No. 22-13626

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ANNA LANGE,

Plaintiff-Appellee,

—v.—

HOUSTON COUNTY, GEORGIA, *et al*.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Middle District of Georgia
D.C. Docket No. 5:19-cv-00382-MTT

BRIEF OF *AMICI CURIAE* LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, NATIONAL EMPLOYMENT LAW PROJECT, AND LATINOJUSTICE PRLDEF AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE AND AFFIRMANCE

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29(c), and Eleventh Circuit Rules 26.1-1(a)(3), 26.1-2(b), and 26.1-3, counsel for *amici curiae* discloses that each of the foregoing listed *amici curiae* is a non-profit organization with no parent corporation and that no publicly-held corporation owns 10% or more of its stock. *Amicus curiae* is not aware of any publicly owned corporation that has a financial interest in the outcome of this litigation and has not cooperated with such corporation.

The undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case:

1. Lawyers' Committee For Civil Rights Under Law – *Amicus Curiae*;
2. National Employment Law Project- *Amicus Curiae*;
3. LatinoJustice PRLDEF- *Amicus Curiae*.

/s/ Kathryn J. Youker
Kathryn J. Youker
Counsel for *Amicus Curiae*

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IDENTITY OF AMICI CURIAE AND STATEMENT OF INTEREST[1]

Formed in 1963, the Lawyers' Committee is a nonpartisan, nonprofit organization that uses legal advocacy to achieve racial justice, fighting inside and outside the courts to ensure that Black people and other people of color have the voice, opportunity, and power to make the promises of our democracy real. To that end, the Lawyers' Committee has participated in hundreds of cases involving issues related to voting rights, housing, employment, education, and public accommodations. *See, e.g.*, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, No. 21-707; *Bostock v. Clayton Cty.*, Nos. 17-1618, 17-1632, 18-107. As a leading national racial justice organization, the Lawyers' Committee has a vested interest in ensuring that people of color, including those who identify as lesbian, gay, bisexual, and transgender ("LGBTQ+"), have strong, enforceable protections from employment discrimination.

[1] All parties consented to the filing of this brief. Pursuant to Fed. R. App. P. 29(a)(4)(E), the *Amici* Organizations state that no party's counsel authored this brief in whole or in part, and that no party or person other than *amici*, their members, and their counsel contributed money towards the preparation or filing of this brief.

STATEMENT OF THE ISSUES

1. Whether an employer-sponsored health insurance plan that denies coverage for medically necessary treatment of gender dysphoria, but covers the same treatment when provided for other medically necessary purposes, facially discriminates on the basis of sex in violation of Title VII.

2. Whether the district court properly held that when a policy facially discriminates on the basis of a protected characteristic under Title VII, no further evidence of discriminatory intent is required.

SUMMARY OF THE ARGUMENT

The diversity and vitality of workplaces in this country, and in turn the American economy, are dependent upon creating workplaces free of discrimination. This important goal is furthered by Title VII's civil rights protections. That is especially imperative for workers who face ongoing barriers to equal opportunity in the workplace, such as Black workers, other systemically marginalized workers, and those with multiple intersecting identities, including Black LGBTQ+ workers.

In addition to the rights of LGBTQ+ workers that are directly at stake in this matter, *Amici* are concerned that a heightened evidentiary standard in cases challenging facially discriminatory policies would have grave impacts on Black workers and other workers of color who continue to face discrimination in the workplace. Our country is increasingly becoming more racially and otherwise diverse and laws prohibiting discrimination must be preserved, not diluted. Workers of color, including those who are LGBTQ+, a growing population in this country, need the protection of strong anti-discrimination laws.

Amici urge this Court to affirm the district court's ruling that a health insurance policy that denies coverage for surgeries that are medically necessary "for a sex change," while allowing the same surgeries when medically necessary for any other reason, is discrimination "because of sex." Title VII's plain text, supported by long-standing judicial interpretation, prohibits disparate treatment of an employee

"because of" his or her race, sex, or other protected characteristic. That means courts need only apply a "simple test": "whether the evidence shows treatment of a person in a manner which but for [the protected characteristic] would be different." *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978). The answer here is clearly yes.

The ultimate inquiry under Title VII—was the discrimination because of a protected characteristic—is the same regardless of how it is proven. When a policy expressly discriminates, the inquiry ends. No further evidence of malice or discriminatory intent is needed. Here, because the Houston County Health Plan exclusion ("Exclusion") expressly discriminates against only those seeking a "sex change," that is, individuals who are transgender, the plaintiff need not prove malice or discriminatory animus to establish intentional discrimination.

Title VII's protections, analyzed and applied in this manner, are important to ensure that LGBTQ+ individuals are not "treated as social outcasts or as inferior in dignity and worth." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018). But it is also critical for ensuring Title VII's protection against other forms of discrimination, including racial discrimination, remains intact. Adopting a restrictive interpretation of Title VII's protections in this case would mark a deviation from settled Title VII doctrine applied to other forms of intentional discrimination, including race discrimination.

Black workers and other workers of color still face intentional racial discrimination in the workplace. Requiring plaintiffs to demonstrate further evidence of malice or intent in cases challenging a facially discriminatory employment policy or practice is legally incorrect and would significantly hamper the ability of Black workers and other systemically marginalized workers to vindicate their rights under Title VII. It would also open the door to a wide range of previously rejected employer justifications for policies that explicitly treat people unequally based on their race, national origin, religion, or any other protected characteristic.

Accordingly, legal rules developed in cases involving facially discriminatory policies must be applied with full strength to claims of sex discrimination involving transgender employees, including Sergeant Anna Lange's claim here. There is no basis to carve out an exception for facially discriminatory policies on the basis of transgender identity. When that settled precedent is applied to this case, Houston County's Health Plan is plainly discriminatory on its face. Holding otherwise would undermine decades of Title VII precedent.

ARGUMENT

While the ultimate "but-for" question under all disparate treatment cases is the same, the analysis that courts apply depends on the theory under which a plaintiff pursues their claim. There are several methods by which a plaintiff can prevail in a

case of disparate treatment under Title VII. In the most prevalent way, a plaintiff presents either direct or circumstantial evidence proving an intentional discriminatory motive. *See Young v. United Parcel Serv., Inc.*, 575 U.S. 206, 213 (2015). In direct evidence cases, the plaintiff proves that the employer unlawfully discriminated with direct evidence of "actions or statements of an employer reflect[ing] a discriminatory or retaliatory attitude correlating to the discrimination or retaliation complained of by the employee." *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1189 (11th Cir. 1997) (quoting *Caban-Wheeler v. Elsea*, 904 F.2d 1549, 1555 (11th Cir. 1990)). Absent direct evidence, a plaintiff can establish intentional discrimination under the three-part burden-shifting analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Tex. Dep't of Comty Affairs v. Burdine*, 450 U.S. 248 (1981).

In rarer cases, the employer relies upon a formal, facially discriminatory policy that requires adverse treatment of employees with a protected trait. *See, e.g., Manhart*, 435 U.S. at 711; *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) (discussing an employer policy that was "discriminatory on its face"). In cases of facially discriminatory policies, "the protected trait by definition plays a role in the decision-making process, inasmuch as the policy explicitly classifies people on that basis." *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 726 (3d Cir. 1995). Hence, where a plaintiff demonstrates that the challenged action

involves disparate treatment through explicit facial discrimination, or a facially discriminatory classification, "a plaintiff need not prove the malice or discriminatory animus of a defendant." *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1501 (10th Cir. 1995). Rather, the focus is on the "explicit terms of the discrimination." *Int'l Union, United Auto. Aerospace & Agric. Implement Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991).

As explained below, the district court correctly evaluated the disparate treatment claim in this case using the analysis which applies to policies that are facially discriminatory.

I. Appellants' Policy is Facially Discriminatory Based on Sex and Violates Title VII.

The district court properly found that Appellants' Exclusion was a facially discriminatory policy because "sex change" surgery by definition only applies to transgender people, and under *Bostock*, such a classification constitutes sex discrimination. The Supreme Court concluded that discriminating against someone based on sexual orientation or transgender status was also "discriminating against that individual based on sex." *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1741 (2020).

Gender dysphoria is the clinical name for the distress caused by the incongruence between one's gender identity and sex assigned at birth, and this is the condition faced by many transgender people. Doc. 205, 2. Treatment for gender dysphoria may include gender-confirming care through hormone replacement

therapy and surgical procedures, which Houston County's Health Plan refers to as "sex change" surgeries. Houston County's Health Plan excludes "[s]ervices and supplies for a sex change and/or the reversal of a sex change," including "sex change" surgery or a vaginoplasty. *Id.* at 3-4. The only persons, however, who seek "sex change" medical services and surgery are transgender. And under the Health Plan, Appellants allow coverage for a vaginoplasty when deemed medically necessary for reasons that are unrelated to a "sex change." *Id*. at 22-23. Therefore, only transgender individuals are denied medically necessary services for "sex changes." Relying on its elected exclusion, Appellants denied Sgt. Lange's request for coverage of gender-confirming surgery, which her physician deemed was medically necessary to treat her gender dysphoria. *Id*. at 6-7.

A policy can create an express classification based on a characteristic protected under Title VII even though it does not use explicit words such as "Black," "transgender," or "women." In *Johnson Controls*, the Supreme Court applied the "but for" test to a battery manufacturer's fetal protection policy which barred employees "capable of bearing children" from lead-exposed jobs. 499 U.S. at 192, 200. The Court rejected the lower court's analysis of the policy as one that was facially neutral, noting that the policy only applied to the reproductive capacity of women and not men. *Id*. at 197-98. Instead, the Court found that the policy's use of the words "capable of bearing children" as the basis for the exclusion was an

express classification based on potential for pregnancy, and that, under the Pregnancy Discrimination Act, such a classification amounts to explicit discrimination on the basis of sex. *Id*. at 198-99. Thus, the Court held, the policy "does not pass the simple test of whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.'" *Id*. at 200 (quoting *Manhart*, 435 U.S. at 711).

In addition, a policy can facially discriminate where it is based on the "'stereotyped' impressions about the characteristics of males or females." *Manhart*, 435 U.S. at 707. The Supreme Court concluded that a policy requiring women employees to contribute greater amounts to a pension fund because, statistically, women tend to live longer violated Title VII. *Id*. at 705, 711. There was no suggestion in that case that the employer's motive was "invidious" or "sexist." It was simply a matter of "actuarial" analysis. *Id*. at 716. Still, Title VII prohibited the practice because the employer's contribution plan "on its face[] discriminated against individual employees because of their sex." *Id.*; *see also Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 684 (1983) (holding that a health plan that provided pregnancy-related benefits to female employees but provided only limited benefits to the spouses of male employees discriminated against male employees on the basis of sex).

Applying the simple test for disparate treatment claims, the Exclusion is facially discriminatory. Sgt. Lange is being denied a medically necessary surgery that, but for her transgender identity, would be permitted.

Appellants' argument that a different standard should apply to a case involving a health insurance exclusion is unavailing. As confirmed by the Supreme Court in *Bostock*, all of the protections against sex discrimination afforded under Title VII also protect LGBTQ+ individuals, including transgender individuals. *See Bostock*, 140 S. Ct. at 1743 ("For an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex. That has always been prohibited by Title VII's plain terms . . . ."). This includes not only an employer's hiring and discharge practices but "compensation, terms, conditions, or privileges of employment," 42 U.S.C. § 2000e-2(a)(1), which necessarily include health policies. *See, e.g.*, *Newport News*, 462 U.S. at 682 (holding that "[h]ealth insurance and other fringe benefits are 'compensation, terms, conditions, or privileges of employment'" under Title VII); *Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1089 (1983) ("Since employers are ultimately responsible for the 'compensation, terms, conditions, [and] privileges of employment' provided to employees, an employer that adopts a fringe-benefit scheme that discriminates among its employees on the basis of race, religion, sex, or

national origin violates Title VII regardless of whether third parties are also involved in the discrimination.") (Marshall J., concurring-in-part).

Moreover, contrary to Appellants' suggestions, the holdings in *Manhart* and *Newport News* in no way limit the circumstances in which a facially discriminatory health insurance policy can constitute intentional discrimination. Instead, the "but for" standard in Title VII is meant to be broad so that it can be flexibly applied to any manner of unforeseen discriminatory conduct. *See Bostock*, 140 S. Ct. at 1752 (2020) (noting the broad language of Title VII has been applied in a number of cases that "were 'unanticipated' at the time of the law's adoption"). A holding based on Appellants' arguments would improperly narrow the scope of what constitutes a facially discriminatory policy as to any protected class. Appellants cite no authority for grafting such sweeping, mechanical limitations onto Title VII, and such a result would be wholly inconsistent with the straight-forward, flexible "but for" test.

The Appellants assert three principal arguments for why the Exclusion is not facially discriminatory. First, Appellants contend that because the Health Plan excludes coverage for "sex change" surgery for both men and women, it is not an explicit classification based on sex. Blue Br. at 59-60. However, the plain language of *Bostock* forecloses this conclusion by making clear that Title VII "works to protect individuals of both sexes from discrimination, and does so equally." *Bostock*, 140

S. Ct. at 1741. The Court expressly held in *Bostock* that it is not a defense "for an employer to say it discriminates against both men and women because of sex." *Id*.

> [I]t doesn't matter if the employer treated women as a group the same when compared to men as a group. If the employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee . . . a statutory violation has occurred.

Id. A policy that applies equally to transgender men and transgender women "doesn't diminish but doubles [an employer's] liability." *Id.* at 1748.

Next, Appellants' argument that the Exclusion is not facially discriminatory since it does not affect all transgender employees is wrong because the focus of Title VII is on the individual, and not the group as a whole class. *See* Blue Br. at 15 n.7. That is because "the basic policy of [Title VII] requires that we focus on fairness to individuals rather than fairness to classes." *Manhart*, 435 U.S. at 716. For example, the Supreme Court explained in *Bostock*, that an employer does not have to discriminate against all members of a protected class in order for a policy to be discriminatory; rather "the law makes each instance of discriminating against an individual employee because of that individual's sex an independent violation of Title VII." 140 S. Ct. at 1742.

The Supreme Court has also applied Title VII to forbid discrimination against subsets of a protected group, rather than limiting application to discrimination against all members of a protected group. *See Connecticut v. Teal*, 457 U.S. 440, 455 (1982) ("It is clear that Congress never intended to give an employer license to

discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group."). The logical extension of Appellants' argument is that a policy barring Black people from working in management would not constitute a facially discriminatory policy because not all Black people want to be managers. Such a result would be antithetical to the purpose of Title VII and its goals of eliminating bias from employment decisions and compensation. As the Supreme Court has observed:

> The fact remains, however, that irrespective of the form taken by the discriminatory practice, an employer's treatment of other members of the plaintiffs' group can be of little comfort to the victims of discrimination. Title VII does not permit the victim of a facially discriminatory policy to be told that he has not been wronged because other persons of his or her race or sex were hired.

Id. (citations and internal quotes omitted). A holding that facially discriminatory policies must disadvantage an entire class, not just individuals, would be a radical departure from decades of Title VII jurisprudence, and would seriously undermine the Act's protections for workers of all races, sexes, religions, national origins, and more.

Lastly, Appellants attempt to absolve themselves of liability by pointing to the coverage provided in Houston County's Health Plan for some gender-confirming care, such as for hormone therapies. Blue Br. at 35-38. Appellants would have this Court find that because transgender employees can access some types of medical care related to gender dysphoria, none of the Health Plan is discriminatory. That the

plan allows for some gender-confirming care is simply a red herring. The focus should instead be on the gender-confirming care Houston County's Health Plan denies simply because an employee is transgender. The doctrine established in *Bostock* forecloses a finding that Appellants' provision of some treatment for gender dysphoria somehow absolves them of their illegal discrimination with regard to gender-confirming surgery. The Supreme Court found that "the law makes each instance of discriminating against an individual employee because of that individual's sex an independent violation of Title VII." *Bostock*, 140 S. Ct. at 1742. Because each violation is assessed independently, this Court must focus solely on the Exclusion, independent of the fact that the Health Plan provides coverage for other gender dysphoria treatments.

Appellants take the position that there are only two sets of circumstances in which a health plan could discriminate in violation of Title VII: (1) if an employer offers a different coverage package to participants based on their protected status, or (2) if a health plan excludes all coverage for members of a protected class. *See* Blue Br. at 39. As the district court correctly observed, there is no authority to support such limitations on which conduct or policies are proscribed by Title VII. Doc. 205, 27-28. And such a rule would yield absurd results. Under Defendants' logic, an employer could offer a single health insurance plan to all employees that excludes coverage for treatments based on an employee's race or ethnicity and avoid Title VII

liability, so long as the same policy was offered to all employees, and if the plan covered at least some treatment and services for Black workers and other workers of color.

Limiting the contours of what constitutes a facially discriminatory exclusion in a health insurance plan in the ways advanced by Appellants would set a harmful precedent for future challenges to other facially discriminatory policies on the basis of any of the protected classes.

II. Under Title VII, Plaintiffs Do Not Need to Provide Further Proof of Discriminatory Intent in Cases of Facially Discriminatory Policies.

On appeal, Appellants argue summary judgment was improper because Sgt. Lange demonstrated no evidence of discriminatory intent.[2] In cases involving employment decisions based on policies that are facially discriminatory, as in the case here, the Supreme Court and lower courts have consistently held that the policy's express terms are sufficient evidence that the employee's protected characteristic was the "but for" cause of the discriminatory treatment. Thus, the *McDonnell-Douglas* burden-shifting analysis, which courts apply when there is only circumstantial evidence of discrimination, is unnecessary in a case involving a facially discriminatory policy. *See Young*, 575 U.S. at 213 ("[A] plaintiff can prove disparate treatment either (1) by direct evidence that a workplace policy, practice, or

[2] While Lange presented ample evidence of discriminatory animus, Red Br. at 26-27, the district court did not need to weigh such evidence under *McDonnell Douglas*.

decision relies expressly on a protected characteristic, or (2) by using the burden shifting framework set forth in *McDonnell Douglas*"); *see also McDonnell Douglas Corp. v. Green*, 411 U.S. at 802-03.

The Supreme Court and this Circuit have consistently held that when a policy facially and expressly discriminates on the basis of a protected characteristic under Title VII, no other evidence of discriminatory intent is required. In *Johnson Controls*, where the defendant's policy was implemented to prevent the risk of occupational harm from lead exposure to fetuses, the Supreme Court held that "the beneficence of an employer's purpose does not undermine the conclusion that an explicit gender-based policy is sex discrimination." 499 U.S. at 200. The Court rejected the Seventh Circuit's analysis that required the plaintiff to bear the burden of persuasion on all questions in a case in which there is direct evidence of a facially discriminatory policy as "wholly inconsistent with settled Title VII law." *Id*. (quoting EEOC Policy Guidance); *id*. at 198 (rejecting the Seventh Circuit's analysis); *see also Int'l Union, United Auto., Aerospace, & Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 886 F.2d 871, 887–888 (7th Cir. 1989). The Court clarified: "[w]hether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination." *Johnson Controls*, 499 U.S. at 199.

In *Manhart*, the Supreme Court found that Title VII barred an employer from requiring women employees to contribute greater amounts to a pension fund because, statistically, women tend to live longer. 435 U.S. at 711. There was no suggestion the employer's motive was "invidious" or "sexist." It was simply a matter of "actuarial" analysis. *Id.* at 716. Still, Title VII prohibited the practice because the employer's contribution plan "on its face[] discriminated against individual employees because of their sex." *Id.* Beyond narrow exceptions like a bona fide occupational qualification ("BFOQ"), "[n]either Congress nor the courts have recognized . . . a defense" permitting an employer to offer a "justification" for disparate treatment. *Id.* at 716-17.

In *EEOC v. Joe's Stone Crab, Inc.*, EEOC brought a Title VII gender-based disparate impact claim against Joe's Stone Crab, a Miami Beach seafood restaurant that hired all male servers for four years, and then continued to hire mostly male food servers even after EEOC filed its discrimination charge. 220 F.3d 1263, 1267-68 (11th Cir. 2000). The Eleventh Circuit instead recognized some of the employer's policies as facially discriminatory and held:

> that a finding of disparate treatment requires no more than a finding that women were intentionally treated differently by Joe's because of or on account of their gender. To prove the discriminatory intent necessary for a disparate treatment or pattern or practice claim, a plaintiff need not prove that a defendant harbored some special "animus" or "malice" towards the protected group to which she belongs.

Id. at 1283-84, 1286.

In the race discrimination context, the Eleventh Circuit has confirmed that, "ill will, enmity, or hostility are not prerequisites of intentional discrimination." *Ferrill v. Parker Grp., Inc.*, 168 F.3d 468, 473 n.7 (11th Cir. 1999). In *Ferrill*, a telephone marketing corporation that made "get-out-the-vote" calls engaged in "race-match" calling, where Black employees were assigned to call Black voters using a "Black script," while white employees were assigned to call white voters using the "white script." *Id*. at 471. In addition, the employees were physically segregated by race. *Id.* The Court found that the company was liable for intentional discrimination under 42 U.S.C. § 1981, even though it had acted without racial animus but rather based on racial stereotypes, holding that "liability for intentional discrimination under § 1981 requires only that decisions be premised on [a protected characteristic], not that decisions be motivated by invidious hostility or animus." *Id*. at 473.[3]

Applying these precedents here, denying a transgender person medically necessary gender-confirming care while permitting the same care for cisgender persons straightforwardly constitutes discrimination "because of . . . sex" and no further showing of intent is required. The district court's ruling must be affirmed.

[3] While *Ferrill* involves a § 1981 claim, "there is no difference in the substantive doctrine of intentional discrimination under Title VII and § 1981." *Joe's Stone Crab*, 220 F.3d at 1284.

III. Upholding the Supreme Court's Precedent for Analyzing Facially Discriminatory Policies Ensures the Equal Opportunity Promised by Title VII.

To hold that plaintiffs must demonstrate additional evidence of animus or intent in cases involving facially discriminatory policies or practices would undermine decades of precedent and place an undue burden on plaintiffs, including Black workers, who continue to face discrimination in the workplace. Title VII has the ambitious purpose of "eliminat[ing] those discriminatory practices and devices which have fostered . . . job environments to the disadvantage of minority citizens." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 348 (1977) (quoting *McDonnell Douglas*, 411 U.S. at 800). It is a "broad remedial measure, designed to assure equality of employment opportunities." *Pullman-Standard v. Swint*, 456 U.S. 273, 276 (1982) (quoting *McDonnell Douglas*, 411 U.S. at 800).

The Supreme Court has emphasized that Title VII furthers the government's "compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 733 (2014). Before Title VII was enacted, a variety of odious racially discriminatory practices were legal. Employers overtly discriminated against employees in hiring, assignments, and pay without repercussion. Some of them included express discriminatory exclusions for African-Americans in job postings

and ads.[4] Others engaged in practices like the one the Supreme Court described in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). There, the employer "openly discriminated on the basis of race in the hiring and assigning of employees," placing African-American employees exclusively in a department "where the highest paying jobs paid less than the lowest paying jobs in the other four . . . departments in which only whites were employed." *Id*. at 427; *see also United States v. Ga. Power Co.*, 474 F.2d 906, 910 (5th Cir. 1973) ("Until July 29, 1963, an open and unvarying policy of the company prevented black persons from competing for any but the most menial and lowpaying jobs within the corporate structure."). In light of this history of discrimination prior to Title VII's enactment, and the recognized compelling interests, time and time again, the Supreme Court and lower courts have applied Title VII to eliminate discriminatory barriers to equality in the workplace.

After the passage of Title VII, many employers ended their expressly discriminatory policies and turned to more subtle forms of discrimination instead.[5]

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[4] *See, e.g.*, William A. Darity Jr. & Patrick L. Mason, *Evidence on Discrimination in Employment: Codes of Color, Codes of Gender*, 12 J. Econ. Persp. 63, 66-67 tbl.1 (1998) (collecting examples of newspaper help-wanted ads from 1960 that expressed racial preferences).

[5] Comm. on the Elimination of Racial Discrimination, Rep. Submitted by States Parties under Article 9 of the Convention, Addendum, U.N. Doc. CERD/C/351/Add.1 at ¶ 71 (Oct. 10, 2000), https://digitallibrary.un.org/record/432925?ln=en#record-files-collapse-header; *see also Bazemore v. Friday*, 478 U.S. 385, 390-91 (1986) (employer dissolved segregated divisions upon passage of Title VII).

However, Black workers still continue to face overt discrimination in the workplace today. In 2020, the Gallup Center on Black Voices found that one in four Black workers reported experiencing workplace discrimination in the past year, and that 75% of them indicated that they felt they were discriminated against based on their race or ethnicity (compared to 61% of Hispanic workers and 42% of white workers).[6]

A review of EEOC's recent press releases demonstrates that employers continue to use expressly discriminatory practices to limit job opportunities for Black workers. In March 2023, EEOC announced that it had filed a lawsuit against several Subway franchises in part for failing to hire and firing Black applicants on the basis of their race.[7] EEOC alleged that from October 2018 to August 2021, the Subway franchise owner "repeatedly instructed the general manager not to hire Black employees and to discharge other employees because they were Black or because they appeared to be Black."[8]

In September 2022, EEOC sued three staffing companies for discriminating against Black employees on the basis of race in selection, referral, placement and

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[6] Camille Lloyd, *One in Four Black Workers Report Discrimination at Work*, GALLUP (Jan. 12, 2021), https://news.gallup.com/poll/328394/one-four-black-workers-report-discrimination-work.aspx.

[7] Press Release, EEOC, EEOC Sues Subway Franchises for Unlawful Employment Practices on the Basis of Race and Color (Mar. 16, 2023), https://www.eeoc.gov/newsroom/eeoc-sues-subway-franchises-unlawful-employment-practices-basis-race-and-color.

[8] *Id.*; *see EEOC v. Bilal & Aaya Subway, Inc.*, No. 5:23-cv-00129 (E.D.N.C. Mar. 16, 2023).

assignment. *EEOC. v. Supreme Staffing LLC*, No. 2:22-cv-02668 (W.D. Tenn. Sept. 29, 2022). EEOC alleged that the staffing agencies regularly assigned Black applicants to lower-paying jobs, if at all, and accommodated client requests and preferences for Latino workers over Black workers. *Id*. In February 2022, EEOC announced the settlement of a lawsuit in Milwaukee in which EEOC alleged a McDonald's franchise refused to hire Black applicants because of their race.[9] The lawsuit alleged that the store manager told unsuccessful Black applicants, "Don't like n-----s," and that the store needed "Spanish people." *Id*.

EEOC also settled a lawsuit against a Tampa-based janitorial business for race discrimination, claiming the employer instructed district managers not to hire African-American applicants and to emphasize the company's pre-employment criminal background checks as a way of discouraging African-American candidates from applying, among other egregious conduct. *EEOC v. Diversified Maint. Sys., LLC*, No. 8:17-cv-01835 (D. Md. July 5, 2017).[10]

The widespread effects of ongoing discrimination contribute to the problem of occupational segregation, in which Black workers are overrepresented in lower

[9] Press Release, EEOC, Pensec Settles EEOC Race Discrimination Claim (Feb. 28, 2022), https://www.eeoc.gov/newsroom/pensec-settles-eeoc-race-discrimination-claim;.

[10] *See also* Press Release, EEOC, Diversified Maintenance Systems, LLC Will pay $750,000 to Settle EEOC Racial Discrimination, Harassment and Retaliation Lawsuit (Nov. 22, 2019), https://www.eeoc.gov/newsroom/diversified-maintenance-systems-llc-will-pay-750000-settle-eeoc-racial-discrimination.

paying and higher risk industries. Black workers are almost twice as likely to be in service-worker or laborer jobs, and almost 25% less likely to be in managerial or professional jobs in the private sector.[11]

On average, Black workers "are not being hired, promoted or paid according to what would signal their level of productivity based on their experience or their education."[12] For example, in the food service industry, Black workers and Latinx workers are "largely channeled to lower paying busser, runner, or kitchen positions in full service restaurants and to limited-service, fast food establishments."[13] Black workers are overrepresented in lower paid positions (such as bussers, dishwashers, and porters) and underrepresented in higher-paying positions (such as supervisors, bartenders, and executive chefs).[14] Restaurant workers are more likely to be low-

[11] MCKINSEY & CO., RACE IN THE WORKPLACE: THE BLACK EXPERIENCE IN THE US PRIVATE SECTOR 21 (2021).
[12] Quote from Valerie Wilson, director of the Economic Policy Institute's program on race, ethnicity and the economy. Courtney Connley, *Why Black workers still face a promotion and wage gap that's costing the economy trillions*, CNBC (Apr. 16, 2021), https://www.cnbc.com/2021/04/16/black-workers-face-promotion-and-wage-gaps-that-cost-the-economy-trillions.html.
[13] REST. OPPORTUNITIES CTRS. UNITED, ENDING JIM CROW IN AMERICA'S RESTAURANTS: RACIAL AND GENDER OCCUPATIONAL SEGREGATION IN THE RESTAURANT INDUSTRY, 1, 17 (2015).
[14] *Id*. at 11, 14.

wage workers, and Black workers and other workers of color within that industry are significantly more likely to experience poverty.[15]

LGBTQ+ people of color—already disproportionately disadvantaged in our economy—suffer far higher rates of job discrimination and harassment than their white counter-parts.[16] For example, in one study, one-third (33.2%) of LGBTQ+ employees of color reported experiencing employment discrimination (being fired or not hired) because of their sexual orientation or gender identity, as compared to one-quarter (26.3%) of white LGBTQ+ employees.[17] Another study suggests that

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[15] *Id.* at 1 ("Despite the industry's growth, restaurant workers occupy seven of the ten lowest-paid occupations reported by the Bureau of Labor Statistics, and the economic position of workers of color in the restaurant industry is particularly precarious. Restaurant workers experience poverty at nearly three times the rate of workers overall, and workers of color experience poverty at nearly twice the rate of white restaurant workers").

[16] *See* NPR ET AL., DISCRIMINATION IN AMERICA: EXPERIENCES AND VIEWS OF LGBTQ AMERICANS (2017), perma.cc/RG7E-8M4G; JAIME M. GRANT ET AL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 51, 56 (2011), perma.cc/93TJ- 6FMB; HUMAN RIGHTS CAMPAIGN FOUND., THE IMPACT OF COVID-19 ON LGBTQ COMMUNITIES OF COLOR 2 (2020), perma.cc/PTQ2-FRY2; *see also*, National Center for Transgender Equality, *Issues: Non-Discrimination Laws*, perma.cc/KQP5-LKS5; M.V. Lee Badgett et al., *Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination*, WILLIAMS INST. 3 (June 2007), perma.cc/NS2A-9K73 (reporting similar evidence of pronounced discrimination against LGBTQ+ employees of color); M.V. Lee Badgett et al., *Evidence from the Frontlines on Sexual Orientation and Gender Identity Discrimination*, CTR. FOR EMP. EQUITY (July 2018), perma.cc/4EK8-5PMF (same).

[17] BRAD SEARS ET AL., UNIV. OF CAL. L.A., SCH. OF LAW WILLIAMS INST., LGBT PEOPLE'S EXPERIENCES OF WORKPLACE DISCRIMINATION AND HARASSMENT 2 (2021), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Workplace-

LGBTQ+ people of color are more than twice as likely to experience anti-LGBTQ+ discrimination when applying for jobs.[18]

LGBTQ+ people of color also report more negative work-place experiences than those of white LGBTQ+ employees. One study shows that LGBTQ+ employees of color are significantly more likely to report experiencing verbal harassment (35.6% compared to 25.9%) at work because of their sexual orientation or gender identity than white LGBTQ+ employees.[19] And LGBTQ+ employees of color report that their success and work-life balance are fostered less extensively, they have less transparent evaluations, and they are respected less by supervisors.[20]

Given the disproportionate rates of employment discrimination faced by Black people, other people of color, and for workers with intersecting identities, such as LGBTQ+ people of color, preventing further discrimination against these communities is essential. Additional barriers to Title VII claims, such as a

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Discrimination-Sep-2021.pdf; *see also* Ctr. for Am. Progress, *Discrimination and Barriers to Well-Being: The State of the LGBTQI+ Community in 2022* (Jan. 12, 2023), https://www.americanprogress.org/article/discrimination-and-barriers-to-well-being-the-state-of-the-lgbtqi-community-in-2022/ (reporting that 70% of transgender respondents reported experiencing workplace harassment or discrimination, and overall LGBTQ+ respondents of color reported higher levels of discrimination).

[18] CORNELL UNIV. WHAT WE KNOW PROJECT, ANTI-LGBTQ DISCRIMINATION INFLICTS DISPROPORTIONATE HARM ON PEOPLE OF COLOR 1 (2021), https://www.americanprogress.org/article/discrimination-and-barriers-to-well-being-the-state-of-the-lgbtqi-community-in-2022/.

[19] SEARS, *supra* at 2.

[20] WHAT WE KNOW PROJECT, *supra* at 2.

requirement of proving intent in addition to a facially discriminatory policy will only serve to undermine Title VII's protections and goals. As a result of these important and compelling interests, this Court should follow established precedent and reject Appellants' invitation to chart new ground in creating new barriers to bringing Title VII claims.

CONCLUSION

If employers are allowed to draft facially discriminatory policies against LGBTQ+ individuals, and thwart Supreme Court precedent that no further evidence of intent be required to show that such a policy violates Title VII, the rights of all protected groups are at risk. Ignoring *Johnson Controls* and the well-established case law regarding facially discriminatory policies would open the door for employers to explicitly discriminate against workers in protected categories without being held accountable. Because the district court's order correctly relied on this well-established precedent, the Court should affirm summary judgment in favor of Sgt. Lange.

Dated: October 30, 2024

Respectfully submitted,

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I hereby certify that the foregoing brief was served electronically on October 30, 2024, with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit using the CM/ECF system; that all participants are registered CM/ECF users; and that service will be accomplished by the CM/ECF system.

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