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

IN THE

Supreme Court of the United States

GERALD LYNN BOSTOCK,

v.

CLAYTON COUNTY, GEORGIA.

ALTITUDE EXPRESS, INC., *et al.*,

v.

MELISSA ZARDA, AS EXECUTOR OF THE ESTATE OF DONALD ZARDA, *et al.*

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

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *et al.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE ELEVENTH, SECOND, AND SIXTH CIRCUITS

AMICI CURIAE BRIEF OF FORMER EXECUTIVE BRANCH OFFICIALS AND LEADERS INCLUDING CHAIRS, COMMISSIONERS, AND GENERAL COUNSEL FROM THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, SECRETARIES OF EDUCATION, DEPUTY ATTORNEY GENERAL, AND OTHER OFFICIALS FROM THE EEOC AND THE DEPARTMENTS OF EDUCATION, HEALTH & HUMAN SERVICES, JUSTICE, AND LABOR, IN SUPPORT OF THE EMPLOYEES

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INTERESTS OF THE *AMICI*[1]

The *amici curiae* here served as government officials and career employees responsible for the interpretation and application of federal laws prohibiting discrimination because of or based on sex. As Executive Branch members and staff, each *amicus* participated in extensive administrative processes to ensure that his or her Department or agency fully considered the relevant statutory law, legal precedent, regulatory guidance, scientific analysis, and factual record in reaching their conclusions concerning the scope and proper enforcement of federal anti-discrimination statutes. *Amici* are listed below in alphabetical order:[2]

- **William J. Baer**, Acting Associate Attorney General, United States Department of Justice (2016-2017);
- **Anurima Bhargava**, Chief, Educational Opportunities Section, Civil Rights Division,

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[1] Pursuant to Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

[2] *Amici* sign this brief solely in their personal capacity and not on behalf of any organization with which they may be affiliated. They submit their views specifically with respect to the Department in which they served.

United States Department of Justice (2010-2016);

- **Sharon Block**, Principal Deputy Assistant Secretary for Policy (2014-2017) and Senior Counselor to the Secretary (2013-2017), United States Department of Labor;
- **James M. Cole**, Deputy Attorney General, United States Department of Justice (2010-2015);
- **James Cole Jr.**, Acting Deputy Secretary (2016-2017), General Counsel (2014-2016); United States Department of Education;
- **Pamela Coukos**, Senior Advisor, Office of Federal Contract Compliance Programs, United States Department of Labor (2011 - 2016);
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- **Arne S. Duncan**, United States Secretary of Education (2009-2015);
- **Chai R. Feldblum**, Commissioner, United States Equal Employment Opportunity Commission (2010-2019);
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2013), United States Department of Education;

- **Javier Guzman**, Deputy Associate Attorney General, United States Department of Justice (2014-2017);
- **Eric Harrington,** Appellate Attorney (2010-2014); Special Assistant to Commissioner Chai Feldblum (2011), United States Equal Employment Opportunity Commission;
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- **John B. King Jr.**, United States Secretary of Education (2016-2017);
- **Gia Lee**, Deputy General Counsel, United States Department of Health and Human Services (2011-2017);
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- **Catherine E. Lhamon**, Chair, United States Commission on Civil Rights (2016-present); Assistant Secretary for Civil Rights, United States Department of Education (2013-2016);
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the United States Equal Employment Opportunity Commission (2010-2014);

- **AJ Pearlman**, Chief of Staff to the Director of the Office for Civil Rights, United States Department of Health and Human Services (2014-2017);
- **León Rodríguez**, Director, United States Citizenship and Immigration Services (2014-2017); Director, Office for Civil Rights, United States Department of Health and Human Services (2011-2014);
- **William B. Schultz**, General Counsel, United States Department of Health and Human Services (2011-2016);
- **Nitin Shah**, Chief of Staff, Civil Division, United States Department of Justice (2015-2017);
- **Patricia A. Shiu**, Director of Office of Federal Contract Compliance Programs, United States Department of Labor (2009-2016);
- **Johnathan Smith**, Senior Counsel to the Assistant Attorney General for Civil Rights, United States Department of Justice (2014-2017);
- **M. Patricia Smith**, Solicitor, United States Department of Labor (2010-2017);
- **Joseph Wardenski**, Trial Attorney, Educational Opportunities Section, Civil Rights Division, United States Department of

Justice (2010-2015); Co-Chair, Civil Rights Division's LGBTI Working Group (2013-2015);

- **Carolyn Wheeler**, Attorney and Assistant General Counsel, Appellate Division of the Office of General Counsel, United States Equal Employment Opportunity Commission (1988-2015); and
- **Jenny R. Yang**, Chair, Vice-Chair, Commissioner, United States Equal Employment Opportunity Commission (2013-2018).

SUMMARY OF ARGUMENT

Between 2010 and 2016, numerous federal Departments and agencies independently considered whether Title VII's prohibition against discrimination "because of sex"[3] includes discrimination based on gender identity, including transgender status,[4] and sexual orientation. To do so, they undertook substantial review of the evolving body of case law and sought to reach coherent and correct determinations informed by statutory text, precedent, science, and logic.

In the early years following passage of Title VII in 1964, the Equal Employment Opportunity Commission ("EEOC") did not assume that lesbian, gay, bisexual, and transgender ("LGBT") people were excluded from the protection of Title VII. *See generally* Br. of Historians as Amici Curiae in Support of the Employees. But ultimately, the EEOC, Executive Departments, and courts withheld crucial protections for LGBT employees under Title

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[3] Certain anti-discrimination statutes prohibit discrimination "because of sex," others prohibit discrimination "based on sex." Courts have drawn no distinction between the two.

[4] The question currently before the Court in *R.G. & G.R Harris Funeral Homes v. EEOC* is whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Any references herein to discrimination on the basis of gender identity refer also to discrimination against transgender people on the basis of transgender status or sex stereotyping.

VII on the unexamined premise that discrimination based on sexual orientation or gender identity, including transgender status, are separate and distinct forms of discrimination not motivated by someone's sex. The viability of that exclusionary approach began to erode, however, after this Court's plurality decision in *Price Waterhouse*, 490 U.S. at 240, made clear that Title VII requires "that gender must be irrelevant to employment decisions," including when based on stereotypes associated with one's sex. Reconsideration of excluding sexual orientation and gender identity as aspects of sex accelerated after the Court's decision in *Oncale v. Sundowner Offshore Services*, 523 U.S. 75, 79 (1998). Justice Scalia, writing for the unanimous Court, explained that Title VII covers all forms of discrimination fairly contained within its texts, even those that Congress "was assuredly not concerned with when it enacted Title VII." *Id.* Numerous courts, some with the urging of the EEOC, have now increasingly repudiated the prior approach when confronted by the mounting injustice, incoherence, and evident unworkability of carving out an exception for sex discrimination based on employees' sexual orientation and gender identity.

Prior to that reconsideration, in evaluating complaints of harassment and discrimination from LGBT employees, courts struggled to find bases to continue excluding sexual orientation and gender identity from Title VII's scope, with many recognizing that the lines between sexual orientation and gender identity, on one hand, and sex, on the other, are at a minimum "imprecise," *Dawson v.*

Bumble & Bumble, 398 F.3d 211, 217 (2d Cir. 2005) or "difficult to draw," *Prowel v. Wise Business Forms, Inc.*, 579 F.3d 285, 291 (3d Cir. 2009).

The evolving and increasingly confused case law, and escalating need to address real, ongoing discrimination, prompted the EEOC and several Departments to undertake deep and detailed analyses of whether the prior exclusionary approaches to Title VII and similar laws were correct. Because of the unique position it occupies in adjudicating discrimination complaints brought by federal employees and applicants, the EEOC led the way, concluding that discrimination because of sex in violation of Title VII necessarily includes discrimination based on gender identity, including transgender status, and sexual orientation. *See Macy v. Holder*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (Apr. 20, 2012) (gender identity); *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641 (July 15, 2015) (sexual orientation). The EEOC recognized, in other words, that sexual orientation and gender identity, including transgender status, are intrinsically subsets of sex and, thus, are squarely covered by Title VII's prohibition of discrimination based on sex.

Notably, the EEOC did not read sexual orientation and gender identity *into* the statute; it instead applied the law and refused to continue to apply discredited precedents to read sexual orientation and gender identity *out* of the statute. Put another way, the EEOC concluded that Title VII contains no LGBT exception.

Several Executive Departments similarly concluded that anti-discrimination statutes within their scope contain no such exception for discrimination on the basis of gender identity, including transgender status. Likewise, other Executive Departments agreed with the EEOC as to Title VII and recognized that the case law and viability of claims regarding sexual orientation were evolving.

These Departments, each with their own specific mission and constraints, did not move in precise lockstep with the EEOC. As officials who were charged with civil rights interpretation and enforcement at the EEOC and these various Departments during that time, however, *amici* agree that the EEOC, and, subsequently, supermajorities of the Seventh (8-3) and Second (11-3) Circuits, correctly concluded that discrimination on the basis of sexual orientation and gender identity *is* discrimination on the basis of sex under Title VII.

Although the current presidential administration has summarily undone many of those determinations and elected not to defend the position argued successfully by the EEOC in *Harris Funeral Homes* and *Zarda*, the EEOC's and Departments' extensive processes and careful reasoning remain highly relevant to the questions now before the Court.

ARGUMENT

The EEOC correctly determined that Title VII's prohibition of discrimination based on sex encompasses sexual orientation and gender identity discrimination. Prior to January 2017, others across

the Executive Branch independently and with considerable deliberation came to, or were considering, a similar conclusion. These determinations have now repeatedly been affirmed and amplified by myriad federal courts from across the country.

Recognizing that not all agencies and Departments are similarly situated, this brief separately addresses first, the determinations by the EEOC and second, the determinations by other relevant Departments.

I. AFTER CAREFUL ANALYSIS, THE EEOC DETERMINED THAT TITLE VII PROHIBITS BOTH DISCRIMINATION BASED ON GENDER IDENTITY, INCLUDING TRANSGENDER STATUS, AND DISCRIMINATION BASED ON SEXUAL ORIENTATION.

A. The EEOC Is Uniquely Empowered to Interpret and Enforce Anti-Discrimination Laws.

The EEOC plays a unique and critical role in interpreting and enforcing anti-discrimination statutes, including Title VII. Indeed, Congress created the EEOC for exactly that purpose and gave it express statutory jurisdiction to carry out its assignment. 42 U.S.C. § 2000e-5. As a bipartisan independent agency,[5] the EEOC "provide[s]

[5] Members of the same political party cannot occupy more than three of the EEOC's five seats. 42 U.S.C. § 2000e-4(a).

leadership and coordination to the efforts of Federal departments and agencies" and "develop[s] uniform standards, guidelines, and policies defining the nature of employment discrimination on the ground of race, color, religion, sex, national origin, age or handicap under all Federal statutes, Executive orders, regulations, and policies which require equal employment opportunity." Exec. Order No. 12066 §§ 1-301(a), 1-201 (June 29, 1978).

In carrying out its obligations in the private sector, the EEOC investigates charges, negotiates settlements, and brings litigation to enforce the nation's employment non-discrimination laws.

In the federal sector, the EEOC plays a singular role as it issues decisions in discrimination claims brought by federal employees and applicants. In such cases, the EEOC applies the law as it has been articulated by Congress and as interpreted by this Court. *Haywood v. Donahoe*, EEOC Appeal No. 0120132452, 2014 WL 6853897, at *4 (Nov. 18, 2014); *Huddleson v. U.S. Postal Service*, EEOC Appeal No. 0720090005, 2011 WL 1455683, at *5 n.6 (Apr. 4, 2011). Any other authority, including federal circuit court authority, may be considered by the EEOC to the extent that it is persuasive, but the agency's role is to interpret the statute in the way that it believes is most faithful to the language and purpose of the law.[6] *Id.* Thus, in contrast with other

[6] By contrast, other Departments that enforce their determinations in federal courts are necessarily constrained by the binding rulings of the judicial forum in which such

federal Departments, a final determination by the EEOC in a federal sector case, where it finds for the employee, binds the federal government with respect to its own employees. It is also treated as the EEOC's official policy position with respect to charges brought by individuals claiming employment discrimination by private employers, unions, and state and local governments, as well. The position also guides the EEOC's litigation efforts in federal courts, as it did in the *Harris Funeral Homes* case before this Court.

B. The EEOC Determined That Sex Discrimination Under Title VII Includes Discrimination Based On Gender Identity, Including Transgender Status, and Sexual Orientation.

The EEOC's two major determinations most relevant to the cases now before the Court are *Macy* (addressing discrimination because of gender identity, including transgender status) and *Baldwin* (addressing discrimination because of sexual orientation). Importantly, however, these two decisions did not signal any sort of sea change, but instead built on evolving analysis done over the course of many years, both in the courts and by civil service attorneys within the agency.

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enforcement may be sought, however inconsistent the logic of those rulings may be with more recent decisions of this Court.

Before *Macy* and *Baldwin*, the number of cases being filed in federal courts claiming gender identity or sexual orientation discrimination under Title VII had been steadily increasing for years.[7] As to sexual orientation cases, courts took varied approaches: some allowed claims to proceed when the claim related to a person's failure to conform with some outward stereotype of the person's sex, *e.g.*, *Prowel*, 579 F.3d at 292 (gay man could proceed on a gender stereotyping theory when he introduced evidence that he "did not conform to [his employer's] vision of how a man should look, speak, and act"); others rejected them in their entirety as inappropriately trying to "bootstrap" a sexual orientation claim onto a sex-based discrimination claim, *e.g.*, *Simonton v. Runyon*, 232 F.3d 33, 36 (2d Cir. 2000) (dismissing claim of employee whose "sexual orientation was known to his co-workers who repeatedly assaulted him with such comments as 'go fuck yourself, fag,' 'suck my dick,' and 'so you like it up the ass?'").

As to gender identity, the courts were slowly but steadily protecting transgender individuals

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[7] The EEOC did not begin collecting statistics about gender identity and sexual orientation claims that were filed with it until 2013. However, it is noteworthy that in 2018 alone, over 1,800 such claims were filed. *See* https://www.eeoc.gov/eeoc/statistics/enforcement/lgbt_sex_based.cfm. An adverse decision by the Court will have a grave impact on numerous victims of discrimination, including on claims that are still pending.

under Title VII. *See Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 571-72 (6th Cir. 2004); *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000); *Rosa v. Park West Bank & Trust Co.,* 214 F.3d 213 (1st Cir. 2000).

As the principal agency charged with enforcing and interpreting Title VII, the EEOC and its staff took notice of the evolving body of law regarding gender identity and the confusing body of law and unwarranted exclusions regarding sexual orientation. In both its private sector and federal sector work, career EEOC staff began to address these issues.

In 2011, career lawyers in the EEOC's Office of Federal Operations, under delegated authority from the Commission, concluded that the agency had jurisdiction over complaints of sexual orientation discrimination because the federal employees had sufficiently alleged sex discrimination under a gender stereotyping theory. *See Veretto v. United States Postal Service*, EEOC Appeal No. 0120110873, 2011 WL 2663401 (July 1, 2011) (discrimination based on gender stereotype that men should marry women, not men); *Castello v. U.S. Postal Service*, EEOC Request No. 0520110649, 2011 WL 6960810 (Dec. 20, 2011) (discrimination based on gender stereotype that women should have sexual relationships with men, not women).

Concurrently, before the Fifth Circuit, the EEOC was pressing the position that same-sex harassment cases involving homophobic remarks

directed at a non-LGBT employee could establish a discrimination claim as gender stereotyping. Ultimately, the Fifth Circuit, en banc, agreed that the EEOC could rely on gender-stereotyping evidence to show that same-sex discrimination occurred "because of sex." *EEOC v. Boh Bros. Constr. Co., L.L.C.*, 731 F.3d 444 (5th Cir. 2013) (en banc) (Ellrod, J.). This holding proved to be an important analytical step in the Commission's understanding of the logical reach of *Price Waterhouse*'s prohibition against gender stereotyping.

Also in 2011, by a bipartisan majority vote, the Commission approved participating as *amicus* in a federal district court case to argue that Title VII's prohibition against sex discrimination per se includes discrimination based on gender identity. Br. for EEOC as Amicus Curiae Supporting Plaintiff, *Pacheco v. Freedom Buick GMB Truck*, No. 07-cv-116 (W.D. Tex. Oct. 17, 2011). This was the first time the EEOC took such a position in federal court.

The next year, the EEOC's strategic enforcement plan noted that the issue of the coverage of LGBT individuals "under Title VII's sex discrimination provisions" was an "emerging and developing" area of the law, which made it a priority for the agency. EEOC, Strategic Enforcement Plan for Fiscal Years 2013-2016, at *9-10 (2012). In implementing that plan, *amicus* David Lopez, then General Counsel of the EEOC, formed and led a working group of career EEOC attorneys and staff to study the LGBT exception and give advice and input to the agency's attorneys.

The EEOC's LGBT working group spent months researching the law, monitoring recent legal developments, and discussing the proper interpretation of Title VII in light of this Court's rulings. The EEOC tested the underlying legal analyses that this working group developed either by filing *amicus* briefs or by litigating cases.

Macy and *Baldwin* grew out of this extensive work at all levels of the agency.[8] Following the issuance of those opinions, the EEOC brought litigation in its own name, including *EEOC vs. Harris Funeral Homes*, and submitted *amicus* briefs in several cases addressing the coverage of sexual orientation under Title VII.[9]

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[8] *See e.g.*, Feldblum, Chai, *Law, Policies in Practice and Social Norms: Coverage of Transgender Discrimination Under Sex Discrimination Law*, 14 J.L. SOCIETY, 1 (2013) (describing evolution of EEOC's analysis in coverage of gender identity discrimination as a form of sex discrimination).

[9] *See e.g.*, Br. of EEOC as Amicus Curiae, *Zarda v. Altitude Express Inc.*, 883 F.3d 100 (2d Cir. 2018) (en banc) (No. 15-3775), *available at* https://www.eeoc.gov/eeoc/litigation/briefs/zarda.html; Brs. of EEOC as Amicus Curiae, *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, (2d Cir. 2017) (No. 16-748), *available at* https://www.eeoc.gov/eeoc/litigation/briefs/christiansen.html; https://www.eeoc.gov/eeoc/litigation/briefs/christiansen2.html (in support of rehearing en banc); Br. of EEOC as Amicus Curiae, *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248 (11th Cir. 2017) (No. 15-15234), *available at* https://www.eeoc.gov/eeoc/litigation/briefs/evans4.html; Br. for EEOC as Amicus Curiae, *Hively v. Ivy Tech. Cmty College*, 830 F.3d 698 (7th Cir. 2016) (No. 15-1720) *available at*

C. As Confirmed By Subsequent Courts, the EEOC's Determinations in *Macy* and *Baldwin* Are Correct as a Matter of Law.

Macy and *Baldwin* emanate from Title VII's first principles, as articulated by Congress and this Court. Both decisions embrace the common sense proposition that Title VII requires "that gender [including gender-based stereotypes] must be irrelevant to employment decisions," *Price Waterhouse*, 490 U.S. at 240, even if particular applications of that rule were not "the principal evil Congress was concerned with when it enacted Title VII," *Oncale*, 523 U.S. at 79.

Macy and *Baldwin* are built upon this foundation, with both ultimately concluding that Title VII contains no LGBT exclusion.[10]

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https://www.eeoc.gov/eeoc/litigation/briefs/hively.html.

[10] This is entirely consistent with the Court's pre-*Baldwin* admonition that one should not read into a statute words—such as exclusions—that do not exist. "The problem with this approach is the one that inheres in most incorrect interpretations of statutes: It asks to add words to the law to produce what is thought to be a desirable result. That is Congress's province." *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033 (2015).

1. Joining Every Circuit Court Since *Price Waterhouse* To Have Considered It, The EEOC Held in *Macy* that Gender Identity Discrimination Is Discrimination Because of Sex.

The EEOC rendered its decision in *Macy* shortly after the Eleventh Circuit joined the First, Sixth, and Ninth Circuits in holding that prohibitions of discrimination because of sex include discrimination because of gender identity. *See Glenn*, 663 F.3d at 1316; *Smith*, 378 F.3d at 571-72; *Schwenk*, 204 F.3d at 1201-02; *Rosa,* 214 F.3d at 213. Those were the only federal circuit courts since *Price Waterhouse* to decide whether Title VII claims can be premised on a claim of gender identity discrimination, including on the basis of transgender status. Each court recognized that disparate treatment of a transgender plaintiff is prohibited discrimination because of sex. *See Macy*, 2012 WL 1435995, at *5-6.

In *Schwenk*, 204 F.3d at 1201-02, for example, the Ninth Circuit concluded that sex under Title VII "encompasses both sex—that is, the biological differences between men and women—and gender. Discrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII." The Sixth Circuit reached a similar conclusion in *Smith*, 378 F.3d at 573, dismissing efforts by some courts to exclude gender identity from Title VII by superimposing classifications such as transgender and then "legitimiz[ing] discrimination based on the plaintiff's gender nonconformity by formalizing the

non-conformity into an ostensibly unprotected classification." *Id.* at 574-75. The Eleventh Circuit likewise reasoned in *Glenn*, 663 F.3d at 1316, that a person is defined as transgender "precisely because of the perception that his or her behavior transgresses gender stereotypes." Thus, there is a "congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms." *Id.*

The EEOC adopted this same common sense approach in *Macy* and thereby aligned EEOC determinations and policy with every circuit to have decided the question over the last thirty years. The EEOC made clear that when an "employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment related to the sex of the victim" in violation of Title VII. *Macy*, 2012 WL 1435995, at *7. This is true no matter whether

> an employer discriminates against an employee because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person.

Id. In each circumstance, the EEOC understood that because the employer necessarily makes a gender-based evaluation in such decisions, it violates Title VII "regardless of whether the individual has expressed their gender in a non-stereotypical fashion." *Id.*

The EEOC also explained that proving sex stereotyping was but one of several means to prove sex had been taken into account in making an adverse employment decision. For example, a transgender person could also successfully make that claim in a more straightforward manner. If an individual could prove that an employer was "willing to hire her when he thought she was a man, but was not willing to hire her once he found out that she was now a woman," she would have proven discrimination based on sex without reference to gender stereotyping. *Id.* at *12. The EEOC reasoned that this was akin to discriminating against someone who changes religion, as in such scenarios, the employer has not necessarily relied on stereotypes associated with a particular religion but has nevertheless taken religion into account. *Id.* at *12-13.

Finally, the EEOC made clear that its decision did not create a new class (transgender) entitled to protection, just as no one would argue that finding that Title VII protected religious converts created a new protected status for converts, as opposed to a type of religious discrimination. Rather, the EEOC simply determined that discrimination against one

who is transgender is by definition discrimination because of sex.

The number of federal courts that agree with the EEOC's conclusion regarding the scope of Title VII has continued to grow after *Macy*. *See EEOC v. R&G & G&R Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018); *Grimm v. Gloucester Cty Sch. Bd.,* 302 F. Supp. 3d 730, 745 (E.D. Va. 2018) ("The Court also concludes that, pursuant to the logic of *Price Waterhouse*, transgender discrimination is per se actionable sex discrimination under Title VII."); *Baker v. Aetna Life Ins. Co.*, No. 3:15-CV-3679-D, 2017 WL 131658, at *5 (N.D. Tex. Jan. 13, 2017); *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 525 (D. Conn. 2016); *Mickens v. Gen. Elec. Co.*, No. 3:16-CV-00603-JHM, 2016 WL 7015665, at *3 (W.D. Ky. Nov. 29, 2016); *Roberts v. Clark Cty Sch. Dist.*, No. 2:15-CV-00388-JAD-PAL, 2016 WL 5843046, at *1 (D. Nev. Oct. 4, 2016).

It is noteworthy that in the case currently before the Court, the Sixth Circuit below held that an adverse employment action taken because the employee "was no longer going to represent himself as a man and wanted to dress as a woman" fell "squarely within the ambit of sex-based discrimination that *Price Waterhouse* and *Smith* forbid." *Harris Funeral Homes*, 884 F.3d at 572.

2. While *Baldwin* Represented a Departure from Prior Federal Circuit Court Authority, Subsequent Authority Has Likewise Demonstrated the EEOC Was Correct In Its Analysis.

Baldwin reexamined the approach that federal circuit courts at the time had taken. In doing so, the EEOC, with its singular role in federal sector cases, based its decision on a careful analysis of this Court's case law. The EEOC's determination that sexual orientation discrimination is an aspect of sex discrimination is fully consistent with this Court's prior opinions and holdings.

Since 2011, EEOC career staff had applied *Price Waterhouse* and *Oncale* in a common-sense way to conclude that EEOC had jurisdiction to hear claims of discrimination based on sexual orientation. In *Baldwin*, the EEOC explicated its reasoning in detail, drawing on the plain language of the statute as well as a careful analysis of *Price Waterhouse* and *Oncale*. The EEOC was also persuaded by the developing body of district court case law that—as Judge Rovner of the Seventh Circuit would later describe—was "beginning to question the doctrinaire distinction between gender non-conformity discrimination and sexual orientation discrimination and coming up short on rational answers." *Hively v. Ivy Tech Cmty. College*, 830 F.3d 698, 703 (7th Cir. 2016), *overturned en banc by* 853 F.3d 339 (2017). Consistent with that emerging pattern, later supermajorities of the Seventh and Second Circuits expressly agreed with the EEOC.

In *Baldwin*, the EEOC concluded that allegations of employment discrimination based on sexual orientation state a claim of discrimination based on sex under Title VII for three independent reasons: (1) sexual orientation is "inherently a 'sex-based consideration'" and a function of sex; (2) sexual orientation discrimination is predicated on gender stereotypes; and (3) sexual orientation discrimination is predicated upon one's association with a person of the same gender (association discrimination). 2015 WL 4397641, at *5-8.

The EEOC rejected the approach of contrary circuit authority—which the agency considers in federal sector cases only to the extent that it is persuasive—as wrongly decided. It concluded that many of those opinions "simply cite earlier and dated decisions without any additional analysis," and rely on "intricate parsing of language" to support the "bare conclusion that Title VII does not prohibit discrimination on the basis of sexual orientation." *Id.* at *8 & n.11 (internal quotations and citations omitted).[11]

As to the EEOC's first basis, in what Judge Cabranes would later call a "straightforward" application of Title VII, *Zarda v. Altitude Express Inc.*, 883 F.3d 100, 135 (2d Cir. 2018) (en banc) (Cabranes, J. concurring), the EEOC held that

[11] In the panel opinion in *Hively*, Judge Rovner took "to heart the EEOC's criticism" of the "lack of recent analysis on the issue." 830 F.3d at 704.

"sexual orientation is inherently a sex-based consideration; accordingly an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII." *Id.* at 108 (internal quotations omitted). This is so because, as Judge Flaum described, "one cannot consider a person's homosexuality without also accounting for their sex. . . . As such, discriminating against that employee because they are homosexual constitutes discriminating against an employee because of (A) the employee's sex and (B) their sexual attraction to individuals of the same sex." *Hively*, 853 F.3d at 358 (Flaum, J. concurring) (en banc); *see also Zarda*, 883 F.3d at 113 (same).

In other words, if an employer discriminates against Joe because he is sexually attracted to Tom but would not discriminate against Sue if she were sexually attracted to Tom, it is a straightforward case of discrimination because, but for Joe being a man, he would not have been subject to discrimination.

As to the second basis for the decision, the EEOC also held that sexual orientation discrimination is sex discrimination because it is necessarily predicated on gender stereotypes, which "often involve[] far more than assumptions about overt masculine or feminine behavior." *Baldwin*, 2015 WL 4397641, at *8. Instead, they are "often, if not always, motivated by a desire to enforce heterosexually defined gender norms." *Id.* (quoting *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002)). As Chief Judge Wood, joined by, among

others, Judge Easterbrook, would later hold, this is actionable under Title VII because it is "a reaction purely and simply based on sex." *Hively*, 853 F.3d at 347.

As to the third basis, the EEOC applied well-established principles of racial discrimination based on association with a member of a different race to sex discrimination. Title VII's prohibition of discrimination because of race includes within it a prohibition of discrimination "based on an employee's association with a person of another race, such as an interracial marriage or friendship." *Baldwin*, 2015 WL 4397641 at *8 (citing *e.g.*, *Floyd v. Amite Cty Sch. Dist.*, 581 F.3d 244, 249 (5th Cir. 2009)).

The Second Circuit, for example, noted that it was "not controversial" that Title VII generally would protect a female employee who is subject to discrimination because she has male friends if it also protects a white employee who has black friends. *See Christiansen*, 852 F.3d at 204 (Katzmann, C.J. concurring). From that premise, the court held, "it makes little sense to carve out same-sex relationships as an association to which these protections do not apply." *Id.*; *see also Zarda*, 883 F.3d at 125. This must be so because if the employer discriminates against Joe because he is married to Tom but would not discriminate against Joe if he were married to Sue, then it is straightforward discrimination because of sex just as it is well-recognized race discrimination to target a white employee for having a black spouse.

II. OTHER FEDERAL DEPARTMENTS MOVED IN TANDEM WITH THE EEOC TO THE EXTENT LEGAL DECISIONS PERMITTED.

A. The Departments Of Education, Justice, Health and Human Services, And Labor Concluded that Similar Federal Anti-Discrimination Laws Include A Prohibition Against Gender Identity Discrimination.

Along with the EEOC, around this time, several Departments were similarly but independently concluding that discrimination on the basis of gender identity is subsumed in prohibitions of discrimination based on sex. Like the EEOC, these Departments reached these conclusions based on careful work done at all levels of each Department. The care and attention given to these separate determinations is evident in the sheer volume of guidance each Department issued over the course of several years, including many guidance documents that were open to, and received, extensive public comment.

In 2014, the Department of Justice concluded, based on its own independent analysis, that "the most straightforward reading of Title VII" protects against gender identity discrimination. *See* U.S. Dep't of Just. Mem. (Dec. 15, 2014). The Attorney General so concluded "after considering the text of Title VII, the relevant Supreme Court case law interpreting the statute, and the developing jurisprudence in this area." *Id.* at 2. The Attorney General instructed that the Department of Justice

would no longer take the position in litigation that Title VII per se excluded gender identity, including transgender status. *Id.*

The Departments of Education and Justice, following the dictates of every federal circuit court to have considered the issue since the 1980s and the EEOC's decision in *Macy*, began adopting a similar interpretation of Title IX's prohibition against sex discrimination. In 2013, for example, they concluded a nearly two-year investigation into allegations that the Arcadia Unified School District in Southern California restricted a transgender boy from using the boys' restrooms, locker rooms, and other sex-segregated facilities. Both Departments made clear that Title IX's prohibition of discrimination on the basis of sex included a prohibition of discrimination on the basis of gender identity in the provision of education programs or activities.[12]

The Department of Education issued additional guidance in April and December 2014 that

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[12] U.S. Dep't of Just., Civ. Rts. Div. & U.S. Dep't of Educ., Off. for Civ. Rts., Letter to Dr. Joel Shawn, DOJ Case No. DJ169-12C-79, OCR Case No. 09-12-1020 (July 24, 2013), *available at* https://www.justice.gov/sites/default/files/crt/legacy/2013/07/26/arcadialetter.pdf. The Department of Justice further endorsed this interpretation of Title IX in *amicus* briefs filed on behalf of the Department of Education in *Carmichael v. Galbraith*, No. 12-11074, 2013 WL 1451385 (5th Cir. 2013) and in *Tooley v. Van Buren Public Sch.*, No. 14-cv-13466 (E.D. Mich. 2015).

reaffirmed these basic principles.[13] These were both designated as "significant guidance documents" under the Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007), meaning that they underwent interagency review and invited public comment.[14]

In 2015, the Department of Education also issued a "Title IX Resource Guide," further clarifying that Title IX protects against all forms of sex discrimination, "including discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity."[15]

In 2016, the Departments of Justice and Education issued further joint "significant" guidance,

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[13] U.S. Dep't of Educ., Off. for Civ. Rts., Questions and Answers on Title IX and Sexual Violence, at 5 (Apr. 29, 2014), *available at* https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf; U.S. Dep't of Educ., Off. for Civ. Rts., Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities at 25 (Dec. 1, 2014), *available at* https://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf.

[14] *See* U.S. Dep't of Educ., Significant Guidance at the Department of Education, *available at* https://ed.gov/policy/gen/guid/significant-guidance.html

[15] U.S. Dep't of Educ., Off. for Civ. Rts., Title IX Resource Guide (Apr. 2015), available at https://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf.

specifically stating that the Department "treat[s] a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations. This means that a school must not treat a transgender student differently from the way it treats other students of the same gender identity."[16] The Department of Education also published *Examples of Policies and Emerging Practices for Supporting Transgender Students.*[17]

The Departments of Education and Justice further expressed their shared interpretation of Title IX to include protections against gender identity discrimination in court briefings filed throughout 2015 and 2016, including original enforcement actions brought by the Department of Justice. *See United States v. Okla. State Univ.*, No. 5:15-cv-324, Complaint (W.D. Okla. Mar. 30, 2015), *G.G. v. Gloucester Cty Sch. Bd.*, No. 4:15cv54, Statement of Interest of the United States (E.D. Va., June 29, 2015); *G.G. v. Gloucester Cty Sch. Bd.*, No. 15-2056, 2015 WL 6585237, Brief for the United States as

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[16] U.S. Dep't of Educ., Off. for Civ. Rts. & U.S. Dep't of Just., Civ. Rts. Division, *Dear Colleague Letter on Transgender Students* (May 13, 2016), *available at* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf.

[17] U.S. Dept. of Educ., Off. of Elementary and Secondary Education & Off. of Safe and Healthy Students, *Examples of Policies and Emerging Practices for Supporting Transgender Students* (May 2016), *available at* https://www2.ed.gov/about/offices/list/oese/oshs/emergingpractices.pdf.

Amicus Supporting Plaintiff-Appellant and Urging Reversal (4th Cir. Oct. 28, 2015); *United States v. State of North Carolina*, Case No. 1:16-cv-425, Complaint (M.D.N.C. May 9, 2016).

In 2016, the Department of Education revised its regulations under Title IV of the Civil Rights Act, which authorizes the Department to provide technical assistance to school districts around, among other things, sex discrimination. 42 U.S.C. § 2000c. The Department amended the regulations' definition of "sex" to include "transgender status, gender identity, sex stereotypes, and pregnancy and related conditions." 81 Fed. Reg. 46,807, 46,816 (July 18, 2016) (currently codified at 34 C.F.R. § 270.7). The Department of Education explained in the Notice of Proposed Rulemaking that this change reflected the Court's reasoning in *Price Waterhouse* "that discrimination based on 'sex' includes differential treatment based on any 'sex-based conditions,'" as well as "subsequent court decisions recognizing that the prohibitions on sex discrimination protect transgender individuals from discrimination." 81 Fed. Reg. 15,665, 15,670 (March 24, 2016. That regulation is currently in effect.

The Department of Labor similarly concluded that federal laws within its purview that prohibit sex discrimination include prohibitions on discrimination based on gender identity.[18] On June 30, 2014, the

[18] Consistent with its policy that it generally follows the EEOC's interpretation of Title VII, but based on their own independent determinations, components of the Department of Labor issued

Department of Labor announced it would update its enforcement protocols and anti-discrimination guidance to "reflect current law" and clarify that the Department provides "the full protection of the federal non-discrimination laws that" it enforces for "transgender individuals."[19] The Department also announced that its OFCCP, Civil Rights Center ("CRC"), and Office of Safety and Health Administration ("OSHA") would issue "guidance to make clear that discrimination on the basis of transgender status is discrimination based on sex." *Id*.

Like the Departments of Education, Justice, and Labor, the Department of Health and Human Services ("HHS") also interpreted Section 1557 of the Patient Protection and Affordable Care Act, which prohibits discrimination on the basis of sex, to

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guidance aligning themselves with the EEOC. For example, in August 2014, the Office of Federal Contract Compliance Programs ("OFCCP") issued Directive 2014-02 and stated that "existing agency guidance on discrimination on the basis of sex under Executive Order 11246, as amended, includes discrimination on the basis of gender identity and transgender status." Dep't of Labor, Off. of Fed. Cont. Compliance Programs, Directive (DIR) 2014-02 (Aug. 19, 2014), *available at* https://www.dol.gov/ofccp/regs/compliance/directives/dir2014_02.html.

[19] U.S. Dep't of Labor, Secretary Thomas Perez, Justice and Identity (June 30, 2014), *available at* https://obamawhitehouse.archives.gov/blog/2014/07/01/justice-and-identity.

include protections against discrimination on the basis of gender identity. The final rules HHS issued in 2016 were the result of nearly six years of work by the Department, including review of tens of thousands of comments from the public.

To inform its rulemaking under Section 1557, in August 2013 the Department's Office of Civil Rights ("OCR") solicited information from the public through a Request for Information published in the Federal Register that requested information on the scope of the non-discrimination provision. 81 Fed. Reg. 31,376, 31,376 (May 18, 2016). After receiving and considering hundreds of comments over the course of two years, the Department issued a proposed rule on September 8, 2015, entitled "Nondiscrimination in Health Programs and Activities" and invited comment. 80 Fed. Reg. 54,172-01 (Sept. 8, 2015). By the close of the comment period, the Department had received 24,875 comments. 81 Fed. Reg. 31,376, 31,376 (May 18, 2016). After a lengthy and rigorous review of the comments received, the Department issued its final rule on May 18, 2016. 81 Fed. Reg. at 31,376; 45 C.F.R. Part 92.

Citing the decisions of other federal agencies and Departments, including those mentioned above, HHS defined discrimination "on the basis of sex" under Section 1557 to include discrimination on the basis of gender identity. 45 C.F.R. § 92.101. The final rule also prohibited discrimination on the basis of gender identity in the provision or administration of health-related insurance. 45 C.F.R. § 92.207.

Notwithstanding this extensive and well considered history, the new administration abruptly after only one month in office rescinded both the Department of Education's January 2015 opinion letter and the May 2016 joint guidance on the purported grounds that neither document was supported by extensive legal analysis.[20] Not only did that assertion ignore the myriad court and agency decisions relied upon by the Departments of Justice and Education in reaching their joint interpretation of Title IX, it also failed to consider the federal Departments that had reached the same interpretation of similar federal anti-discrimination statutory provisions, including the Departments of Justice, Labor, and Health and Human Services.

Similarly, the current administration seemingly undertook minimal, if any, time or effort when it abruptly did a 180 on Title VII's protections against gender identity discrimination. For example, in October 2017, the Attorney General issued a memorandum titled "Revised Treatment of Transgender Employment Discrimination Claims under Title VII of the Civil Rights Act of 1964."[21] In that memo, the Attorney General concluded that Title VII does not prohibit discrimination against

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[20] U.S. Dep't of Justice, Civ. Rts. Div. & U.S. Dep't of Educ., Off. for Civ. Rts., Dear Colleague Letter at 2 (Feb. 22, 2017), *available at* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf.

[21] *Available at* https://www.justice.gov/ag/page/file/1006981/download

transgender individuals "*per se*," and rescinded any prior guidance that had so concluded. Notably, the memorandum does not cite to *any* of the circuit courts that had held that gender identity discrimination was sex discrimination and instead relied on the two-judge *dissent* in *Hively*, ignoring the eight-judge en banc majority in the same case. Thus, the Attorney General, after only a few months and without acknowledging the overwhelming contrary case law in this area, issued a decision that returned to the untenable position of creating an atextual transgender exception to Title VII.

Likewise, the current administration recently issued a proposed regulation that would remove any definition of sex discrimination in health care, including gender identity, on the (incorrect) ground that it was a "relatively novel legal theory" when adopted in 2016. 84 Fed. Reg. 27,853 (June 14, 2019). Once again, the administration failed to cite or address any of the contrary authority from several federal circuit courts and instead relied on a single district court decision in support. *Id.* at 27,848.

B. Departments Increasingly Recognized that Discrimination Because of Sex Also Encompasses Sexual Orientation Discrimination

Reflecting much the same reasons as set forth at pp. 23-27 above, other federal Departments also arrived at the same interpretation of Title VII's prohibition of sexual orientation discrimination. In June 2015, the Office of Personnel Management, Office of Special Counsel, and Merit Systems

Protection Board collaborated with the EEOC to release a memorandum clearly stating that "Title VII's prohibition on sex discrimination protects persons who have been discriminated against based on sexual orientation and gender identity" and providing guidance on employment rights, employee protections, and employer responsibilities.[22] Numerous other federal agencies refer to the EEOC's Title VII guidance as being instructive with respect to the scope of Title VII's sex-based discrimination provision.[23]

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[22] U.S. Off. Of Personnel Mgmt., U.S. Equal Empl. Comm'n, U.S. Off. Of Special Counsel, And U.S. Merit Systems Protection Board, Addressing Sexual Orientation and Gender Identity Discrimination in Federal Civilian Employment (Revised June 2015), *available at* https://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/addressing-sexual-orientation-and-gender-identity-discrimination-in-federal-civilian-employment.pdf.

[23] *See, e.g.*, U.S. Gen. Servs. Admin., Equal Employment Opportunity (May 10, 2019), *available at* https://www.gsa.gov/about-us/organization/office-of-civil-rights/equal-employment-opportunity; USA.GOV, Labor Laws and Issues, https://www.usa.gov/labor-laws; U.S. Dep't Of Labor, Occupational Safety And Health Administration, Best Practices: A Guide to Restroom Access for Transgender Workers (Jun. 1, 2015), *available at* https://www.osha.gov/Publications/OSHA3795.pdf; U.S. Dep't Of Labor, Off. Of Federal Contract Compliance Progs., Guide for Small Businesses with Federal Contracts, https://www.dol.gov/ofccp/taguides/sbguide.htm; U.S. Federal Trade Comm'n, Protections Against Discrimination and Other Prohibited Practices, https://www.ftc.gov/site-information/no-fear-act/protections-against-discrimination.

Further, both before and after the EEOC's decision in *Baldwin*, other federal Departments were moving towards the same conclusion as the EEOC with regard to the lack of an exclusion for sexual orientation discrimination from the anti-discrimination statutes within their jurisdiction. For example, the Department of Education in 2010 noted that when a "gay high school student was called names (including anti-gay slurs and sexual comments)," he faced gender-based harassment.[24] It noted that when an LGBT student is harassed "on the basis of their LGBT status," it may be a "form[] of sex discrimination prohibited under Title IX." *Id.*

In other words, the Department of Education had recognized the overlap between gender and sexual orientation, one of the critical bases of the EEOC's *Baldwin* decision.

Further, when the Department of Education issued the final regulations under Title IV of the Civil Rights Act in July 2016, as described above, it included within the definition of "sex" "sex stereotypes, such as treating a person differently because he or she does not conform to sex-role expectations because he or she is attracted to or is in a relationship with a person of the same sex." 81 Fed. Reg. 46,807, 46,816 (July 18, 2016) (currently codified at 34 C.F.R. § 270.7). The Department of

[24] U.S. Dep't of Educ., Off. for Civil Rights, Dear Colleague Letter (Oct. 26, 2010), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf.

Education explained that some courts had recognized that discrimination based on sex includes "discrimination based on sex stereotypes about sexual attraction and sexual behavior or about deviations from 'heterosexually defined gender norms.'" *Id.* at 46,812. The Department concluded that "[d]iscrimination against an individual because he or she does not conform to sex-role expectations by being attracted to or in a relationship with a person of the same sex will inevitably rely on sex stereotypes" and, thus, amended the regulation to add this language as an example of a prohibited sex stereotype. *Id.* That regulation is currently in effect and was also one of the critical bases of the EEOC's *Baldwin* decision.

Similarly, in issuing regulations under section 1557, HHS cited to *Baldwin*, agreed with its conclusions as a matter of policy, again noted the overlap between claims for sex discrimination and sexual orientation discrimination, and clarified that "when a covered entity discriminates against an individual based on his or her sexual orientation, the entity may well rely on stereotypical notions or expectations of how members of a certain sex should act or behave." Preamble to Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31376, 31389 (May 16, 2016). Ultimately, prior to January 2017, HHS did not resolve the question of whether sexual orientation is per se incorporated into section 1557, noting that the law in this area was evolving and that it would continue to monitor legal developments. It did, however, reiterate that it

would consider sexual orientation claims under a sex stereotyping theory. *Id.* at 31390.

As of January 2017, these Departments had not had the opportunity to address these concerns with the benefit of the powerful subsequent court authority that exists now. However, that some Departments did not move as quickly as the EEOC did with respect to the inclusion of sexual orientation in no way suggests that these Departments disagreed with the EEOC's reasoning and determinations.

As leaders and key officials responsible for implementing and enforcing federal statutory protections against sex-based discrimination, *amici* are in agreement that the EEOC and the, so far, 19 federal appellate court judges who have concluded that discrimination based on sexual orientation *is* discrimination based on sex, are correct. Title VII is, and must be enforced as, a "broad rule of workplace equality"[25] for all, including America's lesbian, gay, bisexual, transgender, as well as non-gay and non-trans, employees.

[25] *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

CONCLUSION

The decisions reached by the EEOC and others —that Title VII's prohibition of the "entire spectrum"[26] of sex discrimination encompasses discrimination on the basis of sexual orientation and gender identity, including transgender status—were the product of long, careful, and conscientious study and independent consideration across multiple Departments and agencies. These deliberate determinations have been embraced and amplified by numerous courts, including several en banc circuits, and are coherent and correct as a matter of law.

Amici thus respectfully request that this Court affirm the judgments of the Second and Sixth Circuits, reverse the judgment of the Eleventh Circuit, and hold that Title VII contains no LGBT exclusion from protection against discrimination on the basis of sex.

Respectfully submitted,

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[26] *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978).