuals depart in significant respects from what is traditionally expected of members of their sex. By entering into same-sex partnerships, they do not follow the expectation that a man should be the family's dominant breadwinner and a woman its subservient caretaker. *See* Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 Wis. L. Rev. 187, 199, 208, 218. In

their affections and intimate relationships, gay men, lesbians, and bisexuals transgress deeply rooted norms regarding each gender's proper, complementary sexual role. *See* Koppelman, *Sex Discrimination*, at 235-236; Sunstein, *supra*, at 22. And in our society, gay men and lesbians are widely presumed to have affects, appearances, behaviors, and mannerisms that are not stereotypical of their sex. *See* Koppelman, *Sex Discrimination*, at 235.

Discrimination based on sexual orientation penalizes men and women for "flouting" traditional gender roles in these ways. MacKinnon, *supra*, at 1355; *see* Law, *supra*, at 187. By demeaning or ostracizing gay men and women, an employer makes clear that it views their departures from traditional gender norms as unacceptable—that it believes men should be dominant, inviolable, and "masculine," and women submissive, available, and "feminine." *See* Koppelman, *Sex Discrimination*, at 233. The employer reaffirms that there are only two "crisply separat[ed] gender roles," and that men and women should not blur them by engaging in or expressing a preference for same-sex intimacy. Sunstein, *supra*, at 21; *see* Zachary A. Kramer, Note, *The Ultimate Gender Stereotype*: *Equalizing Gender-Conforming and Gender-Nonconforming Homosexuals Under Title VII*, 2004 U. Ill. L. Rev. 465, 491 (2004).

Common experience and sociology confirm the close connection between sexual orientation discrimination and the maintenance of traditional, hierarchical roles for each sex. *See* William N. Eskridge, Jr., The Case for Same-Sex Marriage 167-172 (1996). In every social context—from the schoolyard to the water cooler—hostility to individuals perceived as gay or lesbian is tightly linked with disapprobation

for the failure to conform to archetypal notions of masculinity and femininity. *See* Ann C. McGinley, *Erasing Boundaries: Masculinities, Sexual Minorities, and Employment Discrimination*, 43 U. Mich. J. L. Reform 713, 721-724 (2010). Effeminate men and assertive women are the ones most frequently targeted with homophobic epithets. Koppelman, *Sex Discrimination*, at 235. Decades of studies have likewise demonstrated that individuals who exhibit hostility to gay men and lesbians often carry deep hostility toward anyone who does not act in stereotypically gendered ways. *Id.* at 237-238 nn. 156-157 (listing numerous studies).

Even where discrimination does not arise out of such animus, the perpetrators of sexual orientation discrimination are typically motivated—often forthrightly—by their belief that men and women should play "opposite" or "complementary" roles in their relationships and in society at large. *See* Deborah A. Widiss, Elizabeth L. Rosenblatt & Douglas NeJaime, *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 Harv. J. L. & Gender 461, 463-464 (2007). Of course, Title VII quite appropriately does not forbid anyone from entering into such traditional relations in his or her own life, but it has long been understood to forbid employers from insisting that employees follow such a path.

The necessary consequence of sexual orientation discrimination, therefore, is the preservation of sharply delineated spheres of male and female identity. *See* Law, *supra*, at 218-221; Sunstein, *supra*, at 22-23. The discrimination itself serves to punish and exclude from the workplace individuals who depart from traditional and hierarchical gender roles. And it says to other employees, gay and

straight, that deviation from core expectations of how men and women should behave, and what their proper roles in the family, society, and sexual relationships ought to be, will be met with disapproval and censure. *See* I. Bennett Capers, Note, *Sex(ual Orientation) and Title VII*, 91 Colum. L. Rev. 1158, 1170 (1991).

What is more, because of the inseparable link between sexual orientation discrimination and gender stereotyping, sanctioning discrimination against gays and lesbians operates to substantially undermine the protections afforded to all gender-nonconforming employees. *See* Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 Am. U. L. Rev. 715, 731 (2014). Employers and coworkers who disapprove of a person's failure to satisfy sex-based gender norms—a woman's assertiveness, say, or a man's soft-spokenness—will often express their hostility to that transgression by attacking the employee's real or perceived homosexuality. Conversely, homophobia often manifests itself in taunts directed at a person's gender-nonconforming actions or appearance. It is frequently impossible for courts to distinguish between the two types of discrimination: One can easily substitute for, or be masked as, the other.

Denying employees the protection of Title VII for being gay, lesbian, or bisexual thus opens up a "sexual orientation loophole" in the law. Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 Cal. L. Rev. 1, 146-147 (1995). Women who love women should be treated no differently from men who love women—just as women with pre-

school age children should be treated no differently from men with such children. *Phillips*, 400 U.S. at 544. To hold otherwise "exclud[es] people identified as gay from the protection from gender stereotyping extended to all other people *as men and women*," by denying them—and only them—a cause of action under Title VII based on their "failure to conform to * * * gender-based expectations." Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 Yale L.J. 1683, 1783-85 (1998). It makes gay, lesbian, and bisexual employees a uniquely disfavored class under the law, effecting an irrational exclusion of the kind this Court held unlawful in *Romer* v. *Evans*, 517 U.S. 620 (1996). *See* Schultz, *Reconceptualizing Sexual Harassment*, at 1785.

That arbitrary exclusion, moreover, redounds to the detriment of gay and straight employees alike. Persons who can lawfully be fired or harassed for being gay will also fear engaging in conduct that makes them "appear" gay. Permission to engage in sexual orientation discrimination thus deters employees from engaging in the gender non-conforming behaviors—assertiveness for women, sensitivity for men, or a thousand other such deviations—that are tightly bound up with perceptions of homosexuality. *See* Capers, *supra*, at 1170. Authorizing such discrimination allows employers to engage in the sex-based policing of gender norms that Title VII forbids as sex-based discrimination.

In the final analysis, then, scholars have long concluded that sexual orientation discrimination preserves and reinforces the strict separation of gender roles in the workplace that Title VII was designed to disrupt. *See id.* at 1162; Samuel A. Marcosson, *Harassment on the Basis of Sexual Orientation*: *A*

Claim of Sex Discrimination Under Title VII, 81 Geo. L.J. 1, 23-24 (1992). It hardens stereotypes about how men and women, respectively, should live and act. It punishes and deters individuals who depart from those stereotypes. And it reinforces the system of gender hierarchy whose ultimate consequence, in 1964 as today, was the relegation of each sex—particularly women—to a limited and stifling set of opportunities in the workplace.

3. Since 1979, judges and commentators who have rejected the position that sexual orientation discrimination is sex-based discrimination barred by Title VII have relied principally on the theory that such discrimination treats each sex "equally." As the Ninth Circuit reasoned in *DeSantis* v. *Pacific Telephone & Telegraph Co.*, 608 F.2d 327 (9th Cir. 1979), an employer who engages in sexual orientation discrimination "is using the same criterion" whether "dealing with men or women": "it will not hire or promote a person who prefers sexual partners of the same sex." *Id.* at 331.

This analysis fundamentally misapprehends the nature of the discrimination at issue in two different respects. First, by penalizing employees for being gay or lesbian, an employer acts on and reinforces the belief that men and women have *different* roles and responsibilities, and that it is unacceptable for men or women to engage in the familial, sexual, and expressive activities that are thought to be reserved for the other sex. Insisting that each sex conform to a different and sharply limited role in this way is not equality, but the very essence of discrimination "because of * * * sex." That alone defeats the formal "equality" argument.

But there is a second, additional reason why sexual orientation discrimination does not treat both sexes equally. By insisting that individuals adhere to the traditional hierarchy of gender roles, discrimination against gays, lesbians, and bisexuals entrenches the traditional *inequality* of men and women in the workplace. As Title VII's drafters recognized, "the enforcement of traditional sex and family roles" has long been uniquely "detrimental to women and their families." Franklin, *supra*, at 1326. It preserves the belief that it is natural and proper for men to be heads of their households and fill the leading roles in the workforce, whereas women should not behave—in either the private or public spheres—in ways seen as "dominant" or "masculine." MacKinnon, *supra*, at 1355. By punishing individuals—women and men alike—who "fail[] to conform to *** society's requirements for women and femininity, men and masculinity," sexual orientation discrimination in the workplace reinforces the traditional and unequal hierarchy of gender roles that Congress enacted Title VII to uproot. *Id.*; *see* Catharine A. MacKinnon, *The Road Not Taken: Sex Equality in* Lawrence v. Texas, 65 Ohio St. L.J. 1081, 1085 (2004).

Loving v. *Virginia*, 388 U.S. 1 (1967) is instructive. There, too, the State claimed that its ban on miscegenation was not discriminatory because it treated both races "equally": Whites and blacks alike, the State argued, were prohibited from marrying a person of the opposite race. *Id.* at 8. The Court did not accept this pretense of equality. Rather, it recognized that the obvious function of a ban on racial intermarriage was "to maintain White Supremacy." *Id.* at 11. By segregating races in their intimate associations, the State reinforced their

separateness and ensured that whites would retain their privileged social position. *Cf., e.g.*, *Parr* v. *Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986) (holding that Title VII bars discrimination against individuals in interracial marriages regardless of whether the employer inflicts such discrimination on both races).

So too here, the function of discrimination against gays, lesbians, and bisexuals is the maintenance of rigid and hierarchical roles for each sex. *See* Sunstein, *supra*, at 20-21; Andrew Koppelman, Note, *The Miscegenation Analogy*: *Sodomy Law as Sex Discrimination*, 98 Yale L.J. 145, 147 (1988). Much like the ban on miscegenation struck down in *Loving*, it perpetuates the stereotype that men and women should play distinct and highly traditional roles in the family and in society at large. And it reinforces, as a result, the notion that dominant roles must be reserved for men and subordinate ones for women—the very sort of substantive inequality based on sex that the 1964 Congress and its successors worked so diligently to eliminate. MacKinnon, Sex Equality, at 1355; *see* William N. Eskridge, Jr., *Title VII's Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections* 48-49, 127 Yale L.J. ___ (forthcoming Nov. 2017), https://goo.gl/QMHL8p; *see also Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 736 (2003) (explaining that "mutually reinforcing stereotypes" about "women's domestic roles" and the "lack of domestic responsibilities for men" have "created a self-fulfilling cycle of discrimination" and "fostered employers' stereotypical views about women's commitment to work and their value as employees").

B. Courts Have Increasingly Recognized That Sexual Orientation Discrimination Unlawfully Enforces Traditional Gender Roles.

Courts have been slow to acknowledge the link between sexual orientation discrimination and sex discrimination—just as, for decades, they did not recognize that laws barring intimate sexual conduct or marriage between same-sex partners could not be reconciled with the Constitution. But in recent decades a "new insight" has emerged. *United States* v. *Windsor*, 133 S. Ct. 2675, 2689 (2013). With increasing speed, judges have begun to accept the widespread scholarly consensus that sexual orientation discrimination is inherently a form of sex discrimination.

One of the first judges to recognize this point was Justice Johnson of the Vermont Supreme Court, in 1999. Concurring in that court's decision to invalidate Vermont's ban on same-sex unions, she explained that the State's marriage law not only discriminated against gay men and lesbians, but also amounted to "a straightforward case of sex discrimination." *Baker* v. *State*, 744 A.2d 864, 905 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part). By confining marriage to individuals willing to marry partners of a different sex, the law was a "vestige of sex-role stereotyping that applies to both men and women," whose core justifications reflected "impermissible assumptions about" the respective "roles" of each sex. *Id.* at 906, 911-912.[2]

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[2] Many other decisions invalidating prohibitions on same-sex marriage applied similar reasoning. *See, e.g.*, *Latta* v. *Otter*, 771 F.3d 456, 485 (9th Cir. 2014) (Berzon, J., concurring)

In 2002, the District Court for the District of Massachusetts extended this logic to Title VII. In *Centola* v. *Potter*, 183 F. Supp. 2d 403 (D. Mass. 2002), the defendants contended that Title VII did not bar them from "continuously torment[ing]" a gay employee by "mocking his masculinity, portraying him as effeminate, and implying that he was a homosexual." *Id.* at 406. The court disagreed. "[T]he line between discrimination because of sexual orientation and discrimination because of sex," it explained, "is hardly clear." *Id.* at 408. "Sexual orientation harassment is often, if not always, motivated by a desire to enforce heterosexually defined gender norms"; "[t]he harasser may discriminate * * * because he thinks, 'real men don't date men,' " or because of his target's departure from "traditional concepts of masculinity and femininity." *Id.* at 410 & n.8 (citing Law, *supra*). Title VII therefore did not leave the defendants free to discriminate against gay men and lesbians with impunity. Such discrimination, the Court concluded, could well violate the statute by

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(concluding that prohibitions on same-sex marriage "draw on 'archaic and stereotypic notions' about the purportedly distinctive roles and abilities of men and women"); *Perry* v. *Schwarzenegger*, 704 F. Supp. 2d 921, 998 (N.D. Cal. 2010) (concluding that Proposition 8 "mandate[d] that men and women be treated differently based only on antiquated and discredited notions of gender"); *Goodridge* v. *Dep't of Public Health*, 798 N.E.2d 941, 973 (Mass. 2003) (Greaney, J., concurring) (explaining that Massachusetts' marriage laws reflected "ingrained assumptions with respect to historically accepted roles of men and women"); *Baehr* v. *Lewin*, 852 P.2d 44, 59-63 (Haw. 1993) (concluding, by analogy to *Loving*, that Hawaii "regulat[ed] * * * access to the status of married persons * * * on the basis of the applicant's sex").

penalizing employees for "failing to conform with sexual stereotypes about what 'real' men do or don't do." *Id.* at 410.

Numerous other district courts have followed suit. In *Boutillier* v. *Hartford Public Schools*, 221 F. Supp. 3d 255 (D. Conn. 2016), for example, the court explained that "stereotypes concerning sexual orientation are probably the most prominent of all sex related stereotypes." *Id.* at 269. Similarly, in *Videckis* v. *Pepperdine University*, 150 F. Supp. 3d 1151 (C.D. Cal. 2015), the court explained that "the line between sex discrimination and sexual orientation discrimination is 'difficult to draw' because that line does not exist." *Id.* at 1159.

The EEOC adopted the same reasoning in *Baldwin* v. *Foxx*, No. 0120133080, 2015 WL 4397641 (EEOC July 15, 2015). It explained that "[d]iscrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms." *Id.* at *5. It "necessarily involves discrimination based on gender stereotypes," and relies on "deeper assumptions * * * about 'real' men and 'real' women." *Id.* at *7-8. Courts had evaded this "straightforward" conclusion only through "intricate parsing of language" that the statutory text could not bear. *Id.* at *8; *see* Recent Adjudication, *EEOC Extends Workplace Protections to Gay and Lesbian Employees*, 129 Harv. L. Rev. 618, 621-625 (2015) (linking the Commission's reasoning to the longstanding scholarly consensus).

In the past year, judges on three separate courts of appeals have embraced the same logic. In her panel opinion in *Hively* v. *Ivy Tech Community College*, 830 F.3d 698 (7th Cir. 2016), Judge Rovner wrote that

there was no viable distinction between "gender norm discrimination *** and sexual orientation discrimination," because "[d]iscrimination 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." *Id.* at 705 (citing Soucek, *supra*, at 726). The "very status of gay men and lesbians," she explained, challenges longstanding ideas about "[w]ho is dominant and who is submissive," "[w]ho is charged with earning a living and who makes a home," and "[w]ho is a father and who a mother." *Id.* at 706. "In this way," she concluded, "the roots of sexual orientation discrimination and gender discrimination wrap around each other inextricably." *Id.*

Rehearing the case en banc, the Seventh Circuit reaffirmed that conclusion. Writing for the court, Chief Judge Wood explained that a lesbian "represents the ultimate case of failure to conform to the female stereotype." *Hively* v. *Ivy Tech Cmty. Coll.*, 853 F.3d 339, 346 (7th Cir. 2017) (en banc). By discriminating against the plaintiff because of her sexual orientation, her employer thus sought to "polic[e] the boundaries of what jobs or behaviors [it] found acceptable for a woman." *Id.*

Two judges on the Second Circuit have since agreed. "[C]ommon sense," they wrote earlier this year, confirms that "sexual orientation discrimination 'is often, if not always, motivated by a desire to enforce heterosexually defined gender norms.'" *Christiansen* v. *Omnicom Grp., Inc.*, 852 F.3d 195, 205 (2d Cir. 2017) (Katzmann, C.J., concurring) (quoting *Centola*, 183 F. Supp. 2d at 410). Although prior Second Circuit cases had attempted to draw a

distinction between "gender stereotype[s]" and sexual orientation discrimination, the judges explained that that line is "unworkable"; "the idea that men should be exclusively attracted to women and women should be exclusively attracted to men" is "as clear a gender stereotype as any." *Id.* at 205-206. Recently, the Second Circuit voted to reconsider this question en banc. *See* Order, *Zarda* v. *Altitude Express, Inc.*, No. 15-3775 (2d Cir. May 25, 2017).

Finally, Judge Rosenbaum also applied the logic of this line of cases in her dissent from the decision below. "Plain and simple," she explained, "when a woman alleges * * * 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." Pet. App. 27a. There is thus "no basis" for "an artificial line between discrimination because an employee has not *behaved* in a way that the employer thinks a person of that gender should, on the one hand, and discrimination because an employee is not the way that the employer thinks a person of that gender should *be*, on the other." *Id.* at 38a (emphases added).

II. CERTIORARI IS WARRANTED

The time has come for the Court to hold that Title VII bars such discrimination. After decades of exhaustive scholarly and judicial consideration, the issue is fully ripe for the Court's review. The lower courts that tied themselves to outmoded views of sexual orientation discrimination decades ago have made clear that they will not reconsider the issue

absent this Court's intervention. And as scholars have long demonstrated, the status quo—which affords employees some protection for "appearing" and "acting" in a manner perceived as gay, but not for simply *being* gay—is perverse, and establishes a backwards legal regime that Congress assuredly did not intend.

1. There is no reason for this Court to wait to resolve this vital issue. Scholars have recognized since at least the 1970's that sexual orientation discrimination is inherently linked with sex discrimination. *See* Koppelman, *Sex Discrimination*, at 199 n.3; Catharine A. MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination 203-206 (1979). In two seminal works in 1988, Professors Sylvia Law and Andrew Koppelman provided a comprehensive theoretical framework for this view, detailing the numerous respects in which discrimination against gay men and lesbians necessarily serves to reinforce and codify gender distinctions. *See* Law, *supra*, at 187; Koppelman, *The Miscegenation Analogy*, at 145-147. As early as 1991, the first academic work was published extending this analysis to Title VII. *See* Capers, *supra*, at 1158-59.

In the decades since, the legal literature on this subject has flourished. *See supra* pp. 6-15. Scholars have shown that the original meaning and purpose of Title VII was to eliminate the policing of gender roles in the workforce, Franklin, *supra*, at 1332; Schultz, *Taking Sex Discrimination Seriously*, at 1016-20; identified the profound contradictions that the current legal regime entails, Marcosson, *supra*, at 27; Soucek, *supra*, at 716-718; and persuasively critiqued the justifications for retaining a "sexual

orientation loophole" in anti-discrimination law, Valdes, *supra*, at 146-147.

For nearly twenty years, judges have wrestled with the same issues and have increasingly concurred with the scholarship. They too have written extensive and thoughtful opinions describing the inseparability of sexual orientation discrimination and sex discrimination. *See supra* pp. 16-20. And where judges have disagreed, they have fully aired the opposing viewpoint. *See* Pet. App. 19a-26a (Pryor, J., concurring); *Hively*, 853 F.3d at 359-374 (Sykes, J., dissenting).

In short, after three decades, this issue has more than adequately percolated in the courts and the academy. This Court and the parties have a wealth of thoughtful and considered views on both sides to draw from in helping them reach a considered conclusion. Waiting any longer would not generate appreciable new insights; it would merely delay the resolution of a civil rights question vital to the livelihood and dignity of millions.

2. Nor is there any prospect that waiting will cause the split in the lower courts to resolve itself. As the petition explains, nearly every court of appeals locked into a view on this question decades ago—some as early as 1979. *See* Pet. 11-12; Pet. App. 11a. At that time, this Court had not yet issued its landmark decisions on gay rights, and its precedents still tolerated laws that served as "an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." *Lawrence*, 539 U.S. at 575 (overruling *Bowers* v. *Hardwick*, 478 U.S. 186 (1986)). Nor had this Court decided *Price Waterhouse*, which held that Title VII bars efforts to

enforce traditional gender roles in the workplace, 490 U.S. at 256, or *Oncale*, which held that Title VII's prohibition on sex discrimination protects employees from "same-sex harassment," 523 U.S. at 78-79.

Now the law has changed. But these antiquated precedents remain, and at least some circuits have made clear that they will not revisit them absent this Court's intervention. *See* Pet. App. 11a-12a. Given that the Second Circuit has recently gone en banc to reconsider the issue, delay would only allow the split to deepen.

3. Moreover, delaying resolution of this question would entail significant cost. Until this Court resolves the question presented, gay men, lesbians, and bisexuals throughout the country will continue to be subjected to ostensibly lawful discrimination and harassment at the hands of their employers and coworkers—despite the fact that their sexual conduct may no longer be criminalized, *Lawrence*, 539 U.S. at 577, and their relationships must be accorded equal dignity under the law, *Obergefell* v. *Hodges*, 135 S. Ct. 2584 (2015). And all employees will be subject to one of the core evils that Title VII sought to eradicate: a rigid and stifling set of gender codes in the workplace.

Furthermore, the current legal regime is both unworkable and unsound. Employees may appeal to Title VII for protection if they are fired for acting or appearing in a way perceived to be gay, but not simply for *being* gay. *See* Soucek, *supra*, at 716; Pet. 16-19. This system results in arbitrary and absurd distinctions: It requires gay, lesbian, and bisexual employees who are penalized for their behavior or appearance to carefully craft their complaints to omit

any reference to their sexuality, the obvious source of the discrimination they face. Jessica A. Clarke, *Frontiers of Sex Discrimination Law*, 115 Mich. L. Rev. 809, 831 & n.123 (2017). Moreover, it protects employees only for gender non-conforming behavior that is physically seen at the workplace, while denying protection for identical behavior that is simply known or assumed to occur. Soucek, *supra*, at 766-767. It is implausible that this regime—which affords gays and lesbians more protection for their appearance and affect than for their identities, relationships, and affections—is the one that Congress intended. *Id.* at 773-777; Clarke, *supra*, at 830-831.

The Court should not allow this rule to persist. As common sense confirms, gay men and lesbians who are fired for their sexuality are, by definition, fired because they do not conform to the gender roles traditional to their sex. Congress enacted Title VII to abolish this form of stereotypical thinking from the workplace. This Court should declare, at last, that Title VII bars this discrimination "because of * * * sex."

CONCLUSION

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

Respectfully submitted,

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