

IN THE  
**Supreme Court of the United States**

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GERALD LYNN BOSTOCK, *Petitioner*,

v.

CLAYTON COUNTY, GEORGIA, *Respondent*.

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ALTITUDE EXPRESS, INC., AND RAY MAYNARD, *Petitioners*,

v.

MELISSA ZARDA AND WILLIAM MOORE, JR., CO-INDEPENDENT  
EXECUTORS OF THE ESTATE OF DONALD ZARDA, *Respondents*.

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

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND  
AIMEE STEPHENS, *Respondents*.

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On Writs of Certiorari to the United States Courts of Appeals for the  
Eleventh, Second, and Sixth Circuits

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**BRIEF OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION,  
AMERICAN PSYCHIATRIC ASSOCIATION, AMERICAN  
ASSOCIATION FOR MARRIAGE AND FAMILY THERAPY,  
GEORGIA PSYCHOLOGICAL ASSOCIATION, MICHIGAN  
PSYCHOLOGICAL ASSOCIATION, AND NEW YORK STATE  
PSYCHOLOGICAL ASSOCIATION AS *AMICI CURIAE*  
IN SUPPORT OF THE EMPLOYEES**

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## INTEREST OF *AMICI CURIAE*<sup>1</sup>

*Amici* are leading associations of psychologists, psychiatrists, mental health professionals, and behavioral scientists.

The American Psychological Association is a scientific and educational organization dedicated to increasing and disseminating psychological knowledge; it is the world's largest professional association of psychologists, with more than 118,000 members and associates. It has participated as *amicus curiae* in nearly 200 cases in this Court and federal and state appellate courts. It has adopted multiple research-based policy statements supporting the rights of gay, lesbian, transgender, and gender nonconforming people, including a 1975 policy statement denouncing discrimination against gay and lesbian people in employment, housing, public accommodation, and licensing; a 2009 policy statement denouncing all public and private discrimination against transgender and gender nonconforming people, including in health care; and a 2011 policy statement supporting full marriage equality for same-sex couples.<sup>2</sup>

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<sup>1</sup> All parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part, and no person other than *amici* contributed money that was intended to fund preparing or submitting this brief.

<sup>2</sup> American Psychological Ass'n, *Resolution on Marriage Equality for Same-Sex Couples* (2011) (denial of marriage equality "perpetuates the stigma historically attached to homosexuality, and reinforces prejudice against lesbian, gay, and bisexual people"); American Psychological Ass'n, *APA Resolution on Transgender, Gender Identity, and Gender Expression Nondiscrimination*

The American Psychiatric Association, with more than 38,500 members, is the nation's leading organization of physicians who specialize in psychiatry. It has participated in numerous cases in this Court. It opposes discrimination against individuals with same-sex attraction, including in employment, and recognizes that such discrimination may adversely affect the mental health of individuals with same-sex attraction.<sup>3</sup> It also recognizes that “[b]eing transgender or gender diverse implies no impairment in judgment, stability, reliability, or general social or vocational capabilities; however, these individuals often experience discrimination due to a lack of civil rights protections for their gender identity or expression.”<sup>4</sup> The American Psychiatric Association accordingly “[s]upports laws that protect the civil rights of transgender and gender diverse individuals.”<sup>5</sup>

The American Association for Marriage and Family Therapy (“AAMFT”), founded in 1942, is a national professional association representing the field of marriage and family therapy and the professional interests of over 62,000 marriage and family therapists

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(2008); American Psychological Ass’n, *Proceedings of the American Psychological Association, Incorporated, for the Year 1974: Minutes of the Annual Meeting of the Council of Representatives*, 30 Am. Psychol. 620 (1975).

<sup>3</sup> See American Psychiatric Ass’n, *Position Statement on Issues Related to Homosexuality* (2013).

<sup>4</sup> American Psychiatric Ass’n, *Position Statement on Discrimination against Transgender and Gender Diverse Individuals* (2018).

<sup>5</sup> *Id.*

in the United States. It is dedicated to educating its members, contributing to public discourse, and influencing public policy on social and family issues that make a significant difference in the profession and the well-being of families. Issues and policies that affect families' responsibility and ability to provide for their dependents' basic needs, including issues related to employment, are fundamental to these goals. AAMFT joins this brief for the reasons expressed in its 2005 *Position on Couples and Families* and its 2009 *Policy on Reparative/Conversion Therapy*.<sup>6</sup>

Since 1947, the Georgia Psychological Association ("GPA") has advanced the profession of psychology in Georgia. As the preeminent resource and advocate for Georgia psychologists, GPA conducts legislative activities that have resulted in the creation of dozens of laws related to patients' rights and protection of the practice of psychology. Beginning with the nation's second psychology licensing law in 1951, GPA's activities for over half a century have changed the face of psychology in Georgia. GPA and its members are dedicated to both professional success and the enhancement of the mental health and well-being of the people of Georgia.

The Michigan Psychological Association ("MPA") is the only professional association for psychologists in the state of Michigan. It works to advance psychology as a

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<sup>6</sup> American Ass'n for Marriage & Family Therapy, *Policy on Reparative/Conversion Therapy* (2009); American Ass'n for Marriage & Family Therapy, *Position on Couples and Families* (2005).

science and a profession and to promote the public welfare by encouraging the highest professional standards, offering public education and providing public service, and by participating in the public policy process on behalf of the profession and healthcare consumers.

The New York State Psychological Association (“NYSPA”) has been a pioneer organization for psychology in America. It was the first state psychological association, the first group to press for legislation recognizing the profession of psychology, and the first psychological organization to adopt an official code of ethics. NYPSA has operated under various names and organizational forms for nearly 100 years. Today, it is a 501(c)(6), nonprofit organization, geared to advancing the science and practice of psychology.

### **SUMMARY OF ARGUMENT**

*Amici*, leading associations of psychologists, psychiatrists, mental health professionals, and behavioral scientists, present this brief to provide the Court with a balanced review of the scientific and professional literature pertinent to the issues before the Court. As this brief shows, the scientific literature regarding gender and sexuality supports the understanding that discrimination on the basis of sexual orientation and gender identity is discrimination because of sex. Accordingly, laws like Title VII that prohibit sex discrimination reach—and must continue to reach—discrimination against sexual and gender minorities.<sup>7</sup> A contrary conclusion would not comport

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<sup>7</sup> Throughout this brief, lesbian, gay, and bisexual people may be

with mainstream scientific research regarding gender and sexuality.

## ARGUMENT

### I. Stigmatization Based on Sexual Orientation and on Gender Identity Are Forms of Sex-Role Stereotyping.

Thirty years ago, in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Court recognized that Title VII forbids consideration of sex and sex-role stereotypes in the selection, evaluation, and compensation of employees. 490 U.S. at 239, 250-51. It found that denying the respondent a promotion because she did not conform to “feminine” stereotypes was prohibited discrimination “because . . . of sex.” 490 U.S. at 235.

The American Psychological Association filed an amicus brief in *Price Waterhouse* explaining sex-role stereotyping and its discriminatory consequences for stereotyped groups.<sup>8</sup> As the Association explained then,

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referred to collectively in shorthand, as “LGB” people; lesbian, gay, bisexual, and transgender people may be referred to as “LGBT” people. Lesbian, gay, and bisexual people may also be referred to as “sexual minorities,” and transgender people and people with gender identities that do not fall within the binary categories of male or female, as “gender minorities.”

<sup>8</sup> Br. for *Amicus Curiae* American Psychological Ass’n in Support of Resp’t at 12, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (No. 87-1167), 1988 WL 1025869 (explaining that “stereotypic beliefs create expectations about a person before that person is encountered and lead to distorted judgments about behavior. Therefore, ‘stereotypes become the basis for faulty reasoning leading to biased feelings and actions, disadvantaging (or advantaging) others not because of who they are or what they have

sex-role stereotypes “have two features. First, they specify the attributes characteristic of each sex. Second, they dictate which behaviors are appropriate for men and women.”<sup>9</sup> Either can cause discrimination because of sex, “based on faulty descriptive beliefs about what [a person of a given sex] is like,” or “based on normative expectations about what [a person of a given sex] should be like.”<sup>10</sup> Scientific research continues to reveal that sex-role stereotyping is associated with prejudice and discrimination.<sup>11</sup>

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done but because of what group they belong to.” (quoting M.E. Heilman, *Sex Bias in Work Settings: The Lack of Fit Model*, in 5 *Research in Organizational Behavior* 269 (B. Staw & L. Cummings eds., 1983)).

<sup>9</sup> *Id.* at 13.

<sup>10</sup> *Id.*

<sup>11</sup> See, e.g., S.B. Gazzola & M.A. Morrison, *Cultural and Personally Endorsed Stereotypes of Transgender Men and Transgender Women: Notable Correspondence or Disjunction?* 15 *Int'l J. Transgenderism* 76 (2014) (in 3 focus groups of 16 college students and sample of 274 university students, finding that participants espousing more negative cultural stereotypes about transgender people also evidenced greater levels of trans prejudice); C. Reyna et al., *Attributions for Sexual Orientation vs. Stereotypes: How Beliefs about Values Violations Account for Attribution Effects on Anti-gay Discrimination*, 44 *J. Applied Soc. Psychol.* 289 (2014) (in public survey of 90 people and survey of 347 university students, finding that stereotypes that lesbian and gay people violated social values of tradition, self-discipline, and tolerance “were the most powerful predictors of opposition to” gay and lesbian rights); see generally S.T. Fiske, *Stereotyping, Prejudice, and Discrimination*, in *The Handbook of Social Psychology* 357 (D.T. Gilbert et al. eds., 1998); see also A.J.C. Cuddy et al., *The BIAS Map: Behaviors from Intergroup Affect and Stereotypes*, 92 *J. Personality & Soc. Psychol.*

The cases pending before this Court today concern discrimination in employment because of a person's sexual orientation or gender identity. Because such discrimination is based on the employee's nonconformity to the employer's sex-based norms and expectations for how an employee perceived to be of a given sex should appear and behave, these cases reflect precisely the same type of sex-role stereotyping that was at issue in *Price Waterhouse*, and the same type of sex discrimination that Title VII seeks to eliminate from the workplace.

**A. Sexual Orientation and Gender Identity Are Intrinsically Related to Sex.**

*Sexual orientation* refers to an enduring disposition to experience sexual, affectional, or romantic attractions to men, women, or both. It encompasses an individual's sense of personal and social identity based on those attractions, on behaviors expressing them, and on membership in a community of others who share them.<sup>12</sup>

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631 (2007) (based on two samples, including nationally-representative sample, and two experiments, demonstrating a causal relationship between stereotypes and discriminatory behavioral intentions, mediated by prejudicial affect); S.T. Fiske et al., *A Model of (Often Mixed) Stereotype Content: Competence and Warmth Respectively Follow from Perceived Status and Competition*, 82 J. Personality & Soc. Psychol. 878, 878 (2002) (through "stereotype content model," arguing that "stereotypes are captured by two dimensions (warmth and competence) and that subjectively positive stereotypes on one dimension do not contradict prejudice but often are functionally consistent with unflattering stereotypes on the other dimension.").

<sup>12</sup> See National Academy of Sciences' Institute of Medicine, *Report: The Health of Lesbian, Gay, Bisexual, and Transgender People*

Although sexual orientation ranges along a continuum from exclusively heterosexual to exclusively homosexual, it is usually discussed in terms of three categories: *heterosexual* (having sexual and romantic attraction primarily or exclusively to members of the other sex), *homosexual* (having sexual and romantic attraction primarily or exclusively to members of one's own sex), and *bisexual* (having a significant degree of sexual and romantic attraction to both sexes).<sup>13</sup> Sexual orientation is defined by the sex and gender of those in a sexual or romantic relationship with one another, or those who desire to enter into such a relationship. Sexual acts and romantic attractions are categorized as homosexual or heterosexual according to *the biological sex of the individuals*, relative to each other.

*Gender identity* “refers to a person’s basic sense of being male, female, or of indeterminate sex.”<sup>14</sup> Every

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(2011); A.R. D’Augelli, *Sexual Orientation*, in 7 *Encyclopedia of Psychology* 260 (A.E. Kazdin ed., 2000); G.M. Herek, *Homosexuality*, in 2 *Corsini Encyclopedia of Psychology* 774-76 (I.B. Weiner & W.E. Craighead eds., 4th ed. 2010).

<sup>13</sup> J. Drescher & W. Byne, *Homosexuality, Gay and Lesbian Identities, and Homosexual Behavior*, in *Comprehensive Textbook of Psychiatry* 1982 (B.J. Sadock, V.A. Sadock & P. Ruiz eds., 10th ed. 2017).

<sup>14</sup> American Psychological Ass’n, *Report on the APA Task Force on Gender Identity and Gender Variance* 28 (2009) [hereinafter *APA Gender Identity Report*]; see also J. Drescher & W. Byne, *Gender Identity, Gender Variance and Gender Dysphoria*, in *Comprehensive Textbook of Psychiatry* 2023 (B.J. Sadock, V.A. Sadock & P. Ruiz eds., 10th ed. 2017) [hereinafter *Gender Identity, Gender Variance and Gender Dysphoria*]; L.M. Diamond et al., *Transgender Experience and Identity*, in *Handbook of Identity*

person has a gender identity.<sup>15</sup> Gender identity, like sexual orientation, can be understood as existing across a continuum, but it is generally discussed in terms of certain categories. *Transgender people* have a gender identity that is not aligned with the sex assigned to them

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*Theory and Research* 630-31 (S.J. Schwartz et al. eds., 2011) [hereinafter *Transgender Experience and Identity*] (“Gender identity represents a person’s sense of self as a boy/man or a girl/woman. . . . [I]t carries an expected set of role behaviors, attitudes, dress style, and appearance. Gender identity is implicitly presumed to develop in a manner that corresponds directly with biological sex, such that boys develop male identities and girls develop female identities.” (emphasis in original)); American Psychological Ass’n, *APA Dictionary of Psychology*, “Gender Identity” (Gary R. VandenBos ed., 2007) (“[A] recognition that one is male or female and the internalization of this knowledge into one’s self-concept.”).

A person of “indeterminate sex” is a person whose gender identity does not fall within the binary categories of male or female. J. Drescher et al., *Lesbian, Gay, Bisexual, and Transgender Patients, in American Psychiatric Press Textbook of Psychiatry* App’x 1211 (L.W. Roberts ed., 7th ed. 2019) [hereinafter *LGBT Patients*] (defining “nonbinary” as a term “used to describe a gender identity outside of the gender binary (man versus woman)”); *Transgender Experience and Identity, supra*, at 635 (noting that one conceptual model of gender identity “attempts to deemphasize the rigid gender binary that characterizes conventional models of gender identity development, and instead presumes the existence of parallel gender continuums inclusive of male and female dimensions. According to this model, individuals can strongly identify with both male and female dimensions, or with neither”).

<sup>15</sup> *APA Gender Identity Report, supra* note 14, at 28.

at birth.<sup>16</sup> *Cisgender people* have a gender identity that is aligned with the sex assigned to them at birth.<sup>17</sup>

*Gender expression* “refers to the way in which a person acts to communicate gender within a given culture,” such as through “clothing, communication patterns, and interests.”<sup>18</sup> A person’s gender expression “may or may not be consistent with socially prescribed gender roles,”—*i.e.*, the “behaviors, attitudes, and personality traits that a society, in a given historical period, designates as masculine or feminine,” or the norms and expectations of gender expression for persons of the male or female sex.<sup>19</sup> *Gender nonconforming people* express their gender in ways that do not conform to these norms and expectations.<sup>20</sup> A gender nonconforming person may be transgender or cisgender.<sup>21</sup>

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<sup>16</sup> *LGBT Patients*, *supra* note 14, App’x 1209, 1212; American Psychological Ass’n, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 *Am. Psychologist* 832, 832, 834 (2015) [hereinafter *APA Guidelines*]; see also American Academy of Pediatrics, *Policy Statement: Office-Based Care for Lesbian, Gay, Bisexual, Transgender, and Questioning Youth*, 132 *Pediatrics* 198 (2013).

<sup>17</sup> *APA Guidelines*, *supra* note 16, at 861.

<sup>18</sup> *APA Gender Identity Report*, *supra* note 14, at 28.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*; see also *Gender Identity, Gender Variance and Gender Dysphoria*, *supra* note 14, at 2023 (“[G]ender is increasingly regarded as more *fluid* reflecting a continuous dimension of masculinity/femininity as opposed to a dichotomy of masculine and feminine. Thus, gender identity/experienced gender may be

Sexual orientation and gender identity are thus each intrinsically related to sex. A relationship between a man and a man, or a woman and a woman, is homosexual *because of* the sex of the individuals in the relationship. A person is transgender *because of* the nonalignment of their gender identity with the sex to which they were assigned at birth; a person is gender nonconforming *because of* the nonconformity of their gender expression with the norms and expectations of gender expression for persons of the male or female sex.

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described as male (boy/man), female (girl/woman), somewhere in between, or neither, while gender role/expressed gender may be described as masculine, feminine, or mixed.” (emphasis in original). The respondent in *Price Waterhouse*, for example, was a cisgender woman who was arguably perceived as gender nonconforming by the firm partner who informed her that “her ‘professional’ problems”—*i.e.*, her stalled partnership candidacy—“would be solved if she would ‘walk more femininely, talk more femininely, wear make-up, have her hair styled, and wear jewelry.’” 490 U.S. at 272.

**B. Sexual and Gender Minorities Are Stigmatized Because of Their Nonconformity with Sex-Role Stereotypes.**

Stigma has been characterized as “an undesired differentness.”<sup>22</sup> Although stigma has been defined in a variety of ways, social scientists generally agree that a stigmatized condition or status is one that is negatively valued by society, fundamentally defines a person’s social identity, and disadvantages and disempowers those who have it.<sup>23</sup> Stigma is manifested in the attitudes and actions of individuals—such as ostracism, harassment, discrimination, and physical attacks (sometimes referred to as *enacted stigma*)—as well as in social institutions, including the law (referred to as *institutional or structural stigma*).<sup>24</sup>

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<sup>22</sup> E. Goffman, *Stigma* 5 (1963)

<sup>23</sup> See, e.g., *id.*; B.G. Link & J.C. Phelan, *Conceptualizing Stigma*, 27 *Ann. Rev. Soc.* 363 (2001); J. Crocker et al., *Social Stigma*, in 2 *The Handbook of Social Psychology* 504 (D.T. Gilbert et al. eds., 4th ed. 1998).

<sup>24</sup> See, e.g., G.M. Herek, *Confronting Sexual Stigma and Prejudice: Theory and Practice*, 63 *J. Soc. Issues* 905 (2007); P.W. Corrigan et al., *Structural Stigma in State Legislation*, 56 *Psychiatric Serv.* 557 (2005).

Despite recent changes in aggregate public opinion<sup>25</sup> and the law,<sup>26</sup> LGB, transgender, and gender nonconforming people remain stigmatized in the United States. A substantial portion of sexual and gender minority adults has experienced enacted and institutional stigma: In a 2013 survey with a nationally-representative sample of LGBT adults, two-thirds (66%) reported experiencing some form of discrimination or negative treatment because of their respective sexual orientation and gender identity.<sup>27</sup>

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<sup>25</sup> G.M. Herek, *Beyond “homophobia”: Thinking More Clearly about Stigma, Prejudice, and Sexual Orientation*, 85 *Am J. Orthopsychiatry* S29 (2015) (noting changes in law and public opinion toward sexual minorities); A.R. Flores, *Attitudes toward Transgender Rights: Perceived Knowledge and Secondary Interpersonal Contact*, 3 *Politics, Groups, & Identities* 398 (2015) (same, toward gender minorities); P. Schwadel & C.R.H. Garneau, *An Age-Period-Cohort Analysis of Political Tolerance in the United States*, 55 *Soc. Q.* 421 (2014) (documenting changes in public opinion toward a variety of groups, including sexual minorities); see also J. McCarthy, *Slim Majority in U.S. Favors New LGBT Civil Rights Laws*, Gallup (June 13, 2019) (reporting results of Gallup poll reflecting that 53% of Americans believe that new civil rights laws are needed to reduce discrimination against LGBT people); but see GLAAD et al., *Accelerating Acceptance 2019: Executive Summary* 1 (2019) (in national poll, finding that, in 2017, more non-LGBT adults reported being “very” or “somewhat” uncomfortable with LGBT people in particular situations, and that, in 2018, participants between ages 18-34 reported higher discomfort with LGBT people in scenarios like “learning a family member is LGBTQ” and “learning my doctor is LGBTQ”).

<sup>26</sup> See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015); *United States v. Windsor*, 570 U.S. 744, 773-75 (2013); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

However, despite changes in public opinion, gender minorities have

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recently experienced disparate treatment by the law in a number of ways, including a federal ban on military service by transgender people, *see* U.S. Dep’t of Defense, DTM 19-004, Military Service by Transgender Persons and Persons with Gender Dysphoria (Mar. 12, 2019); multiple state legislatures’ proposal of “bathroom bills,” or laws restricting access to public restrooms based on a person’s sex assigned at birth, *see* National Conference of State Legislatures, “*Bathroom Bill*” *Legislative Tracking: 2017 State Legislation* (July 28, 2017), <http://www.ncsl.org/research/education/-bathroom-bill-legislative-tracking635951130.aspx>; and enacted or proposed roll-backs of federal regulations protecting transgender people from discrimination in health care, housing, education, and prison, *see* Nondiscrimination in Health and Health Education Programs or Activities, 84 Fed. Reg. 27,846 (2019) (proposing revision of prior interpretation of Affordable Care Act to no longer prohibit gender identity-based discrimination); Proposed Rule, Revised Requirements Under Community Planning and Development Housing Programs, FR-6152 (U.S. Dep’t of Hous. & Urban Dev. 2019) (proposing withdrawal of regulations prohibiting gender identity-based discrimination by federally-funded homeless shelters); U.S. Dep’t of Justice, Fed. Bureau of Prisons, Transgender Offender Manual: Change Notice (May 11, 2018) (revising prior policy on housing transgender people in federal prison facilities, from housing based on gender identity to biological sex); U.S. Dep’t of Justice & U.S. Dep’t of Educ., Dear Colleague Letter (Feb. 22, 2017) (withdrawing 2016 guidance on gender identity-based discrimination against students).

<sup>27</sup> Pew Research Center, *A Survey of LGBT Americans: Attitudes, Experiences and Values in Changing Times* 41 (2013) [hereinafter *2013 Survey of LGBT Americans*] (21% said they had been treated unfairly by an employer in hiring, pay, or promotion; 23% reported they had received poor service in restaurants, hotels, or places of business because of their sexual orientation; other reports of negative treatment based on sexual orientation included being threatened or physically attacked (30%), being subjected to slurs or jokes (58%), being made to feel unwelcome at a place or worship or religious organization (29%); and being rejected by a friend or family member (39%)); *see also* Harvard T.H. Chan School of Public Health

The stigma associated with homosexuality and bisexuality is based on a person's relationship (actual, imagined, or desired) with others of their same sex. LGB individuals are stigmatized because their private desires are directed at people of their same sex, or because their sexual or romantic partner is of their same sex.<sup>28</sup> In other words, the focal point of sexual

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et al., *Discrimination in America: Experiences and Views of LGBTQ Americans* (2017) [hereinafter *Discrimination in America*] (in probability sample, reporting that 51% of lesbian, gay, bisexual, transgender, and queer ("LGBTQ") respondents had, or had an LGBTQ friend or family member who had, experienced violence because of their sexuality or gender identity; that 20% had been discriminated against because of their sexuality or gender when applying for jobs, 21% when being paid equally or considered for a promotion, and 22% when trying to rent a room or apartment or buy a house; and that 26% of respondents had been, or had an LGBTQ friend or family member who had been, unfairly stopped or treated by the police or unfairly treated by the courts because of their sexuality or gender identity).

<sup>28</sup> Indeed, a person's homosexuality or bisexuality often becomes known to others only when she or he enters into a same-sex relationship, whether that relationship involves a single sexual act or a lifelong commitment to another person. Consistent with this observation, psychological research using indirect indicators of attitudes toward gay men and lesbians (*e.g.*, measures of physiological reactions or implicit biases that may be outside an individual's conscious awareness or control) has often used images of same-sex couples to nonverbally depict gay men or lesbians. This body of research has shown that heterosexuals' reactions to same-sex couples are typically more negative than their reactions to heterosexual couples. For example, using stylized images of same-sex and different-sex couples as stimuli, an online study of nearly 20,000 health care providers found among heterosexual providers "moderate to strong implicit preferences for straight people" over lesbian and gay patients. J.A. Sabin et al., *Health Care Providers'*

orientation stigma, and the discrimination that enacts that stigma, is the same-sex nature of same-sex relationships.<sup>29</sup> Discrimination against gay, lesbian, and bisexual people is thus inherently related to sex-role stereotypes, because the defining feature of sexual minorities is their nonconformity with sex-role stereotypes—*i.e.*, the belief that men should have, and desire to have, romantic or sexual relationships with women, and vice versa.

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*Implicit and Explicit Attitudes toward Lesbian Women and Gay Men*, 105 *Am. J. Pub. Health* 1836 (2015) (noting that this “widespread” preference manifested both in direct verbal expressions of attitudes and in an indirect indicator of attitudes through performance on the Implicit Association Test).

<sup>29</sup> See, *e.g.*, K. Lehavot & A.J. Lambert, *Toward a Greater Understanding of Antigay Prejudice: On the Role of Sexual Orientation and Gender Role Violation*, 29 *Basic & Applied Soc. Psychol.* 279 (2007) (in study of 213 university students, finding moderate trend among participants with high prejudice against sexual minorities to disparage individuals perceived as simultaneously violating expectations about sexuality and traditional gender roles); see also D.J. Parrott et al., *Determinants of Aggression toward Sexual Minorities in a Community Sample*, 1 *Psychol. of Violence* 41 (2011) (in study of 199 heterosexual men, finding that strong adherence to traditional male gender role norms, particularly to “antifemininity” and status norms, is key determinant of aggression toward sexual minorities); W.A. Jellison et al., *Implicit and Explicit Measures of Sexual Orientation Attitudes: In Group Preferences and Related Behaviors and Beliefs among Gay and Straight Men*, 30 *Personality & Soc. Psychol. Bull.* 629 (2004) (in two studies of 37 and 87 heterosexual undergraduate men, respectively, finding that, as men in the samples held more negative attitudes towards homosexuality, they more strongly endorsed the importance of heterosexual identity and of traditional masculine gender roles).

Stigma against gender minorities is based on the nonconformity of their gender expression with their sex assigned at birth, or with the norms and expectations of gender expression for persons of the male or female sex more generally. This stigma arises from the nonconformity of a person perceived to be of a given biological sex to society's expectations of how people of that sex should look, behave, dress, speak, or otherwise express their gender identity.<sup>30</sup> The stigma and

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<sup>30</sup> See B.H. Ching & J.T. Xu, *The Effects of Gender Neuroessentialism on Transprejudice: An Experimental Study*, 78 *Sex Roles* 228, 228 (2018) (in sample of 132 college students, finding that reading fictitious article explaining sex differences through neurological, biologically determinist factors primed essentialist beliefs about sex in participants, who showed more negative stereotypes and stronger prejudicial attitudes toward transgender people compared with participants who read article questioning biological determinist model of sex and control group, suggesting that “essential claims that ground the male/female binary in biology may lead to more transprejudice”); A.T. Norton & G.M. Herek, *Heterosexuals' Attitudes toward Transgender People: Findings from a National Probability Sample of U.S. Adults*, 68 *Sex Roles* 738 (2013) (in national probability sample of heterosexual U.S. adults, finding that negative attitudes towards transgender people were associated with endorsement of a binary conception of gender, among other factors); E.N. Tebbe & B. Moradi, *Anti-Transgender Prejudice: A Structural Equation Model of Associated Constructs*, 59 *J. Counseling Psychol.* 251 (2012) (in analysis of 250 undergraduate students, finding that traditional gender role attitudes were positively associated, among other factors, with anti-transgender prejudice); see also E. Lombardi, *Varieties of Transgender/Transsexual Lives and Their Relationship with Transphobia*, 56 *J. Homosexuality* 977, 979 (2009) (defining “transphobia” as “the feeling of unease or even revulsion towards those who express nonnormative expressions of gender identity and expression.”).

associated discrimination perpetrated against gender minorities is thus also intrinsically related to sex-role stereotyping.

Accordingly, when an employer discriminates against a lesbian, gay, or bisexual employee because of that employee's sexual orientation, a transgender employee because of that person's gender identity, or a gender nonconforming employee because of that person's gender expression, the employer's discriminatory conduct is rooted in the same sex-role stereotyping faced by the respondent in *Price Waterhouse*. The scientific understanding of sexual orientation and gender identity and the discrimination that sexual and gender minorities experience is thus analogous to discrimination against women more generally: All are forms of enacted stigma that stem from the employees' nonconformity with their employers' perceptions about how a person of a given biological sex should appear and behave, based on sex-role stereotypes.

## **II. Sexual and Gender Minorities Face Significant, Harmful Stigma in the Workplace.**

As in *Price Waterhouse*, sex-role stereotyping against sexual and gender minorities has discriminatory consequences in the workplace.<sup>31</sup> In multiple nationally-

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<sup>31</sup> See *supra* at 5-6; see also E.A. Leskinen et al., *Gender Stereotyping and Harassment: A "Catch-22" for Women in the Workplace*, 21 *Psychol., Pub. Policy, & L.* 192 (2015) (in sample of cisgender working women, finding that deviation from stereotypical femininity increased risk of workplace harassment, in the form of sexist remarks and gender policing).

representative surveys, more than 1 in 5 LGBT respondents report that they have been treated unfairly in the workplace—either by being paid less, denied promotion, or not hired at all.<sup>32</sup> Other studies reveal that sexual and gender minorities also experience day-to-day mistreatment in the workplace, such as homophobic and

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<sup>32</sup> *Discrimination in America*, *supra* note 27; *2013 Survey of LGBT Americans*, *supra* note 27; see also S.E. James et al., *The Report of the 2015 U.S. Transgender Survey* 148 (2016) (of respondents who had ever been employed, 16% reporting losing at least one job because of their gender identity or expression; of respondents with job in last year, 30% reporting being fired, denied a promotion, or experiencing harassment or physical attack, or some other form of mistreatment in the workplace because of their gender identity or expression, 23% reporting being told by their employer to present as the wrong gender in order to keep their job, among other forms of mistreatment, and 77% reporting taking steps to avoid mistreatment at workplace, such as by hiding or delaying their gender transition, or quitting their job); B. Sears & C. Mallory, The Williams Institute, *Documented Evidence of Employment Discrimination and Its Effects on LGBT People* (2011) (reporting analyses of data from the 2008 General Social Survey, an ongoing national survey conducted by the National Opinion Research Center at the University of Chicago using probability sampling methods; among the 57 self-identified lesbian, gay, and bisexual adults in the sample, 35% said they had been harassed in the workplace and 16% reported having lost a job because of their sexual orientation; other surveys reviewed reported that, when separately questioned, anywhere from 78% to 52% of transgender respondents reported experiencing employment discrimination); see also G.M. Herek, *Hate Crimes and Stigma-Related Experiences among Sexual Minority Adults in the United States*, 24 *J. Interpersonal Violence* 54, 61, 64 (2009) (in a national survey with a probability sample of LGB adults, roughly 18% of gay men and 16% of lesbians said they had been fired from a job or denied a job or promotion because of their sexual orientation).

transphobic remarks criticizing their choice of actual or desired sexual partner or their gender expression, and threats to their physical safety.<sup>33</sup>

A limitation of the data from such surveys is that respondents can only report discrimination of which they are aware. However, discrimination can also occur without an individual's knowledge, such as during the hiring process. In recent field experiments, researchers have found evidence of ongoing discrimination against individuals in hiring based on the potential employers' perceptions of those individuals' sexual orientation or gender identity.<sup>34</sup>

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<sup>33</sup> See L. Mizock et al., *Transphobia in the Workplace: A Qualitative Study of Employment Stigma*, 3 *Stigma & Health* 275 (2018) (in qualitative study of transgender and gender nonconforming adults, finding a number of themes associated with gender-identity stigma in the workplace, including policing of transgender and gender nonconforming respondents' gender identities and threats made to their personal safety); L. Zurbrugg & K.N. Miner, *Gender, Sexual Orientation, and Workplace Incivility: Who Is Most Targeted and Who Is Most Harmed?* 7 *Frontiers in Psychol.* 1, 1 (2016) (in sample survey of 1,300 academic faculty, finding that sexual minority women reported highest levels of "workplace incivility," defined as "rude and discourteous behavior in violation of workplace norms for mutual respect.").

<sup>34</sup> Field studies indicate that potential employers' perception of an applicants' sexual orientation impacts their response to job applications. See, e.g., E. Mishel, *Discrimination against Queer Women in the U.S. Workforce: A Resumé Audit Study*, 2 *Socius: Soc. Res. for Dynamic World* 1, 6 (2016) (conducting experiment in three states and the District of Columbia, and finding that female online job applicants whose past work experience suggested they were nonheterosexual received approximately 29% fewer follow-up contacts for interviews compared to women whose applications were identical except that they did not imply that the applicants

Stigma against sexual and gender minorities in the workplace can significantly impair their work performance. One study found that gender minority employees' experiences of gender identity-based disrespect and lack of acceptance in the workplace are significantly negatively associated with work volition, or the perceived capability to make career choices.<sup>35</sup> When gender minority employees work in jurisdictions that are not perceived to extend legal protections from employment discrimination to gender minorities, moreover, their experiences of verbal harassment and sexual and physical assault are also negatively associated with their work volition, suggesting that “legal protections may act to buffer the deleterious

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were not heterosexual); A. Tilcsik, *Pride and Prejudice: Employment Discrimination against Openly Gay Men in the United States*, 117 *Am. J. Soc.* 586 (2011) (yielding similar results in study of gay and heterosexual male applicants in seven states). These studies have found differences across states, suggesting that the likelihood of discrimination varies geographically. Such variation may explain why a third study—which was limited to employers in four cities that had enacted gay rights ordinances—did not find differences across sexual orientation groups in employer responses. J. Bailey et al., *Are Gay Men and Lesbians Discriminated against When Applying for Jobs? A Four-City, Internet-Based Field Experiment*, 60 *J. Homosexuality* 873 (2013). A qualitative study of transphobia in the workplace also found that transgender and gender nonconforming people experienced barriers to their ability to find employment or advance in their jobs due to perceived bias from interviewers or current employers. Mizock et al., *supra* note 33.

<sup>35</sup> E.A. Tebbe et al., *Work and Well-Being in TGNC Adults: The Moderating Effect of Workplace Protections*, 66 *J. of Counseling Psychol.* 1, 1, 8 (2018) (sampling 175 transgender and gender nonconforming adults).

effect of” such experiences “on work and career processes and outcomes.”<sup>36</sup>

Similar outcomes have been found for sexual minority employees: sexual minority employees who perceive more sexual orientation discrimination in the work place also hold more negative job and career attitudes—including lower job satisfaction, organization and career commitment, organization-based self-esteem, satisfaction with opportunities for promotion, and higher turnover intentions—than those who do not perceive such discrimination.<sup>37</sup> Protective legislation has been

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<sup>36</sup> *Id.* at 8-9; accord M.V.L. Badgett et al., The Williams Institute, *The Business Impact of LGBT-Supportive Workplace Policies* (2013) (in literature review of 36 studies, finding that workplace policies and climates that are supportive of LGBT workers are linked to greater job commitment, improved workplace relationships, increased job satisfaction, and improved health outcomes among LGBT employees).

<sup>37</sup> B.R. Ragins & J.M. Cornwell, *Pink Triangles: Antecedents and Consequences of Perceived Workplace Discrimination against Gay and Lesbian Employees*, 86 *J. Applied Psychol.* 1244 (2001) (conducting national sample of 534 gay and lesbian employees); see also K.N. Miner & P.L. Costa, *Ambient Workplace Heterosexism: Implications for Sexual Minority and Heterosexual Employees*, 34 *Stress & Health* 563 (2018) (in survey of 536 sexual minority and heterosexual restaurant employees, finding that greater experiences of “ambient workplace heterosexism”—defined as exposure to homophobic jokes, remarks, slurs, or literature or materials—were associated with heightened fear and anger, and, in turn, with heightened psychological distress and lowered job satisfaction, and that sexual minorities reported feeling more fearful than heterosexuals); B.L. Velez et al., *Testing the Tenets of Minority Stress Theory in Workplace Contexts*, 60 *J. Counseling Psychol.* 532 (2013) (in sample of 326 sexual minority employees, finding link between high discrimination and high expectations of

found to indirectly influence increased compensation, promotions, and positive work attitudes among sexual minority employees, by reducing perceived workplace discrimination.<sup>38</sup>

Workplace discrimination against sexual and gender minorities is moreover associated with negative outcomes in psychological and physiological health. Sexual and gender minorities who experience discrimination in the workplace may also experience

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stigma, among other factors, with greater psychological distress and lower job satisfaction among participants).

<sup>38</sup> Ragins & Cornwell, *supra* note 37.

minority stress-related<sup>39</sup> psychological distress and illness,<sup>40</sup> substance use,<sup>41</sup> and even physical violence.<sup>42</sup>

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<sup>39</sup> The stress that stigma creates for sexual and gender minorities is often referred to as *minority stress*. I.H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence*, 129 *Psychol. Bull.* 674 (2003) (noting that minority stress is understood as an excess of stress beyond the stress routinely experienced by heterosexual and sexual minority people alike); W.O. Bockting et al., *Stigma, Mental Health, and Resilience in an Online Sample of the U.S. Transgender Population*, *Am. J. Pub. Health* 943 (2013) (extending minority stress model to analysis of effects of stigma on mental health of transgender and gender-diverse populations). Minority stress is associated with directly experiencing enactments of stigma, such as discrimination, as well as anticipating that one may be the target of such enactments of stigma and consequently modifying one's actions as a self-protective strategy. *See, e.g.*, R.D. Davies & B. Kessel, *Gender Minority Stress, Depression, and Anxiety in a Transgender High School Student*, 174 *Am. J. Psychiatry* 1151 (2017) ("The gender minority stress model posits that transgender individuals experience four distinct external stress types: victimization, rejection, discrimination, and identity nonaffirmation.").

<sup>40</sup> *See, e.g.*, J.A. Bauermeister, *Sexuality-Related Work Discrimination and Its Association with the Health of Sexual Minority Emerging and Young Adult Men in the Detroit Metro Area*, 11 *Sex Res. Soc. Policy* 1 (2014) (in sample of 397 gay men, finding that experience of workplace discrimination—such as denial or firing from a job, denial of promotion or salary, or receipt of unfair work evaluation—in the prior year was associated with poorer self-related health, a greater number of days when health was not good, and more functional limitation, or limitation in their everyday activities due to physical, mental, or emotional difficulty); Bockting et al., *supra* note 39 (in sample of 1,093 transgender people, finding that respondents had a high prevalence of clinical depression (44.1%), anxiety (33.2%), and somatization (27.5%)—defined as symptoms of cardiovascular, gastrointestinal, and other

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physiological systems observed in presentations of anxiety and depression, and that experience of social stigma, including stigma enacted through employment discrimination, was positively associated with psychological distress); *see also* A. Corrington et al., *Letting him B: A study on the intersection of gender and sexual orientation in the workplace*, *J. Vocational Behav.* (2018) (in study of 219 gay, lesbian, and bisexual participants, 131 of whom were bisexual, finding that bisexual men reported more perceived workplace discrimination, more psychological distress, and more substance use, than that reported by bisexual women); Miner & Costa, *supra* note 37; Velez et al., *supra* note 37.

<sup>41</sup> *See* M.C. Parent et al., *Stress and Substance Use among Sexual and Gender Minority Individuals across the Lifespan*, 10 *Neurobiology of Stress* (2019) (in literature review, noting findings of significant health disparities in substance use among sexual and gender minorities, including associations between workplace harassment and greater alcohol consumption and alcohol-related problems in sample of sexual minority women, job loss and smoking and substance use in national sample of transgender and gender nonconforming people, and methamphetamine and crack/cocaine use as means of coping with work stress in sample of sexual minority men); L.R. Miller & E.A. Grollman, *The Social Costs of Gender Nonconformity for Transgender Adults: Implications for Discrimination and Health*, 30 *Sociological Forum* (2015) (finding that, based on survey of 4,115 transgender adults, transgender people who face more every day and major discrimination, including discrimination in workplace, are more likely to engage in health-harming behaviors (*i.e.*, attempted suicide, drug/alcohol abuse, and smoking), and that transgender people who visibly appear transgender or gender nonconforming experience heightened exposure to discrimination and health-harming behaviors, when compared to transgender people who appear gender conforming); *see also* Corrington et al., *supra* note 40.

<sup>42</sup> E.L. Lombardi et al., *Gender Violence: Transgender Experiences with Violence and Discrimination*, 42 *J. Homosexuality* 89 (2002) (in sample of 402 transgender people, finding that participants who experienced any form of employment discrimination were almost

As the scientific research shows, sexual and gender minorities experience stigma in every facet of the workplace—in hiring, firing, promotion, and in their day-to-day interpersonal interactions at work—because of their nonconformity with sex-role stereotypes. Title VII thus provides a critical protection by prohibiting employment discrimination against sexual and gender minorities.

### CONCLUSION

The pertinent scientific and professional literature supports the view that employment discrimination based on sexual orientation or gender identity is discrimination “because . . . of sex.” For the foregoing reasons, the judgment in *Bostock v. Clayton County, Georgia*, 17-1618 should be reversed, and the judgments in *Altitude Express Inc. v. Zarda*, 17-1623 and *R.G. & G.R. Harris Funeral Homes Inc. v. EEOC*, 18-107, should be affirmed.

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five times as likely to experience physical violence because of their gender identity).

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