

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

In the Supreme Court of the United States

GERALD LYNN BOSTOCK, *Petitioner*,

v.

CLAYTON COUNTY, GEORGIA, *Respondent*.

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

v.

MELISSA ZARDA, *et al.*, *Respondents*.

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

v.

E.E.O.C., *et al.*, *Respondents*.

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

**BRIEF OF ALTRIA GROUP, INC. AS *AMICUS
CURIAE* SUPPORTING THE EMPLOYEES**

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INTEREST OF THE *AMICUS CURIAE*¹

Altria Group, Inc. is a Fortune 200 company whose direct and indirect subsidiaries manufacture and sell tobacco products, alcohol, and other consumer goods to adult consumers through retailers. The Altria family of companies (“Altria”) employs more than 7,000 people—valued team members upon whom the companies’ success depends. Altria is committed to fostering a diverse and inclusive workplace, where all of its employees—including those who identify as lesbian, gay, bisexual, transgender, or queer (“LGBTQ”)—are treated equally and with respect, and feel secure expressing themselves. In support of that commitment, Altria maintains a robust antidiscrimination policy that prohibits discrimination on the basis of sexual orientation and gender identity. Altria also invests time and resources to educate employees about issues facing LGBTQ individuals, supports an active employee resource group for LGBTQ employees and allies, provides insurance coverage for transition-related medical care, and provides reimbursements to LGBTQ employees who are starting a family through adoption, surrogacy, or assisted reproductive technology.

Altria invests in a diverse workforce not only because its values proscribe discrimination in any form, but also because creating and maintaining a diverse and inclusive workplace benefits both the company and its employees. Employees are more productive in

¹ Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and that no one other than *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

inclusive workplaces, and the satisfaction of its employees helps drive Altria's success. This investment in diversity and inclusion has led to Altria being repeatedly named by Forbes as one of America's best employers and being rated among the "Best Places to Work" for 2018 and 2019 by the Human Rights Campaign's Corporate Equality Index. Altria's inclusive workplace enables it to attract and retain the most talented employees, who in turn help develop new and innovative ideas and solutions to business challenges. It also helps the company connect with diverse suppliers, who bring additional perspectives and new ideas.

Altria's investments in its workforce will be undermined and ineffective if employees fear that they might be discriminated against in the future because they lack legal protection against discrimination. Those employees may hide their identities and refrain from expressing their ideas and points of view, notwithstanding Altria's efforts to make its workplace tolerant and respectful.

In addition, Altria's access to a diverse labor pool will be compromised if other companies are permitted to discriminate. Altria hires many of its employees from other corporate employers. If those employers discriminate against LGBTQ individuals and cause them to either leave the workforce or underperform, Altria's ability to hire talented, experienced employees will be impaired. For these reasons, Altria has a strong interest in the robust enforcement of the federal antidiscrimination laws, including their application to LGBTQ employees.

SUMMARY OF ARGUMENT

Altria agrees with the employees in these cases (the Petitioner in *Bostock*, the Respondents in *Zarda*,

and Respondent Aimee Stephens in *Harris*) that Title VII’s prohibition on employment discrimination “because of . . . sex” encompasses discrimination based on LGBTQ status. See Br. for Resp’t Aimee Stephens at 21-27, *R.G. & G.R. Harris Funeral Homes v. EEOC*, No. 18-107; Br. for Pet’r at 10-12, *Bostock v. Clayton Cty.*, No. 17-1618; Br. for Resp’ts at 10-14, *Altitude Express, Inc. v. Zarda*, No. 17-1623. Altria also agrees with the views expressed in the *amicus curiae* brief filed by 206 businesses in support of those parties.

This brief addresses two specific issues relating to sex stereotyping under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

1. The second question presented in *Harris Funeral Homes* is whether Title VII prohibits discrimination against transgender people based on sex stereotyping under *Hopkins*. It does. Workplace discrimination against transgender people is almost invariably a form of sex stereotyping. Ms. Stephens’ experience is far from anomalous. When employers discriminate against transgender employees, it is because those employees do not conform to sex stereotypes: They are perceived by their employers as either men who are too “feminine” or as women who are too “masculine.” That type of stereotyping is discrimination on the basis of sex when applied to cisgender individuals,² and it does not suddenly become permissible when applied to transgender individuals.

2. *Harris Homes*, like many employers, believes it is necessary to enforce these sorts of sex stereotypes to prevent harm to its business. Such businesses con-

² Cisgender people are people whose gender identity corresponds with the sex they were assigned at birth.

tend that their employees and clients would be uncomfortable dealing with an openly LGBTQ person in the workplace. The concern is irrelevant as a legal matter—it is no more permissible to base an adverse employment decision on customer prejudice than to base it on employer prejudice—but in any event, that belief is not borne out by experience. Altria is a large, consumer-facing business that is committed to treating all of its employees equally. That commitment has had a profoundly *positive* impact on Altria’s business. Social science research confirms that Altria’s experiences are not unique: Companies with diverse and inclusive workforces grow faster than, and out-perform, their peers.

ARGUMENT

I. Title VII Prohibits Discrimination Based On Sex Stereotyping.

A. Title VII Prohibits The Use Of Gender Stereotypes In Employment Decisions.

In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), this Court held that Title VII prohibits an employer from making an employment decision based on gender stereotyping—that is, from “evaluat[ing] employees by assuming or insisting that they match[] the stereotype associated with their group.” *Id.* at 251 (plurality op.); see also *id.* at 258-61 (White, J., concurring); *id.* at 272-73 (O’Connor, J., concurring).

The defendant in that case based its adverse employment decision in part on feedback that the female plaintiff was “macho” and “somewhat masculine” and that she should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.” *Id.* at 235 (plurality op.). The Court concluded that the use of those sex

stereotypes violates Title VII's prohibition against discrimination based on sex. An employer who acts on beliefs about what a woman "cannot" or "must not be," the Court explained, has impermissibly "acted on the basis of gender." *Id.* at 250-51.

Price Waterhouse was not the first decision to recognize that Title VII prohibits employers from relying on sex stereotypes in making employment decisions. A decade earlier, it already was "well recognized that employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females." *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 (1978). This principle has also been recognized in the Court's Equal Protection jurisprudence. See, e.g., *Weinberger v. Wiesenfeld*, 420 U.S. 636, 637, 645 (1975) (striking down difference in Social Security Act payouts based on a "gender-based generalization"); *Craig v. Boren*, 429 U.S. 190, 198-99 (1976) (recognizing that "archaic and overbroad generalizations" about characteristics of men and women could not justify gender-based classifications (internal quotation marks omitted)).

These cases reflect the reality that most instances of discrimination based on "sex" are in fact based on sex stereotypes. As one commenter has explained:

[W]hen an employer demonstrates a preference for hiring male employees, the discrimination presumably is not based upon concrete distinctions between the respective capacities of people with ovaries and people with testes, but based upon stereotypes about women's abilities or interests. When an employer institutes a family leave plan that is more generous to women, the discrimination is not based on any biological mandate that mothers

(and not fathers) should spend time with new children, but based on stereotypes about the respective caretaking responsibilities of men and women.

Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 Calif. L. Rev. 561, 565 (2007). This Court, too, has observed that that sex-based classifications “carry the inherent risk of reinforcing the stereotypes.” *Orr v. Orr*, 440 U.S. 268, 282 (1979).

Although prior decisions rejected sex stereotyping, *Price Waterhouse* was the first case in which the Court expressly held that Title VII’s prohibition on sex stereotyping encompasses discrimination based on *prescriptive* stereotyping (a belief about how a member of a particular group *should* be, look, or act) as well as *descriptive* stereotyping (a belief about how members of a particular group *do* look or act). *Price Waterhouse* recognized the impermissibility of penalizing individuals for *nonconformity* with sex stereotypes, as opposed to penalizing individuals based on the expectation that they *will conform* with such a stereotype.

Price Waterhouse’s recognition that Title VII bars prescriptive stereotyping is consistent with established social science and practical experience. Gender stereotypes have long been recognized as having both descriptive and prescriptive properties.³ And the two components often are closely connected. As many researchers have explained, descriptive stereotypes—

³ Madeline E. Heilman, *Gender Stereotypes and Workplace Bias*, 32 Research in Org. Behavior 113, 114, 122 (2012), <https://tiinyurl.com/y2b8wwwv5>.

which tend to disadvantage subordinate groups—often develop a prescriptive component. For example, the belief that women are quiet and timid often goes hand and hand with the belief that women *should* be quiet and timid. This is not surprising. Individuals who benefit from the application of descriptive stereotypes will often seek to reinforce the correctness of those stereotypes—both to themselves and to others—by using their authority to force others to comply with the stereotype.⁴

Research has shown, moreover, that prescriptive stereotypes can cause even more harm than descriptive ones. While employees sometimes can disprove the applicability of a *descriptive* stereotype to them, an employee’s failure or refusal to comply with a *prescriptive* stereotype often elicits a strong backlash by the employer against the employee.⁵

Ultimately, discrimination based on either category of stereotype causes the precise harm that Title VII is intended to eradicate. Congress sought to ensure that employers would “ignore[] the attributes enumerated in the statute” and instead “*focus on the qualifications of the applicant or employee.*” *Price Wa-*

⁴ See, e.g., Cecilia L. Ridgeway, *Gender, Status, and Leadership*, 57 *J. Social Issues* 637, 641 (2001), <https://tinyurl.com/y5hhl5f9> (describing literature on interaction of descriptive and prescriptive stereotypes).

⁵ See, e.g., Anne M. Koenig, *Comparing Prescriptive and Descriptive Gender Stereotypes About Children, Adults, and the Elderly*, 9 *Frontiers in Psychol.* 1086 (2018), <https://tinyurl.com/y6b3l6hp> (comparing surprise created by violations of descriptive stereotypes with anger and outrage created by violation of prescriptive stereotypes).

terhouse, 490 U.S. at 243 (emphasis added). That singular goal—ensuring that employment decisions are based on “qualifications” instead of race, religion, sex, or national origin—“is the theme of a good deal of the statute’s legislative history.” *Ibid.*; see also 110 Cong. Rec. 7247 (1964) (“Indeed, the very purpose of Title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color.”) (mem. of Sen. Case and Sen. Clark). Sex stereotypes—whether descriptive or prescriptive—divert an employer’s focus from the individual’s qualifications to assumptions based on the individual’s sex.

Accordingly, in the wake of *Price Waterhouse*, lower courts have routinely held that Title VII prohibits an employer from punishing an employee for failing or refusing to conform to sex stereotypes. See, e.g., *Lewis v. Heartland Inns of Am., LLC*, 591 F.3d 1033, 1039 (8th Cir. 2010) (finding that terminating a front desk employee for having a masculine appearance rather than a “pretty” “Midwestern girl look” was sufficient to show wrongful sex stereotyping); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874 (9th Cir. 2001) (holding that “*Price Waterhouse* applies with equal force to a man who is discriminated against for acting too feminine”); *Doe v. City of Belleville*, 119 F.3d 563, 566 (7th Cir. 1997), *vacated on other grounds*, *City of Belleville v. Doe*, 523 U.S. 1001 (1998) (“[A] man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he exhibits his masculinity in a way that does not meet his coworkers’ idea of how men are to appear and behave, is harassed ‘because of his sex.’”); see also *Knussman v. Maryland*, 272 F.3d 625, 629-30 (4th Cir. 2001) (employer violated Equal Protection Clause by prohibiting father of newborn from taking

“primary care giver” leave based on employer’s stereotyped belief that “God made women to have babies and, unless [the employee] could have a baby, there is no way he could be primary care giver” (internal brackets omitted)).

B. Transgender People Are Not Excluded From Title VII’s Protections.

Transgender people are frequently the target of discrimination. One in six transgender people who have been employed reported losing a job because of their gender identity or expression, and almost a quarter of those who had a job in the previous year reported mistreatment based on their gender identity or expression. Sandy E. James et al., Nat’l Ctr. for Transgender Equality, *The Report of the 2015 Transgender Survey* 12 (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

The experiences of transgender people—as documented in both caselaw and social-science literature—demonstrate that this discrimination is based on prescriptive sex stereotyping. An employer may assume, for example, that a transgender woman is “really” a man—because that is the sex she was assigned at birth—and fire her because she doesn’t act or dress the way the employer thinks men “should” act or dress. Or the opposite: an employer fires a transgender woman because her appearance and behavior do not comport with the employer’s traditional view of how “feminine” a woman should act and look. Either way—whether the adverse employment decision is based on a failure to conform to stereotypes associated with the employee’s assigned sex at birth or to those associated with her gender identity—the em-

ployer has impermissibly based its decision on sex stereotypes, rather than the employee’s qualifications for the job.

That stereotyping is no different from firing a cisgender man who appears too feminine or a cisgender woman who does not appear feminine enough—precisely what this Court in *Price Waterhouse* held is forbidden. All of the courts of appeals that have decided the issue since *Price Waterhouse* (either in analyzing Title VII claims or in analyzing claims under laws that mirror Title VII) have correctly recognized that Title VII’s prohibition on making adverse employment decisions based on an individual’s nonconformance to sex stereotypes applies equally to transgender people.

1. *Discrimination Against Transgender People Is Based On Sex Stereotyping.*

The facts of discrimination cases brought by transgender people make clear that discrimination against transgender people invariably is based on the same sex stereotyping held unlawful in cases involving cisgender individuals: The plaintiffs are perceived as men who are not “masculine” enough or women who are not “feminine” enough.

Most of the reported cases involve claims that employers discriminated against transgender employees for a perceived failure to conform to stereotypes associated with the sex they were assigned at birth.

In *Smith v. City of Salem*, for example, a transgender woman’s co-workers “began commenting on [her] appearance and mannerism as not being masculine enough,” and after her supervisors became aware of her “allegedly unmasculine conduct and appearance,” they forced her to undergo psychological

evaluations and schemed to intimidate her into resigning. 378 F.3d 566, 572 (6th Cir. 2004).

In *Glenn v. Brumby*, a transgender woman’s supervisor asked her to go home when she “came to work presenting as a woman” because her supervisor “deemed her appearance inappropriate because he was a man dressed as a woman and made up as a woman,” then fired her because she intended to proceed with a gender transition, come to work as a woman, and change her legal name. 663 F.3d 1312, 1314 (11th Cir. 2011) (internal brackets and quotation marks omitted).

In *Rosa v. Park West Bank & Tr. Co.*, the plaintiff, who had been assigned a male gender at birth and was dressed in “traditionally feminine attire,” was told to go home and change into “more traditionally male attire.” 214 F.3d 213, 214 (1st Cir. 2000).

And in *Schwenk v. Hartford*, a transgender woman was assaulted because she called herself “Crystal Marie,” “ha[d] shoulder-length hair, [was] extremely soft-spoken and feminine, crie[d] easily, and use[d] make-up and other female grooming products.” 204 F.3d 1187, 1193 (9th Cir. 2000).

The *Harris Funeral Homes* case exemplifies *both* types of improper sex stereotyping: Ms. Stephens was fired because Mr. Rost, the owner of Harris Homes, believed that her appearance and behavior did not align with the stereotypes associated with *either* the sex assigned to her at birth *or* her gender identity. His testimony makes this clear.

On the one hand, he believed that because Ms. Stephens was assigned a male sex at birth, she should dress and act “like a man” while at work and use a traditionally masculine name. See, e.g., Resp. App.

62a, 63a. (“[A] male should look like a . . . man, and a woman should look like a woman.”).

On the other hand, he *also* believed that Ms. Stephens was not feminine enough to conform to “traditional” expectations about women, because even if she dressed in women’s clothes, he and others would be able to tell that she was a “man”: “[T]here is no way,” he said, “that . . . the person I knew . . . would be able to present in such a way that it would not be obvious that it was [a man].” Resp. App. 45a.

In other words, Ms. Stephens was fired because she didn’t conform to two *different* prescriptive stereotypes. Her mode of expression—the way she dressed, the name she used, the way she wore her hair—did not conform to the stereotypes her employer associated with her sex assigned at birth. At the same time, her physical characteristics did not, in her employer’s view, sufficiently conform to the stereotypes associated with her gender identity.

Ultimately, it does not matter whether an employer’s discriminatory actions are motivated by a belief that the employee is failing to conform to stereotypes associated with her sex assigned at birth or those associated with her gender identity. As all of these cases demonstrate, discrimination against transgender people in the workplace is almost invariably based on prescriptive sex stereotypes—beliefs about the way people of a certain sex *should* act and present themselves—rather than on the employee’s qualifications for the job. Title VII squarely prohibits decisionmaking on that basis.

2. *The Court Should Not Deny A Person The Protections of Title VII Simply Because the Person Is Transgender.*

Title VII’s prohibition on sex discrimination applies to transgender people in exactly the same way it applies to everyone else. The statute prohibits workplace discrimination against “*any* individual.” 42 U.S.C. § 2000e-2(a)(1) (emphasis added). And its purpose—requiring employers to “focus on qualifications rather than on . . . sex”—is undermined every bit as much by stereotype-based discrimination against transgender employees as it is when that discrimination is directed against cisgender individuals. *Price Waterhouse*, 490 U.S. at 243.

That is why the federal courts of appeals have had no difficulty concluding that Title VII, and other sex discrimination laws, apply fully to transgender people. See *Smith*, 387 F.3d at 573-75 (Title VII); *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1049 (7th Cir. 2017) (Title IX, which court interpreted by “look[ing] to Title VII”); *Rosa*, 214 F.3d at 215-16 (Equal Credit Opportunity Act, which court interpreted by “look[ing] to Title VII case law”); *Schwenck*, 204 F.3d at 1201-03 (Gender Motivated Violence Act, which Court recognized “parallel[s] Title VII”); *Glenn*, 663 F.3d at 1320-21 (applying Title VII caselaw in analyzing claim under Equal Protection Clause).⁶ This Court should reach the same conclusion.

⁶ Many district courts reached the same conclusion. See, e.g., *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 527 (D. Conn. 2016); *Finkle v. Howard Cty.*, 12 F. Supp. 3d 780, 787-90 (D. Md. 2014); *Schroer v. Billington*, 577 F. Supp. 2d 293, 305

C. Title VII Prohibits Sex Stereotyping Even Where The Stereotype Is Not Used To Favor One Sex Over Another.

Harris Homes argues that its decision to fire Ms. Stephens did not violate Title VII because it did not disadvantage one sex as a whole as compared to another sex as a whole. Pet. 22.

But this Court already has rejected the argument that “the absence of a discriminatory effect on women as a class justifies an employment practice which, on its face, discriminated against individual employees because of their sex.” *Manhart*, 435 U.S. at 716. This is because Title VII’s “focus *on the individual* is unambiguous.” *Id.* at 708 (emphasis added). Section 703(a)(1) prohibits “discriminat[ion] against any *individual*”; Section 703(a)(2) prohibits depriving “*any individual* of employment opportunities or otherwise adversely affect[ing] his status as an employee.” 42 U.S.C. § 2000e-2(a)(1), (2) (emphasis added).

Consistent with the statutory text, this Court has explained that Title VII “precludes treatment of individuals as simply components of a racial, religious, sexual, or national class. . . . Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.” *Manhart*, 435 U.S. at 707-08; see also *Connecticut v. Teal*, 457 U.S. 440, 453-54 (1982) (“The principal focus of [Title VII] is the protection of the

(D.D.C. 2008); *Lopez v. River Oaks Imaging & Diagnostic Grp.*, 542 F. Supp. 2d 653, 659-61 (S.D. Tex. 2008); *Mitchell v. Axcan Scandipharm, Inc.*, 2006 WL 456173, at *2 (W.D. Pa. Feb. 17, 2006); *Tronetti v. TLC HealthNet Lakeshore Hosp.*, 2003 WL 22757935, at *4 (W.D.N.Y. Sept. 26, 2003).

individual employee, rather than the protection of the minority group as a whole.”).

Accordingly, this Court has repeatedly held that employment decisions discriminating against *individuals* because of their sex violate Title VII even if they do not privilege one entire sex over another.

For example, in *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971), the Court held that Title VII does not permit an employer to refuse to hire women, but not men, with pre-school-age children, even though the employer’s practice did not affect all women and, in fact, women made up the vast majority of the employer’s employees. *Id.* at 543. The Court also has recognized that Title VII prohibits an employer from permitting men to sexually harass *another male coworker* in the workplace—a type of discrimination that does not favor women as a class over men as a class. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998).

Indeed, Harris Homes’s argument would deprive men of the protection afforded by Title VII under *Oncale*: A man bringing a claim that he was discriminated against based on his failure to act sufficiently “macho” in a traditionally male-dominated industry, like the plaintiff in *Oncale*, is not claiming that all men are being disadvantaged as compared to women. This Court held that such a plaintiff nevertheless can state a claim under Title VII.

This focus on the individual comports with Title VII’s goal of “focus[ing] on qualifications rather than on race, religion, sex, or national origin.” *Price Waterhouse*, 490 U.S. at 243. Regardless of whether they treat all of the members of a group differently from all of the members of another group, “[p]ractices that

classify employees in terms of religion, race, or sex tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals.” *Manhart*, 536 U.S. at 709.

Ultimately, regardless of whether a discriminatory employment practice treats all of the members of a particular group differently from all of the members of another group, those practices result in the same harms to the targeted individual and, as described in the next section, to businesses.

II. Prohibiting Sex Stereotyping In The Workplace Benefits Both Employers And Employees.

Employers sometimes argue that discrimination on the basis of sex stereotypes is necessitated by business concerns. Harris Homes, for example, suggests that affirmance of the Sixth Circuit’s decision would disrupt and harm its business by causing its clients and other employees to feel uncomfortable. Pet. 5, 32-33.

As Respondent Stephens in *Harris* (and several *amici*) explain in some detail, customer and co-worker preferences and prejudices are irrelevant as a matter of law to the question whether a defendant has engaged in unlawful discrimination. See Br. for Resp’t Aimee Stephens, *supra*, at 41; Br. for Lawyers’ Committee for Civil Rights Under Law, The Leadership Conference on Civil and Human Rights, and Civil Rights Organizations as *Amici Curiae* in Support of the Employees, § III.C; see also, *e.g.*, *Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908, 913 (7th Cir. 2010); *Bradley v. Pizzaco of Nebraska, Inc.*, 7 F.3d 795, 799 (8th Cir. 1993); *Fernandez v. Wynn Oil Co.*, 653

F.2d 1273, 1276 (9th Cir. 1981); *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971).

In addition, practical experience suggests that such concerns are largely unwarranted. Altria's experience—which, as discussed below, is consistent with that of other consumer-facing businesses—demonstrates that disregarding sex stereotypes, allowing people to express themselves honestly at work, and evaluating them based on their merit, is good for employees, clients, and businesses.

A. Diverse And Inclusive Workplaces Are Good For Businesses.

Altria's experience is that promoting a diverse and inclusive workplace where employees feel respected as individuals and comfortable and safe expressing their true selves makes the company stronger, more nimble in responding to business challenges, and better able to come up with creative solutions to issues that arise in its business. For this reason, Altria makes significant financial and personnel investments to further diversity and inclusion within the workplace.

This experience is confirmed by broader research. By rejecting discrimination based on sex stereotypes, companies increase the diversity of their workforce. Numerous studies have shown that diverse and inclusive companies experience better average growth than, and otherwise outperform, their peers.⁷

⁷ See, e.g., Katherine W. Phillips, *How Diversity Makes Us Smarter*, *Scientific American*, Oct. 1, 2014, <https://tinyurl.com/y4vrn8q2>; Sylvia Ann Hewlett et al., *How Diversity Can Drive Innovation*, *Harvard Bus. Rev.* (Dec. 2013), <https://tinyurl.com/j8nyu8k>; Lily Trager, Morgan Stanley, *Why Gender*

This success is attributable to a number of benefits that flow from a commitment to diversity and inclusion. When employees feel free to share their experiences and unique points of view—shaped by their education, family, life experiences, gender identity, race, and sexual orientation—companies benefit in many ways. Employees are more engaged.⁸ They are more creative and innovative.⁹ Rather than staying silent or offering only opinions and perspectives that conform to stereotypes, employees feel comfortable offering different information, opinions, and perspectives. All of this leads to faster and better problem solving and decision making.¹⁰

A diverse and inclusive workplace also creates stronger teams within the workplace. By fostering a sense of true belonging, companies make their employees feel more aligned with the company. Additionally, employees are more likely to share details about their lives with their colleagues, and thus form closer, more meaningful, and more trusting bonds with co-workers. These are all desirable outcomes in and of themselves. But beyond that, confident employees who are comfortable expressing their true

Diversity May Lead to Better Returns for Investors, Mar. 7, 2019, <https://tinyurl.com/y4dt9noj>; Thomas Barta et al., McKinsey & Co., *Is There a Payoff From Top-Team Diversity?* (2012), <https://tinyurl.com/y68feod9>; Catalyst, *The Bottom Line: Connecting Corporate Performance and Gender Diversity* 2, 7 (2004), <https://tinyurl.com/yxgk36qz>.

⁸ See Deloitte, *Waiter, Is That Inclusion in my Soup? A New Recipe to Improve Business Performance* 8 (2013), <https://tinyurl.com/jnnszk4>.

⁹ See Phillips, *supra* n.7.

¹⁰ Cloverpop, *Hacking Diversity with Inclusive Decision Making* 6-8, 16 (2018), <https://tinyurl.com/y3m64hnm>.

selves are more productive and are less likely to leave, thereby reducing employee turnover.¹¹ And cultivating a diverse and inclusive workplace helps to attract even more talent.¹²

By contrast, numerous studies have shown that discrimination and fear of discrimination have a materially adverse impact on employee productivity and job satisfaction. A robust set of data shows that subjecting people to stereotyping—such as sex stereotypes—undermines their performance and reduces their self-esteem and motivation.¹³ Stereotyping also prevents businesses from objectively and accurately assessing the value an employee offers.¹⁴

LGBTQ individuals frequently feel these and other effects of discrimination. In one study, two-thirds of LGBTQ employees who were not open about

¹¹ Melanie E. Brewster et al., *Voices From Beyond: A Thematic Content Analysis of Transgender Employees' Workplace Experiences*, 1 *Psy. of Sexual Orientation & Gender Diversity* 159, 161 (2014), <https://tinyurl.com/y4c652hb>; Daniel Sgroi, *Happiness and Productivity: Understanding the Happy-Productive Worker* 8 (2015), <https://tinyurl.com/yxmqqvf2>.

¹² Sarab Kochhar, Inst. For Pub. Relations, *Nearly Half of American Millennials Say a Diverse and Inclusive Workplace Is an Important Factor in a Job Search*, Dec. 4, 2017, <https://tinyurl.com/y2e94rna>.

¹³ See, e.g., Charles Stangor, et al., *Activating Stereotypes Undermines Task Performance Expectations*, 75 *J. Personality & Social Psy.* 1191, 1191, 1197 (1998), <https://tinyurl.com/y43ht7ja>; Daisy Grewal, *Reducing the Impact of Negative Stereotypes on the Careers of Minority and Women Scientists*, *Science*, Nov. 26, 2010, <https://tinyurl.com/y66e6vwq>.

¹⁴ Cf. Grewal, *supra* n.13 (noting that “people rate the quality of a scientific paper differently depending on whether they think a man or woman wrote it”).

their identity at work reported that they were unhappy with their careers.¹⁵ Those employees also were “more likely to feel isolated and uncomfortable ‘being themselves,’ were 40% less likely to trust their employer, . . . were less likely to achieve senior management status,” and were more likely to leave their company.¹⁶ Other studies have similarly found that negative workplace gender transition experiences lead to greater stress, anxiety, impaired cognitive functioning, poor job satisfaction, and higher rates of absenteeism.¹⁷

B. Stripping LGBTQ Employees Of Title VII’s Protections Would Harm Businesses.

The benefits to companies and their employees that flow from uniform rules prohibiting discrimination would be severely undermined if this Court were to rule that Title VII does not apply to LGBTQ people. Absent legal protection against discrimination, LGBTQ employees may fear that policies could change with personnel changes or that any future employer might not be as inclusive. That fear of unknowns in the future may lead employees to hide their gender identity or sexual orientation in the present, with the attendant adverse effects on the employee and on their companies.¹⁸

¹⁵ Brad Sears & Christy Mallory, The Williams Institute, *Documented Evidence of Employment Discrimination & Its Effects on LGBT People* 13 (2011), <https://tinyurl.com/yxleoca8>.

¹⁶ *Id.* at 13-14.

¹⁷ Brewster et al., *supra* n.11, at 160, 166.

¹⁸ See Sears & Mallory, *supra* n.15, at 13, 15 (fear of discrimination leads many LGBT individuals to hide their identity and to experience many of the same negative impacts that result from

Loss of Title VII protections for LGBTQ people would also harm companies' ability to conduct outreach to and attract such employees. Like many companies, Altria draws many of its employees from other business, which may not implement the same robust antidiscrimination policies and practices as Altria. If this Court takes away Title VII's protections from LGBTQ employees, those other businesses may discriminate against their LGBTQ employees—either by firing them or denying them the opportunity to develop skills and advance in the workplace. Consequently, when Altria seeks to fill positions within its companies, there will be fewer LGBTQ candidates with the skills and experience Altria needs. LGBTQ individuals also will be more reluctant to self-identify to potential employers or recruiters for fear of discrimination.¹⁹ These consequences will impair Altria's—and many other companies'—ability to locate and hire the talented diverse employees who are a necessary component to its continued business success.

CONCLUSION

The judgments of the courts of appeals in *Harris Funeral Homes* and *Zarda* should be affirmed, and the judgment in *Bostock* should be reversed.

discrimination); see also Chaka L. Bachman & Becca Gooch, *LGBT in Britain: Trans Report* 11 (2018), <https://tinyurl.com/y4doyl9h> (finding half of transgender people have hidden that they are transgender at work because they feared discrimination).

¹⁹ See, Lily Zheng & Alison Ash Fogarty, *Why You Still Have No (Out) Trans People at Your Company*, Quartz at Work, June 18, 2018, <https://tinyurl.com/yxd53ygy>.

Respectfully submitted.

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