

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

In the Supreme Court of the United States



GERALD LYNN BOSTOCK, Petitioners,

—v—

CLAYTON COUNTY, GEORGIA, Respondents.

ALTITUDE EXPRESS, INC., ET AL., Petitioners,

—v—

MELISSA ZARDA, ET AL., Respondents.

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

—v—

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION, ET AL., Respondents.

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

**BRIEF OF AMICI CURIAE
THE WOMEN'S AND CHILDREN'S ADVOCACY
PROJECT, EQUAL MEANS EQUAL,
AND ALLIES REACHING FOR EQUALITY
IN SUPPORT OF PETITIONERS**

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INTEREST OF AMICI CURIAE¹

The issues before the Court are of great concern to amici, who have a particular interest in ensuring ratification of the Equal Rights Amendment. (ERA) The ERA, which was proposed by Congress and sent to the state legislatures for ratification in 1972, states, “Equality of rights shall not be denied or abridged, by the United States or any state, on account of sex.” *Proposed Amendment to the United States Constitution*, H.R.J. Res. 208, 92d Cong., 2d Sess., 86 Stat. 1523 (1972). Presently, 37 of the necessary 38 states have ratified the ERA. Chappell, B., *One More to Go: Illinois Ratifies Equal rights Amendment*, NPR.org, May 31, 2018, available at, <https://www.npr.org/sections/thetwo-way/2018/05/31/615832255/one-more-to-go-illinois-ratifies-equal-rights-amendment>. It is anticipated that the final state will ratify in the very near future. Roy, K., *3 Gender Equity Predictions for 2019*, Forbes.com, February 13, 2019, available at, <https://www.forbes.com/sites/ellevate/2019/02/13/3-gender-equity-predictions-for-2019/#585ff7f49a8e>. Although a ratification deadline imposed on the states by Congress has expired, the deadline will not likely pose a barrier to the ERA’s viability. Herndon, H. *et al.*, *The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly Before the States*, 3

¹ No party or counsel for a party authored this brief in whole or in part. No one other than amici or counsel for amici made any monetary contribution to fund the preparation or submission of this brief. All parties have either provided a blanket consent or have provided written consent which was filed with the clerk along with this amici brief.

William and Mary Journal of Women and the Law, pp.113-136 (1997).

This case has important implications for the ERA because it will determine whether sex, as a protected class category under Title VII of the Civil Rights Act of 1964, includes LGBTQ+² individuals. Amici are very concerned that if the Court declines to provide such protection, the LGBTQ+ community will be excluded not only from civil rights protections, but also from protections under the ERA given that the ERA also uses the word sex to define the protected category. Amici stand united with their LGBTQ+ allies, and seek by this brief to ensure their fully equal protection and treatment under civil rights laws, and ultimately, the ERA. If the meaning of sex under Title VII includes LGBTQ+ individuals, it will similarly and equally protect LGBTQ+ persons after the ERA is ratified.

This brief will provide the Court with relevant research and policy arguments to influence the Court's decision on behalf of women and others whose lives are affected by sex discrimination.

A. Women's and Children's Advocacy Project

The Women's and Children's Advocacy Project (WCAP) at New England Law | Boston is a project of the school's Center for Law and Social Responsibility (CLSR). The WCAP produces the Judicial Language Project, which uses sociolinguistic research to critique the language used in law and society to describe

² Rather than repeatedly saying sexual orientation and transgender, amici will use the acronym LGBTQ+ throughout for efficiency.

violence against women and children. It also provides pro bono advocacy services on a variety of legal matters related to the rights of abused women and children. WCAP has submitted many briefs to state and federal courts around the country.

B. Equal Means Equal

Equal Means Equal (EME) is a national nonprofit 501(c)(4) organization that Advocates for sex/gender equality and the fully equal treatment of women and girls. Through the use of grassroots activism, social media, and documentary filmmaking, EME has actively led or participated in hundreds of events to support sex/gender equality. In 2016, EME produced and released the film Equal Means Equal. In 2018, EME testified before the Illinois legislature in support of that state's successful ratification of the ERA. Equal Means Equal is based in California, where its founder and president, actress Kamala Lopez, resides. EME's mission is to advocate for the fully equal treatment of women, and sex/gender as a legal category.

C. Allies Reaching for Equality

Allies Reaching for Equality (A.R.E.) is a 501(c)(3) organization based in Connecticut. It was formed in 2017 to address the significant issue of university practices that allow hostile environments to go unchecked and places the achievement of women and other intersectional populations in jeopardy. A.R.E. advocates for university community members navigating issues related to sex and other forms of discrimination. A.R.E. provides training and resources for university staff related to civil rights laws, including Title IX and Title VII. A.R.E.'s mission is to partner

with university leadership, faculty, staff, and students to create a community prioritizing the values of equality for all. A.R.E.'s mission is to advocate for the equal treatment of women, and sex-based harm, including equal treatment of civil rights laws for all.



SUMMARY OF ARGUMENT

The Court should hold that discrimination against an employee because of sexual orientation or status as a transgender person constitutes prohibited employment discrimination “because of . . . sex” within the meaning of Title VII of the Civil Rights Act of 1964, because a wealth of scholarly and scientific literature demonstrates that discrimination, including state-sponsored exclusion of categories of people from equal legal protection of the law, causes measurable and intolerable harm.



ARGUMENT

I. THE COURT SHOULD HOLD THAT DISCRIMINATION AGAINST AN EMPLOYEE BECAUSE OF SEXUAL ORIENTATION OR STATUS AS A TRANSGENDER PERSON CONSTITUTES PROHIBITED EMPLOYMENT DISCRIMINATION “BECAUSE OF . . . SEX” WITHIN THE MEANING OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, BECAUSE RESEARCH SHOWS THAT DISCRIMINATION, INCLUDING STATE-SPONSORED EXCLUSION OF CERTAIN CATEGORIES OF PEOPLE FROM EQUAL LEGAL PROTECTION OF THE LAW, CAUSES MEASURABLE AND INTOLERABLE HARM

Civil rights laws are designed to promote the unifying and universal values of equal dignity and treatment, *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 291 (1964) (the primary purpose of the Civil Rights Act is to prevent “the deprivation of personal dignity” . . . and “equal treatment . . .” by prohibiting discrimination.) Discrimination is defined as “the process by which a member, or members, of a socially defined group is, or are, treated differently (especially unfairly) because of his/her/their membership in that group.” Kreiger, N., *Discrimination and Health Inequities*, supra, at 650, citing, Jary D. and Jary J. (eds.) *Collins Dictionary of Sociology*, Harper-Collins, Glasgow, UK, 1995, p. 160. It involves not only “socially derived beliefs each [group] holds about the other” but also “patterns of dominance and oppression, viewed as expressions of a struggle for power and privilege.” Kreiger, supra, citing Marshall, G. (ed.) *The Concise Oxford Dictionary of Sociology*.

Oxford University Press, Oxford, UK, 1994. Discrimination can vary in “form and type,” and involves individual conduct as well as institutional actions, as when discriminatory laws and policies are created by state entities, such as lawmakers and the courts. *Id.*, at 648-650. “In all cases, perpetrators of discrimination act unfairly toward members of socially defined subordinate groups to reinforce relations of dominance and submission, thereby bolstering privileges conferred to them as members of a dominant group.” Kreiger, *id.*, at 250. When an individual or group is excluded from equal protection of laws that preserve basic human rights, they suffer injury to their dignity, autonomy, and humanity. See Jackson, V., *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 Mont. L.Rev. 15-40 (2004) (discussing cases where human dignity is described as an underlying value to be protected through the enforcement of law); Ho, J., *Finding Out What it Means to Me: The Politics of Respect and Dignity in Sexual Orientation Antidiscrimination*, 2017 Utah L. Rev. 463 (generally discussing philosophical and legal foundations of dignity, autonomy, and humanity in American law); Francois, A., *Only Connect: The Right to Community and the Individual Liberty Interest in State-Sponsored Integration*, 112 Penn St. L. Rev. 985, 1006, 1018-1019 (2008).

While individuals commit most offenses against LGBTQ+ individuals, it is the state that controls “the context—whether permissive or prohibitive—for discriminatory acts: it can enforce, enable, or condone discrimination, or, alternatively, it can outlaw discrimination and seek to redress its effects.” Kreiger, *Discrimination and Health Inequities*, at 650. Thus,

the question before the Court is not whether LGBTQ+ individuals experience discrimination and are worthy of protection, but rather, whether the Court will be an enabler of such discrimination, or a protector against it.

To be sure, people can and do experience discrimination in ways the Court cannot prevent, irrespective of its ruling in this case. But should the United States promote discrimination against LGBTQ+ persons by excluding them from protection? Of course, the Court could hold that Congress must decide whether to “add” group categories to Title VII, but it is the position of Amici that there is no need to “add” anything to Title VII because sex includes LGBTQ+ persons. This Court has similarly construed the language of civil rights laws to further the law’s purpose. *Meritor v. Vinson*, 477 U.S. 57 (1986) (Title VII prohibits not only discrimination against persons who fit categorically under the definition of sex, but also discrimination in the form of sexual conduct); *See Jackson v. Birmingham*, 544 U.S. 167 (2005) (Title IX’s prohibition against sex discrimination covers individuals who speak out about sex discrimination, even if they are not, themselves, members of the class intended to be protected), and *Davis v. Monroe*, 526 U.S. 629 (1999) (Title IX’s prohibition against sex discrimination covers not only sex as a category of people, but also discrimination in the form of sexual conduct). If it is appropriate for the Court to read the phrase sex discrimination to cover sexual behavior, then it is even more appropriate for the Court to read the phrase sex discrimination to cover LGBTQ+ individuals, because civil rights laws are supposed to protect people, and sexual behavior is

a thing someone does, it is not who someone is as a human being.

Civil rights laws, such as Title VII, are also designed to protect society from the harm caused by perpetuation of stereotypes and “broad patterns of inequality.” Clarke, J., *Protected Class Gatekeeping*, 92 NYU Law Rev. 101, 106 (2017). The practice of discrimination “contributes to sexist, racist, or otherwise suspect systems of hierarchy.” *Id.* See Clarke, J., *Frontiers of Sex Discrimination Law*, 115 Michigan Law Rev. 809 (2017) (discrimination is threatens people’s ability to “choose a life free of predetermined roles,” and “creates a self-fulfilling cycle” that locks people out of the workplace, and “reinforces their subordinate status,” at 836, citing, *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003)).

This Court itself has rejected the idea of hierarchies within civil rights laws. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 243 n.9 (1989) (“ . . . [Title VII] on its face treats each of the enumerated categories [race, color, sex, religion, and national origin] exactly the same . . . [and] our specific references to gender throughout this opinion, and the principles we announce, apply with equal force to discrimination based on race, religion or national origin.”) Which is not to say all protected class people share the same history, or experience the same type or degree of harm, but this Court has properly recognized the importance of treating all categories of people the same under civil rights laws, despite their differences, presumably to advance the larger goal of guaranteeing equal, rather than hierarchical, respect for the universal values of human autonomy and dignity. Seen in this light, it

makes no sense to exclude LGBTQ+ persons from the meaning of the word sex under Title VII when the overarching purpose of the law is to ensure that no person is harmed because of who they are in society, especially in the important context of employment.

Scientific studies support this holistic view of civil rights laws by illustrating the negative health impacts of discriminatory acts, and laws that permit or fail to prohibit second-class treatment of certain categories of people. Esteemed researcher in the field, Dr. Nancy Kreiger, from Harvard, has demonstrated the numerous ways discrimination harms individual and public health. Kreiger, N. *Discrimination and Health Inequities*, International Journal of Health Services, vol. 44, No. 4, pp. 643-710, 2014 (meta-analysis of studies showing discrimination's negative health consequences through multiple pathways, including that discrimination, inter alia, limits access to occupational and economic resources, thereby constraining options for living and working in healthy environments, and causing stressors that adversely affect the psychological well-being and health behaviors, thus increasing the risk of somatic and mental illness). Kreiger has also identified how individual and public health are affected by the consequences of discrimination and accumulated insults arising from every day experiences, including violence, of being treated as a second-class citizen. Kreiger N., *Epidemiology and The People's Health: Theory and Context*. New York, NY: Oxford; 2011; Kreiger N. *Methods for the Scientific Study of Discrimination and Health: From Societal Injustice to Embodied Inequality: An Ecosocial Approach*. Am J. Public Health. 2012; 102:936-945. *See also*, Williams, D.R., *et al. Racial/Ethnic Discrimination and Health:*

Findings From Community Studies. Am. J. Public Health 93(2):200-208, 2003, at p. 243 “. . . acceptance of negative cultural stereotypes can lead to unfavorable self-evaluations that have deleterious effects on psychological well-being;” Yang Y., Lee L.C., *Sex and Race Disparities in Health: Cohort Variations in Life Course Patterns*. Social Forces. 2009; 87:2093-2124; Meyer, I.H. *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence*. Psychol. Bull. 129(5):674-697, 2003 (LGBTQ+ individuals are exposed to excess stress due to their minority position and . . .this stress causes an excess in mental disorders.”)

Importantly, Kreiger has further shown the harm from “state-sanctioned” de jure and de facto discrimination, *Discrimination and Health Inequities*, *supra*, at 687-688. Kreiger N., et al., *The Unique Impact of Abolition of Jim Crow Laws on Reducing Inequities in Infant Death Rates and Implications for Choice of Comparison Groups in Analyzing Societal Determinants of Health*. Am J Public Health. 2013; 103:2234-2244; *See also*, Kreiger, N. et al., *Jim Crow and Premature Mortality Among the US Black and White Population, 1960-2009*; Epidemiology. 2014 July; 25(4): 494-504; Accord, Hatzenbuehler, M. L., *et al.*, *State-Level Policies and Psychiatric Morbidity in Lesbian, Gay, and Bisexual Populations*. Am. J. Public Health 99(12):2275-2281, 2009 (finding higher rates of psychiatric disorders among LGBTQ+ persons who resided in states that did not extend protections against hate crimes and employment discrimination based on sexual orientation, compared to states that did); and Kramer, M.R. and Hogue, C.R., *Is*

Segregation Bad For Your Health? Epidemiol. Rev. 31(1):178-194, 2009. Negative health consequences for women in particular from state-sanctioned discrimination have also been recognized. One study looked at the prevalence of estrogen receptor status among breast cancer patients, and found the highest rates among women born in Jim Crow states. Kreiger, N., et al., *Breast Cancer Estrogen Receptor Status According to Biological Generation: U.S. Black and White Women Born 1015–1979*, Am J. Epidemiol., 2018, May 1; 187(5):960-970.

It should be noted that people routinely experience discrimination based on more than one category. Kreiger, N. *Discrimination and Health Inequities*, at 651. For example, a man might suffer harm based on his race and his religion. While such individuals surely perceive themselves as falling under two different categories, they ought not to be coerced by law to choose one status over the other based on whether civil rights laws afford them better protections only for some aspects of who they are in society.

By implication from this research, equal protection of all persons under civil rights laws improves individual and public health outcomes. See Kaplan, G., et al. *Lifting Gates, Lengthening Lives: Did Civil Rights Policies Improve the Health of African-American Women in the 1960s and 1970s?* In *Making Americans Healthier: Social and Economic Policy as Health Policy*, ed. R.F. Schoeni et al. Russell Sage Foundation, New York 2008.

The United States prides itself as a world leader of civil rights. See Burnett, L., *The Global Context of the Civil Rights Movement*, The Cross Cultural

Solidarity History Education Project, (2019) available at, <http://crossculturalsolidarity.com/the-global-context-of-the-civil-rights-movement/>. This case presents an important opportunity for the Court to shine a light on the integrity of that claim.



CONCLUSION

For the foregoing reasons, this Court should rule in favor of the employees, and hold that discrimination against an employee because of sexual orientation or status as a transgender person constitutes prohibited employment discrimination “because of . . . sex” within the meaning of Title VII of the Civil Rights Act of 1964.

Respectfully submitted,

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