Case No. 19-1063

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CHRISTINE FRAPPIED,
CHRISTINE GALLEGOS,
KATHLEEN GREENE,
JOYCE HANSEN,
KRISTINE JOHNSON,
GEORGEAN LABUTE,
JOHN ROBERTS,
ANNETTE TRUJILLO, and
DEBBIE VIGIL

Plaintiffs-Appellants,

v.

AFFINITY GAMING BLACK HAWK, LLC

Defendants-Appellees.

On Appeal from the United States District Court for the District of Colorado
The Honorable Raymond P. Moore
District Court Civil Action No. 17-cv-1294-RM-NYW

BRIEF OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AND THE EMPLOYEE RIGHTS ADVOCACY INSTITUTE FOR LAW & POLICY AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL OF THE JUDGMENT BELOW

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ORAL ARGUMENT IS REQUESTED

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DISCLOSURE STATEMENT OF AMICI CURIAE

The Internal Revenue Service has determined that The National Employment Lawyers Association ("NELA") is organized and operated pursuant to Section 501(c)(6) of the Internal Revenue Code. NELA is a non-profit organization and is exempt from income tax. NELA has no parent corporation, nor has it issued shares or securities.

The Employee Rights Advocacy Institute for Law & Policy is a related charitable public interest organization of NELA. It is organized pursuant to Section 501(c)(3) of the Internal Revenue Code as a non-profit organization exempt from income tax.

CERTIFICATION PURSUANT TO FED. R. APP. P. 29(a)(4)(E)

No party's counsel authored any part of this brief; no party or party's counsel contributed any money to fund preparing or submitting the brief; and no person other than amicus curiae, its members, or its counsel contributed any money that was intended to fund preparing or submitting the brief. *See* Fed. R. App. P. 29(a)(4)(E).

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INTEREST OF AMICI CURIAE

The National Employment Lawyers Association ("NELA") is the largest professional membership organization in the country comprising lawyers who represent workers in labor, employment, and civil rights disputes. NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

The Employee Rights Advocacy Institute for Law & Policy ("The NELA Institute") advances workers' rights through research and advocacy to achieve equality and justice in the American workplace. The NELA Institute works hand-in-hand with NELA to create workplaces in which there is mutual respect between employers and workers, and workplaces are free of discrimination, harassment, and retaliation.

NELA and The NELA Institute ("amici") have an interest in this Court's decision on whether the claim of discrimination based on sex plus age is

cognizable under Title VII because it will impact not only NELA's members and their clients who are victims of discrimination, but also our country's commitment to the elimination of workplace discrimination through Title VII of the Civil Rights Act of 1964. Amici's authority to file this brief is by leave of this Court.

I. INTRODUCTION

The importance our society places on women's youth, and, as a counterpart, the prevalence of discrimination against older women, is manifest. "One only has to look as far as the television in one's home to see an example of how the merging point of sexism and ageism has really affected older women in a very unique, and unfortunately, very negative way." Nicole Porter, *Sex Plus Age Discrimination: Protecting Older Women Workers*, 81 Denv. U.L. Rev. 79, 94 (2003). The experience of anchorwoman Christine Craft, who in 1983 sued the television station that demoted her because she was "too old, too unattractive, and wouldn't defer to men," has long symbolized this dynamic. Editorial Board, *For Once, We'd Like to See a 65-Year Old TV Anchorwoman*, THE KANSAS CITY STAR (June 10, 2017).[1]

The judicial system was unmoved. The court rejected the allegations of sexism, and the Eighth Circuit Court of Appeals affirmed. *See Craft v. Metromedia, Inc.*, 572 F. Supp. 868 (W.D. Mo. 1983), *aff'd* 766 F.2d 1205 (8th

[1] https://www.kansascity.com/opinion/editorials/article155403359.html

Cir. 1985). These courts found Ms. Craft's case should be dismissed before being heard by a jury even though it was undisputed that the station demoted her after it conducted a viewer survey that focused, among other things, on Ms. Craft's appearance and the "image of a 'professional anchor woman.'" 766 F.2d at 1209. Missing from the courts' analyses was recognition that "viewer surveys indicating that [Ms. Craft] was negatively perceived by the Kansas City audience" likely "themselves reflected impermissible sex stereotypes." Leslie Gielow, *NOTE: Sex Discrimination in Newscasting*, 84 Mich. L. Rev. 443, 446 (Dec. 1985). "[S]ex-role expectations pervade society." *Id.* at 447. "These societal stereotypes relate to an individual's ability, behavior, appearance, and dress," and constitute "[r]ole expectations [that] result in…individuals being evaluated on different criteria according to sex." *Id.* at 448-49.

Age is an additional characteristic that results in different criteria being applied to women and men. While society generally views a man's worth to remain the same, or even increase, as he ages, the opposite is true for women. Indeed, in 1985, the year that the Eighth Circuit concluded that Metromedia had not discriminated against Ms. Craft, 48% of male local news anchors were over forty, whereas ***only 3%*** of female local news anchors were. Porter, *supra* at 94.

Little has changed over the past three decades. Studies and anecdotal evidence show that especially in occupations where appearance is believed to be

important—like broadcast news and front-of-the-house jobs in casinos—"the treatment of older women is much worse than that of older men or younger women." *Id.* at 95; *see also* Alana Roberts, *Appearance counts: Casinos say looks just one aspect of standards for cocktail servers*, THE LAS VEGAS SUN (Mar. 31, 2005) (describing industry experts' opinions about the importance of casinos employing female cocktail servers who look young).[2] "[I]n our sociocultural order, older women must cope, not only with ageism, but with its conjunction with sexism, as well." Porter, *supra*, at 96.

Almost fifty years ago, the Supreme Court affirmed that Title VII of the Civil Rights Act of 1964 prohibits an employer from applying one employment policy to women but another to men. *See Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971). *Phillips* established that "sex considered in conjunction with a second characteristic—'sex plus'—can delineate a 'protected group' and can therefore serve as the basis for a Title VII suit." *Fisher v. Vassar Coll.*, 70 F.3d 1420, 1433 (2d Cir. 1995). "Under a 'sex-plus' theory of discrimination, it is impermissible to treat men characterized by some additional characteristic more or less favorably than women with the same added characteristic." *Derungs v. Wal-Mart Stores, Inc.*, 374 F.3d 428, 438 n.8 (6th Cir. 2004). Nevertheless, some

[2] https://lasvegassun.com/news/2005/mar/31/appearance-counts-casinos-say-looks-just-one-aspec/

courts, like the district court here, continue to reject discrimination claims based on an employer treating women with the added characteristic of being older less favorably than older men and younger women.

Refusal to recognize a claim based on sex plus age fails to follow Supreme Court and Tenth Circuit precedent, is inconsistent with the protections of Title VII and the Age Discrimination in Employment Act ("ADEA"), and leaves a large segment of American workers vulnerable to pernicious discrimination, undermining the principle that "remedial and humanitarian legislation" like Title VII and the ADEA "should be construed liberally to achieve its purpose." *Morelli v. Cedel*, 141 F.3d 39, 43 (2d Cir. 1998). Under the district court's holding in this case, employees ironically would be better protected if employers discriminated against them for having one protected status, rather than two. This Court should reverse the district court's ruling prohibiting Plaintiffs from bringing a sex plus age claim.

II. ARGUMENT

This argument proceeds in two parts. First, starting with *Phillips*, well-established case law supports older women workers bringing Title VII claims alleging that an employer discriminated against them because of their sex plus age.[3] Second, literature addressing the prevalence of discrimination based on an

[3] Good arguments exist that an employee may also bring a claim under the ADEA

employee belonging simultaneously to two or more protected classes demonstrates the persistence of such discrimination. Fortunately, the existing framework for "sex plus" claims supplies a remedy for the very real discrimination that older women workers experience daily.

A. Showing discrimination based on sex plus age is simply one method of proving sex discrimination under Title VII.

1. Almost fifty years of case law supports "sex plus" claims.

In a groundbreaking opinion, the Supreme Court held in 1971 that applying one employment policy to women but another to men constituted sex discrimination under Title VII. *See Phillips*, 400 U.S. at 544. Martin Marietta had denied Phillips a position based on its policy not to employ women with pre-school-age children. *Id.* at 543. Martin Marietta did not apply the same policy to men, and, in fact, employed men with pre-school-age children. *Id.* The Supreme Court held that in doing so Martin Marietta violated Title VII, even though 75-80% of those hired for the position Phillips sought were women, because Title VII does not permit "one hiring policy for women and another for men—each having pre-

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based on sex plus age, given that this Court has held that the ADEA does not require that age be the sole motivating factor in an employment decision: "an employer may be held liable under the ADEA if other factors contributed to its taking an adverse action, as long as age was the factor that made the difference." *Jones v. Okla. City Pub. Sch.*, 617 F.3d 1273, 1277 (10th Cir. 2010) (citation omitted). However, because Plaintiffs brought their sex plus age claims under Title VII, this brief will restrict its analysis to Title VII claims. *See* App. I pp. 175-76, 178 (second and fourth claims for relief).

school-age children." *Id.* at 543-44. Rather, Title VII "requires that persons of like qualifications be given [the same] employment opportunities irrespective of their sex." *Id.* at 544.

Philips recognized that an employer that discriminates against a subclass of women because they are female with an additional characteristic—in *Phillips*, women with pre-school-age children—discriminates based on sex even if the employer does not discriminate against all women. The Supreme Court reaffirmed this principle in *International Union v. Johnson Controls*, 499 U.S. 187 (1991), holding that excluding fertile women (those capable of bearing children) from certain jobs but not excluding fertile men from the same jobs "explicitly discriminate[d] against women on the basis of their sex." *Id.* at 197. The defendant's "policy [did] 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 (citation omitted).

Other Supreme Court opinions likewise have recognized that adverse treatment of a subclass of a protected class constitutes actionable discrimination even absent discrimination against the entire class. *See AT&T Corp. v. Hulteen*, 566 U.S. 701, 726-27 (2009) (Ginsburg, J., dissenting) (describing *Phillips* as an "opinion recognizing that Title VII applies to classifications disadvantageous to some, but not most women," and quoting the EEOC's regulation that "'[i]t [is]

not…relevant that [a] rule is not directed against all females, but only against married females, for so long as sex is a factor in the application of the rule, such application involves…discrimination based on sex.'" (quoting 29 CFR § 1604.4)); *Connecticut v. Teal*, 457 U.S. 440, 455 (1982) ("Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because [it] favorably treats other members of the employees' group.").

Every Circuit Court of Appeals has explicitly or implicitly recognized "sex plus" claims. "Inclusion of 'sex plus' discrimination within the proscription of [Title VII] has legitimate legislative…underpinning" because "[a]n amendment which would have added the word 'solely' to the bill, modifying 'sex,' was defeated…in the House." *Willingham v. Macon Tel. Pub. Co.*, 507 F.2d 1084, 1089 (5th Cir. 1975). "Presumably, Congress foresaw the debilitating effect such a limitation might have upon the sex discrimination [legislation]." *Id.*

A leading Circuit Court case addressing "sex plus" claims is the Fifth Circuit's decision in *Jefferies v. Harris County Community Action Association*, 615 F.2d 1025 (5th Cir. 1980), which the Supreme Court cited with approval in *Olmstead v. L.C.*, 527 U.S. 581, 598 n.10 (1999). *Jefferies* held that the Supreme Court's "sex plus" cases mandated the conclusion that an employee may bring a discrimination claim based on sex plus race. 615 F.2d at 1032-33. The Fifth Circuit refused to condone a result that left black women "without a viable Title VII

remedy" in "the absence of a clear expression by Congress that it did not intend to provide protection against discrimination directed especially toward black women as a class separate and distinct from the class of women and the class of blacks." *Id.* at 1032. Because "discrimination against black females can exist even in the absence of discrimination against black men or white women," when "a Title VII plaintiff alleges that an employer discriminates against black females, the fact that black males and white females are not subject to discrimination is irrelevant and must not form any part of the basis for a finding that the employer did not discriminate against the black female plaintiff." *Id.* at 1032, 1034.

Likewise, in *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971), the Seventh Circuit held that "[t]he effect of [Title VII] is not to be diluted because discrimination adversely affects only a portion of the protected class," invalidating United's policy that female, but not male, flight attendants must be unmarried. *Id.* And in *Lam v. University of Hawaii*, the Ninth Circuit explained that "when a plaintiff is claiming race *and* sex bias, it is necessary to determine whether the employer discriminates on the basis of that *combination* of factors, not just whether it discriminates against people of the same race or the same sex." 40 F.3d 1551, 1562 (9th Cir. 1994). This Court has similarly recognized a "sex plus" claim, explaining that under *Phillips*, "Title VII not only forbids discrimination against women in general, but also discrimination against subclasses of women."

Coleman v. B-G Maint. Mgmt., 108 F.3d 1199, 1202-03 (10th Cir. 1997); *see also Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1416-17 (10th Cir. 1987) (citing *Jefferies* for the proposition that "disparate treatment of a sub-class of women would constitute a violation of Title VII").[4]

Following the lead of the Supreme Court and the Circuit Courts of Appeals, innumerable federal district court cases—too many to list here—have also recognized "sex plus" claims. For example, the District of Colorado has explained that "not all women in a workplace must face the same discrimination in order for a plaintiff to prove sex discrimination. Courts have found as actionable discrimination against some women but not all women based on their gender 'plus' another characteristic such as appearance, pregnancy, marital status, ***or age***."

[4] *Accord Franchina v City of Providence*, 881 F.3d 32, 52-53 (1st Cir. 2018); *Rosencrans v. Quixote Enters.*, 755 F. App'x 139, 142 (3d Cir. 2018); *Shazor v. Pro'l Transit Mgmt.*, 744 F.3d 948, 957-58 (6th Cir. 2014); *Harris v. Maricopa Cty. Superior Court*, 631 F.3d 963, 967-77 (9th Cir. 2011); *Mosley v. Ala. United Judicial Sys.*, 562 F. App'x 862, 866 (11th Cir. 2014); *Hamilton v. Geithner*, 666 F.3d 1344 (D.C. Cir. 2012); *Gavura v. Pa. State House of Representatives*, 55 F. App'x 60, 64 (3d Cir. 2002); *Higgins v. New Balance Ath. Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Fisher*, 70 F.3d at 1433-34; *Maganuco v. Leyden Cmty. High Sch. Dist. 212*, 939 F.2d 440, 443-44 (7th Cir. 1991); *Schafer v. Bd. of Pub. Educ. of Sch. Dist.*, 903 F.2d 243, 244, 247 (3d Cir. 1990); *King v. Trans World Airlines, Inc.*, 738 F.2d 255, 258-59 (8th Cir. 1984); *Bryant v. Int'l Sch. Servs., Inc.*, 675 F.2d 562, 575-76 (3d Cir. 1982); *Gerdom v. Cont'l Airlines*, 692 F.2d 602, 606 (9th Cir. 1982); *Harper v. Thiokol Chem. Corp.*, 619 F.2d 489, 492-93 (5th Cir. 1980); *In re Consol. Pretrial Proceedings in Airline Cases*, 582 F.2d 1142, 1145 (7th Cir. 1978); *Earwood v. Cont'l Se. Lines, Inc.*, 539 F.2d 1349, 1351 (4th Cir. 1976); *Knott v. Mo. P. R. Co.*, 527 F.2d 1249, 1250-51 (8th Cir. 1975).

Osman v. Bimbo Bakeries USA, Inc., 2016 U.S. Dist. LEXIS 5313, at *28 (D. Colo. Jan. 15, 2016) (emphasis added) (addressing discrimination against foreign-born women).

Osman provided a further sub-categorization of "sex plus" claims, explaining that when the "plus" characteristic is another protected characteristic, the plaintiff has asserted a claim for "intersectional discrimination." *Id.* at *30 (citation omitted). Intersectional discrimination occurs when the defendant "treat[s] the plaintiff disparately because she belong[s] simultaneously to two or more protected classes." *Id.* (citation omitted); *see also Alfonso v. SCC Pueblo Belmont Operating Co.*, 912 F. Supp. 2d 1018, 1027 n.5 (D. Colo. 2012). Intersectional "sex plus" discrimination claims are merely a subset of "sex plus" claims, and are actionable for the same reasons.[5]

Regardless of whether the "plus" characteristic in a "sex plus" claim is seemingly neutral or whether it constitutes a separate protected status, "sex plus discrimination is still just a form of gender discrimination." *Weightman v. Bank of*

[5] The EEOC describes intersectional discrimination as prohibited under Title VII: "Title VII prohibits discrimination not just because of one protected trait…but also because of the intersection of two or more protected bases." (EEOC Compliance Manual, Ch. 15, § IV.C, http://www.eeoc.gov/policy/docs/race-color.html (last visited May 15, 2019) (citing *Jefferies*). Because the EEOC is the agency tasked by Congress to enforce Title VII, EEOC guidelines "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance" on Title VII. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986) (citation omitted).

N.Y. Mellon Corp., 772 F. Supp. 2d 693, 701 (W.D. Pa. 2011). "The term 'sex plus' or 'gender plus' is simply a heuristic," a "judicial convenience developed in the context of Title VII to affirm that plaintiffs can, under certain circumstances, survive summary judgment even when not all members of a disfavored class are discriminated against." *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 118-19 (2d Cir. 2004). Thus, "'plus' does not mean that more than simple sex discrimination must be alleged." *Chadwick v. WellPoint, Inc.*, 561 F.3d 38, 43 (1st Cir. 2009). "[T]he ultimate question remains the same as in all gender discrimination cases: i.e., did the employer take an adverse employment action, at least in part, because of the employee's gender." *Weightman*, 772 F. Supp. 2d at 702.

2. <u>A claim alleging discrimination based on sex plus age is a viable "sex plus" claim.</u>

Contrary to the district court's conclusion, there is no reason to treat sex plus age claims under Title VII any differently than any other "sex plus" claim. "It is beyond belief" that while an employer may not discriminate against other subclasses of women, such as African-American women, women with young children, or married women, it could be allowed to discriminate against a subclass of older women. *Jefferies*, 615 F.2d at 1034. As the Fifth Circuit found in relation to race, "[t]his would be a particularly illogical result, since…[age] itself is prohibited as a criterion for employment." *Id.*

Similar to the intersection of race and gender, older women are subject to a set of stereotypes and assumptions shared neither by older men nor younger women. *Lam*, 40 F.3d at 1561. Older women "may be targeted for discrimination" even in the absence of discrimination against older men or younger women. *Id.* (citation omitted). To reject a sex plus age claim as beyond the reach of Title VII would be to tolerate "distinctions in employment between men and women on the basis of immutable or protected characteristics" and "inhibit employment opportunity in violation of [Title VII]." *Jefferies*, 615 F.2d at 1034.

Examining some types of proof a Title VII plaintiff might offer and how she would fare with such proof if a sex plus age claim were not viable illustrates the perils of rejecting these claims. For example, assume that in response to a dispositive motion, a plaintiff without direct evidence of sex plus age discrimination was proceeding under the familiar *McDonnell-Douglas* analysis. Either to meet the fourth element of her *prima facie* case, that the adverse employment action "occurred under circumstances which give rise to an inference of unlawful discrimination," *Plotke v. White*, 405 F.3d 1092, 1100 (10th Cir. 2005), or to show that the employer's proffered reason for the adverse action is pretext, the plaintiff shows that the employer treated other women over forty adversely. If the court refused to recognize older women as a protected subclass of women and instead treated the plaintiff's protected class as *all* women, the

employer could defeat the plaintiff's claim by showing how well it treated younger women. Or, the plaintiff presents data demonstrating statistical significance in the adverse treatment of older women compared to older men (or to all other employees besides older women), but instead the court looks at the employer's treatment of ***all*** women as compared to ***all*** men and thereby obscures or fails to detect a significant statistical disparity.

Another example: a plaintiff with a disparate impact claim cannot show that the defendant's policies disproportionately adversely affected ***all*** women, even though the plaintiff can show that the defendant's policies resulted in a disproportionate impact on the subclass of ***older*** women. *See Maganuco v. Leyden Cmty. High Sch. Dist. 212*, 939 F.2d 440, 443-44 (7th Cir. 1991) (recognizing that a plaintiff could establish a disparate impact claim by showing an employment policy's "disproportionate and adverse impact on women teachers who experience pregnancy-related disability"). In these scenarios, without defining older women as a protected subclass, defendants would be able to do exactly what the Supreme Court has held impermissible: defeat a sex discrimination claim by showing favorable treatment of all women. *See Jefferies*, 615 F.2d at 1032 (explaining that if both black men and white women were considered to be within the same protected class as black women for purposes of a *prima facie* case or proving pretext, "no remedy will exist for discrimination which is directed only toward

black females"). The insistence on counting the experiences of all women would be directly contrary to *Phillips* and its progeny, which prohibit a policy withholding from some women because of their sex a particular employment benefit but does not affect all women in that workplace because not all women share the disfavored characteristic. Likewise, withholding from women the benefit of being allowed to age without suffering detriment to their career, while simultaneously providing such benefit to men, constitutes sex discrimination even though the discrimination does not affect all women.

For these reasons, a significant number of cases have recognized a claim for sex plus age discrimination. This Court itself has addressed such a claim; although not explicitly recognizing it. This Court concluded that evidence that an employer treated older women worse than men and younger women in the office sufficiently supported a jury verdict that the plaintiff was subjected to a hostile work environment because of her gender. *Ridgell-Boltz v. Colvin*, 565 F. App'x 680, 682, 687 (10th Cir. 2014). That this Court found a sex plus age claim uncontroversial directly impugns the district court's holding in this case that no such claim exists.

Similarly, in *Gorzynski v. JetBlue Airways Corporation*, 596 F.3d 93, 109-10 (2d Cir. 2010), although ultimately finding it did not need to reach the issue, the Second Circuit strongly indicated it would recognize a sex plus age claim. *Id.*

(explaining that "where two bases of discrimination exist, the two grounds cannot be neatly reduced to distinct components"); *see also Wolf v. Time Warner, Inc.*, 548 F. App'x 693, 694 (2d Cir. 2013) (addressing a claim for sex plus age discrimination); *Renz v. Grey Advert.*, 1997 U.S. LEXIS 20766, at *2-5 (2d Cir. Aug. 4, 1997) (same); *accord Mulvihill v. Pac. Mar. Ass'n*, 587 F. App'x 422, 423 (9th Cir. 2014) (holding that "the district court did not err…when it expressly considered the combination of both [the plaintiff's] age *and* sex when reaching its holding"); *Doucette v. Morrison County*, 763 F.3d 978, 982, 985 & n.9 (8th Cir. 2014) (relying on the *Phillips* line of cases to hold that "a claim of sex-plus-age discrimination is likely cognizable" under Minnesota sex discrimination laws); *Johnston v. U.S. Bank Nat'l Ass'n*, 2009 U.S. Dist. LEXIS 79125, at *25 (D. Minn. Sep. 2, 2009) (sex discrimination claims under Title VII and Minnesota anti-discrimination laws are analyzed the same).[6]

Many federal district courts that thoroughly analyzed the issue have concluded that a sex plus age claim is viable under Title VII. For example, in *Arnett v. Aspin*, the court recognized a sex plus age claim under Title VII because, otherwise, "defendant employers could escape Title VII liability" by showing it did not discriminate against women in general. 846 F. Supp. 1234, 1240 (E.D. Pa.

[6] It does not appear that any Circuit Court of Appeals case has refused to recognize a sex plus age claim under Title VII, although some have refused to reach the issue.

1994). "[S]uch a result cannot be condoned….whether or not the 'plus' classification is also one afforded protection on its own, such as age." *Id.* The court aptly illustrated this point by explaining that like the employer in *Phillips* who required that its female employees not have pre-school-age children, the defendant employer in *Arnett* "required more of [the plaintiff] than [it] did of the male applicants for the [same] position. That is, [it] required that she be under the age of forty." *Id.*[7]

Nor is it problematic that if sex plus age discrimination claims were allowed, "any employee who believes they are a victim of age discrimination and falls under a category protected by Title VII would be better served by filing a Title VII mixed-motive theory of discrimination, rather than a claim under the ADEA, and arguing that the Title VII factor plus age was the basis for the

[7] *See also Refermat v. Lancaster Cent. Sch. Dist.*, 2018 U.S. Dist. LEXIS 129136, at *7-9 (W.D.N.Y. Aug. 1, 2018); *Dominguez v. FS1 L.A., LLC*, 2016 U.S. Dist. LEXIS 65657, at *6-7 (C.D. Cal. May 17, 2016); *Smith v. Conn. Packaging Materials*, 2015 U.S. Dist. LEXIS 5265, at *6-8 (D. Conn. Jan. 16, 2015); *EEOC v. BOK Fin. Corp.*, 2013 U.S. Dist. LEXIS 191620, at *7-8 (D.N.M. Sep. 18, 2013); *Siegel v. Inverness Med. Innovations, Inc.*, 2009 U.S. Dist. LEXIS 110541, at *3-9 (N.D. Ohio Nov. 6, 2009); *Hall v. Mo. Highway & Transp. Comm'n*, 995 F. Supp. 1001, 1005 (E.D. Mo. 1998); *Sherman v. Am. Cyanamid Co.*, 996 F. Supp. 719, 728-28 (N.D. Ohio 1998), *aff'd* 188 F.3d 509 (6th Cir. 1999); *Zekavat v. Phila. Coll. Of Osteopathic Med.*, 1997 U.S. Dist. LEXIS 3802, at *7-8 (E.D. Pa. Mar. 21, 1997); *cf. Fuller v. Meredith Corp.*, 2018 U.S. Dist. LEXIS 140322, at *3-5 (D. Kan. Aug. 20, 2018) (recognizing a sex plus age claim under the ADEA); *Good v. U.S. W. Commc'ns*, 1995 U.S. Dist. LEXIS 1968, at *2-3 (D. Or. Feb. 16, 1995).

discriminatory conduct." *Bauers-Toy v. Clarence Cent. Sch. Dist.*, 2015 U.S. Dist. LEXIS 193758, at *20-21 (W.D.N.Y. Sep. 30, 2015). Despite the district court's focus on the different standards of proof under Title VII and the ADEA, under neither statute does the plaintiff need to show her protected classification was the sole motivating factor in the employment decision. *See Jones*, 617 F.3d at 1277. Indeed, neither *Phillips* nor the Supreme Court's other sex plus cases rely or even focus on the mixed-motive standard of proof available under Title VII as a reason for allowing "sex plus" claims under the Act.

The district court dismissed the "sex plus" Title VII claim also because Plaintiffs pleaded a free-standing ADEA claim, App. I. p. 283 n.7, but given that it later dismissed the ADEA claim entirely, App. VIII pp. 2084-94, the court's earlier rejection of Plaintiffs' sex plus age claim proved especially fatal for Plaintiffs' case. To paraphrase *Jefferies* vis-à-vis black women, "[i]n the absence of a clear expression by Congress that it did not intend to provide protection against discrimination directed especially toward [older] women as a class separate and distinct from the class of women and the class of [older individuals]," this Court should not "condone a result which leaves [older] women without a viable Title VII remedy." 615 F.2d at 1032.

3. Plaintiffs' sex plus age claims stated a Title VII claim.

As discussed above, "sex plus" discrimination is merely a method of proving gender discrimination. *See, e.g.*, *Weightman*, 772 F. Supp. 2d at 701. The standard for "sex plus" claims does not require plaintiffs "to allege more than what is required for traditional sex discrimination claims." *Franchina*, 881 F.3d at 53. "Sex plus" discrimination thus requires proof, using either direct or circumstantial evidence, that the plaintiff's employer took an adverse action against her, at least in part, because of her sex. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003); *see also Weightman*, 772 F. Supp. 2d at 701. The "plaintiff meets [this] burden by putting forth…evidence showing she was treated less favorably than similarly situated men or through evidence of other circumstances, such as impermissible stereotyping, that gives rise to an inference of gender discrimination." *Rosencrans*, 755 F. App'x at 142; *see, e.g.*, *Craig v. Yale Univ. Sch. of Med.*, 838 F. Supp. 2d 4, 7-9 (D. Conn. 2011); *Hall*, 995 F. Supp. at 1006.

While the requirement of showing an inference of "sex plus" discrimination therefore "may be (and often is) satisfied by proof that the employer treated similarly situated employees more favorably, such proof is just one sufficient means to do this and should not itself be mistaken as an indispensable element of the prima facie case." *EEOC v. BOK Fin. Corp.*, 2013 U.S. Dist. LEXIS 191620, at

*10 (D.N.M. Sep. 18, 2013) (citation omitted) (discussing Tenth Circuit precedent).

> [The plaintiff] must…establish that she was discriminated against based on her sex—which is, analytically, equivalent to establishing that a similarly situated man would not have been discriminated against if such a man existed. But it does not follow that [the plaintiff] must be able to prove that a particular similarly situated man was in fact treated better than she.

Johnston, 2009 U.S. Dist. LEXIS 79125, at *28.

Under these standards, Plaintiffs stated a claim for sex plus age discrimination, and the district court erred in its alternate rationale for rejecting the claim. *See* App. I pp. 284-85. Plaintiffs made several specific allegations that Defendant treated Plaintiffs adversely because of their sex plus age. For instance, Plaintiffs alleged that in determining whom to terminate, Defendant's "selection process…had a discriminatory impact on older workers, and older females in particular." App. I p. 171, ¶ 30; *see also id.* at 172, ¶ 36. Plaintiffs further alleged that during the layoff in which Plaintiffs were fired, approximately 73% of women over forty lost their jobs, compared to 56% of men over forty, *id.* at 171, ¶ 33; approximately 63% of the women who lost their jobs during the layoffs were over forty, whereas only 37% of the men were, *id.* at 172, ¶ 34; and "Defendants hired approximately twenty-four workers to replace the employees who were laid off," three of whom were men over forty, but none were women over forty, *id.* at 173, ¶ 41. Based on these specific and detailed factual allegations, Plaintiffs stated

plausible claims for sex plus age discrimination and disparate impact in violation of Title VII. *Id.* at 175-76, 178.

B. The everyday experiences of those who fall within two or more protected classes support recognition of a sex plus age claim.

1. The experience of belonging simultaneously to more than one protected class equals more than the sum of the experience of belonging to each class individually.

As discussed above, "[c]ourts…have properly shown solicitude for claims based on the intersection of different categories of discrimination." *Harris*, 631 F.3d at 976-77. Lawyer and scholar Kimberlé Crenshaw coined the term "intersectionality" to explain how individuals can identify as members of more than one protected class (e.g. black women, older women, Latina and lesbian, etc.), and that the coexistence of these different categories affect individuals experiencing discrimination to varying and greater degrees. *See Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, UNIV. OF CHICAGO LEGAL FORUM, Vol. 1989: Iss. 1, Art. 8 (1989).[8] Fundamentally, "[i]ntersectionality …is…an approach to identity that recognizes that different identity categories can intersect and co-exist in the same individual in a way which creates a qualitatively different experience when compared to any of the individual characteristics

[8] http://chicagounbound.uchicago.edu/uclf/vol1989/iss1/8

involved." Ben Smith, *Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective*, EQUAL RIGHTS REVIEW, Vol. 16 (Apr. 1, 2016), at 73.

Because discrimination does not always occur on a "single categorical axis," anti-discrimination law's traditional single-axis framework prevents "identification and remediation of … discrimination" by "obscur[ing] claims that cannot be understood as resulting from discrete sources of discrimination." Crenshaw, *supra* at 140. "'Single-axis' models" of discrimination "create[] a fiction of uniformity, which states that the problems of a particular, generally dominant, sub-group are the only issues affecting the group as a whole." Smith, *supra* at 81. For this reason, for example, "laws that only see only the claimants' gender cannot adequately address the particular vulnerability of black women to unequal pay where the vulnerability results from a complex interplay of sexism and racism." *Id.* at 82. Without recognizing intersectional discrimination, and assuming instead that "[a] discriminator treats all people within a race or sex category similarly," courts would be free to conclude that "[a]ny significant experiential or statistical variation within [the] group suggests…that group is not being discriminated against." Crenshaw, *supra* at 150. However, *Phillips* and the multitude of cases that

followed make clear that courts are not free to do so, confirming that the law provides a remedy for intersectional discrimination.[9]

Understanding the importance of recognizing intersectional experience when addressing "sex plus" claims with the plus factor being another protected characteristic is aptly illustrated by an examination of stereotypes. As Crenshaw explains, "[f]eminists have attempted to expose and dismantle separate spheres ideology"—the ideology that women should avoid certain spheres of society—by "identifying and criticizing the stereotypes that traditionally have justified the disparate societal roles assigned to men and women." *Supra* at 155. "Yet this attempt to debunk ideological justifications for women's subordination offers little insight into the domination of Black women" because "the experiential base upon which many feminist insights are grounded is white." *Id.* While single-axis sexism is based on stereotypes of men "as independent, capable, [and] powerful," and women "as dependent, limited in abilities, and passive," these assumptions "overlook[] the anomalies created by crosscurrents of racism and sexism." *Id.*

[9] But although "most courts no longer reject[] intersectional claims out of hand," statistics addressing the resolution of intersectional claims show that plaintiffs claiming intersectional discrimination continue to "fac[e] both structural and ideological barriers to recognition and redress." Serena Mayeri, *Intersectionality and Title VII: A Brief (Pre-)History*, 95 Boston Univ. L. Rev. 713, 714 (May 2015); *see also id.* at n.6 (describing studies showing that plaintiffs who allege intersectional discrimination are much less likely to succeed or survive summary judgment than other discrimination plaintiffs).

Indeed, "Black men are not viewed as powerful, nor are Black women seen as passive." *Id; see also Shazor v. Pro'l Transit Mgmt.*, 744 F.3d 948, 958 (6th Cir. 2014) ("African American women are subjected to unique stereotypes that neither African American men nor white women must endure.").

Acknowledging that unique stereotypes apply to people subject to intersectional discrimination is critical to recognizing and remedying discrimination. For instance, "[p]rejudiced individuals have long promulgated a pernicious image of black men as sexual predators; a view they do not hold with respect to men of other racial backgrounds or with respect to black women." *Harris*, 631 F.3d at 977. Without recognizing the existence of this type of stereotype unique to black men and instead assuming discrimination against a black man is the same as discrimination against all men or discrimination against all African-Americans, a court may fail to credit evidence of sex plus race discrimination based on, for example, a decision-maker's statements incorporating this stereotype. *See Kimble v. Wis. Dep't of Workforce Dev.*, 690 F. Supp. 2d 765, 770-71 (E.D. Wis. 2010) ("It is sometimes mistakenly thought that the black male experience represents a mere racial variation on the white male experience and that black men suffer from discrimination only because they are black. Conceptualizing separate over-lapping black and male categories has sometimes interfered with the recognition that certain distinctive features of being black and male serve as the

target for discrimination."); *see also Lam*, 40 F.3d at 1562 (explaining that "Asian women are subject to a set of stereotypes and assumptions shared neither by Asian men nor by white women").

Explicit acknowledgment of the existence of intersectional discrimination thus remains critical to remedying sex discrimination under Title VII, as "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Sprogis*, 444 F.2d at 1198; *see also Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1998) ("As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.").

2. <u>The experience of older women in the workplace is uniquely shaped by the intersection of sexism and ageism.</u>

Women facing discrimination based on the intersection of sex and age "face employment and societal discrimination that is separate and distinct from that of older men and younger women." Porter, *supra* at 100-01 (citation omitted). As one interviewee in a study regarding this type of intersectionality astutely observed, "[t]here is always a sex stereotype for the age a woman is." Catherine Harnois, *Age and Gender Discrimination: Intersecting Inequalities Across the Lifecourse*, in AT THE CENTER: FEMINISM, SOCIAL SCIENCE AND KNOWLEDGE 93 (Demos & Segal

eds., 2015) (citation omitted). Another explained: "[W]hatever age they are, women's age is held against them. They are never the right age, they are either too young or too old." *Id.* (citation omitted).

Older women are subject to unique stereotypes and assumptions that neither older men nor younger women must endure. "Older women workers are often stereotyped as grandmotherly, technologically incompetent, unable to learn, or are overlooked entirely." *Id.* at 92. Moreover, "[t]o the extent that women are valued primarily according to sexual attractiveness, availability and usefulness to men, older women are especially undervalued relative to their male counterparts." *Id.* (citation omitted).

Empirical evidence shows that these and other negative stereotypes spawn employment discrimination against older women. For example, a comprehensive 2017 study on the impact of age discrimination in hiring decisions found "much stronger and more robust evidence of age discrimination against older women than against older men." Neumark et al., *Is It Harder for Older Workers to Find Jobs? New and Improved Evidence from a Field Experiment*, NATIONAL BUREAU OF ECONOMIC RESEARCH (Nov. 2017), at 36.[10] Another study shows similar bias against hiring older women, as compared to younger women. Joanna Lahey, *Age, Women, and Hiring: An Experimental Study*, THE JOURNAL OF HUMAN RESOURCES,

[10] https://www.nber.org/papers/w21669.pdf

Vol. 43, No. 1 (Winter 2008), at 30-56. It thus is not surprising that older women consistently report "demotions, job losses, and the inability to find another job—outcomes they attribute primarily to their age and gender." Lauren Rikleen, Older *Women Are Being Forced Out of the Workforce*, HARVARD BUSINESS REVIEW (Mar. 10, 2016).[11] "[S]enior women are being phased out of the workplace." *Id.*

Intersectional discrimination based on sex plus age therefore is—and must be—as illegal as any other type of sex plus discrimination under Title VII. Finding otherwise is against the weight of the law as developed over the past 50 years and flies in the face of what actually happens at discriminatory American workplaces.

III. CONCLUSION

For the reasons stated above, this Court must reverse the district court's ruling prohibiting Plaintiffs from proceeding with their sex plus age claims.

Respectfully submitted this 6th day of June 2019.

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[11] https://hbr.org/2016/03/older-women-are-being-forced-out-of-the-workforce

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This brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B) because this brief contains **6,496** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Local Rule 32.

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