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Amicus Curiae Brief of NOW Legal Defense and Education Fund and Equal Rights Advocates in Support of Plaintiff-Appellant and in Support of Reversal

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AMICUS CURIAE BRIEF OF NOW LEGAL DEFENSE AND EDUCATION FUND AND EQUAL RIGHTS ADVOCATES IN SUPPORT OF PLAINTIFF-APPELLANT AND IN SUPPORT OF REVERSAL

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

LUCAS ROSA

V.

PARK WEST BANK AND TRUST COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS†

Katherine M. Franke

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I. IDENTITY OF THE AMICI

NOW Legal Defense and Education Fund ("NOW LDEF") is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in support of efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by leaders of the National Organization for Women as a separate organization. NOW LDEF has appeared as amicus in numerous cases involving sex stereotyping as a form of sex discrimination, including *Price Waterhouse v. Hopkins*,[1] and *Fisher v. Vassar College*.[2]

Equal Rights Advocates ("ERA") is one of the oldest public interest law firms specializing in educational and litigation efforts to eliminate gender discrimination and secure equal rights. Begun in 1974 as a teaching law firm focused on sex-based discrimination, ERA has evolved into a legal organization with a multi-faceted approach to addressing issues of gender discrimination. Its current work includes impact litigation, advice and counseling, public education, and public policy initiatives. ERA's interest in this case is based on the organization's commitment to fighting discrimination on the basis of sex stereotyping. ERA's amicus work in the area of sex stereotyping discrimination includes *Price Waterhouse v. Hopkins*,[3] and *Fisher v. Vassar College*.[4]

II. SUMMARY OF THE ARGUMENT

By dismissing the plaintiff's complaint under the Equal Credit Opportunity Act ("ECOA") on the ground that "the issue in this case is not [Rosa's] sex, but rather how he chose to dress when applying for a loan" (Bench Order at 1), the lower court erroneously established that there are no set of facts in which clothing-based sex stereotyping can form the basis of a legitimate claim of sex discrimination in access to credit. This view of the meaning and scope of the ECOA runs contrary to well-established Supreme Court precedent which prohibits, *inter alia*, the adverse treatment of a man or a woman for his or her failure to

1. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).
2. Fisher v. Vassar Coll., 114 F.3d 1332 (2d Cir. 1997), *cert. denied*, 522 U.S. 1075 (1998).
3. *Price Waterhouse*, 490 U.S. at 228.
4. *Fisher*, 114 F.3d at 1332.

conform to traditional sex stereotypes—whether it be the expectation that men should be breadwinners, or that women should be feminine.[5]

Further, to rule, as did the lower court, that stereotypes associated with proper "men's" and "women's" clothing is a matter separate and apart from sex discrimination, is to ignore the significant role that dress reform has played in efforts to achieve gender equality for women—from rejecting the wearing of corsets to demands to be permitted to wear trousers in the workplace. Further, the lower court's ruling denies a large body of psychological research that demonstrates the cognitive role that clothing plays in the use of sex stereotypes in the workplace and other market settings.

Thus, the lower court erred in holding, as a matter of law, that there can be no relation between clothing-based sex stereotypes and sex discrimination under the ECOA.

III. ARGUMENT

A. *The District Court Erred in Rejecting Plaintiff's Claim of Sex-Based Disparate Treatment*

The trial court in the instant case dismissed the plaintiff's claim of sex discrimination in access to credit on the ground that "the issue in this case is not [Rosa's] sex, but rather how he chose to dress when applying for a loan." (Bench order at 1.) Yet time and again the Supreme Court has interpreted sex discrimination prohibitions to apply to men and women who do not conform to traditional norms with respect to how the different sexes are "supposed to" look or behave. In case after case the Court has held that federal law prohibits disparate treatment of men or women on the basis of stereotypic assumptions about who is or should be the breadwinner in the family, who is or should be the primary caretaker for children, and how a person should dress in conformance with gender norms that dictate feminine dress for women and masculine dress for men. The Supreme Court's ruling in *Price Waterhouse v. Hopkins*,[6] represents the culmination of a long line of

5. *See e.g., Price Waterhouse*, 490 U.S. at 228 (employer may not refuse partnership to a woman who was considered to be too masculine); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (improper to set award of public benefits on the automatic presumption that wives are economically dependent upon their husbands, and husbands are not so dependent upon their wives).

6. *Price Waternouse*, 490 U.S. at 228.

Supreme Court cases in which principles of sex discrimination were grounded in a prohibition against sex stereotyping.

The Supreme Court's sex equality jurisprudence has progressed through a number of stages. Initially, the Court sanctioned the separate spheres doctrine, turning away challenges to state laws that prohibited women from practicing law,[7] and denying them licenses to serve alcohol unless they were employed by their husbands or fathers.[8] In the 1970s the Court began to take a different tack in its approach to sex discrimination claims. Having previously endorsed policies grounded in sexual stereotypes regarding the proper roles, abilities and positions of women and men in the home and in public, in 1973 the Court began to question the legitimacy of these same stereotypes. Numerous cases established the Court's view that the legal wrong of sex discrimination lay in the problem of the illegitimacy of decisions based upon gender stereotypes.[9]

In these cases, the Court established a rule that it was unfair to judge the qualifications, merits or traits of an individual based upon

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7. *See* Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872).
8. *See* Goesaert v. Cleary, 335 U.S. 464 (1948).
9. *See, e.g.*, Caban v. Mohammed, 441 U.S. 380, 394 (1979) (reasoning that maternal and paternal roles are not invariably different in importance and holding that the Equal Protection Clause was violated by the sex-based *distinction between* unmarried mothers and unmarried fathers in New York domestic relations law); Orr v. Orr, 440 U.S. 268, 279 (1979) (holding that gender-based alimony statute violated equal protection and could not be validated on basis of state's preference for allocation of family responsibilities in which wife plays a dependent role); Califano v. Goldfarb, 430 U.S. 199, 217 (1977) (holding that Social Security Act's gender-based distinction between widows and widowers violated due process and equal protection and discriminated against covered female wage earners); *Schlesinger v. Ballard*, 419 U.S. 498, 507 (1975) (disparate treatment of men and women in Naval promotion schedules does not reflect "archaic and overbroad generalizations" about the relative abilities of men and women); Stanton v. Stanton, 421 U.S. 7, 17 (1975) (statutory distinction between males and females, which resulted in appellee's liability for child support for a daughter only to age 18 but for a son to age 21, found unconstitutional); *Weinberger*, 420 U.S. at 645 (Social Security Act provision that granted survivors' benefits to widows, but not widowers, was grounded in the impermissible gender-based generalization that men are more likely than women to be the primary supporters of their spouses and children); Kahn v. Shevin, 416 U.S. 351, 352 (1974) (challenge to Florida statute giving widows but not widowers a $500 exemption from property taxation); Frontiero v. Richardson, 411 U.S. 677, 690–91 (1973) (striking down statutes that granted automatic presumption that wives of male uniformed service members were economically dependent upon their husbands for purposes of obtaining increased quarters allowances and medical, and dental benefits, but that spouses of female members were not so dependent); Reed v. Reed, 404 U.S. 71, 77 (1971) (invalidating Idaho probate statute which granted preference to males over equally qualified females in the administration of estates).

gross generalizations or stereotypes about the class—male or female—to which that person belonged. This was the case even if the application of those generalizations might hold true for some or many members of the class, and the use of the generalization was, therefore, a relatively efficient or administratively convenient way of allocating resources, or resolving disputes.[10] According to the Court, the abilities and needs of each person must be assessed on an individualized basis, not by resort to group-based generalizations or stereotypes.

Most interesting, for present purposes, is the fact that a great many of the cases through which the Supreme Court chose to develop its modern sex discrimination jurisprudence involved claims in which men were the victims of sex-based stereotypic thinking. Thus, in *Weinberger*,[11] the Court invalidated a federal Social Security death benefit policy that paid benefits only to surviving widows/mothers, but not to widowers/fathers, on the grounds that the gender-based classification illegitimately frustrated the desires of fathers, such as Stephen Wiesenfeld, to stay home and care for their dependent children since

> [i]t is no less important for a child to be cared for by its sole surviving parent when that parent is male rather than female. And a father, no less than a mother, has a constitutionally protected right to the "companionship, care, custody, and management" of "the children he has sired and raised" . . .[12]

The Court applied similar reasoning in *Califano*,[13] when a widower challenged a Social Security rule that extended survivors' benefits to widows but not widowers on the assumption that widowers, as a rule, were not likely to have been dependent upon their wives, whereas it was fair to assume that widows have been so dependent upon their former husbands. The statute was held unconstitutional because it was "supported by no more substantial justification than 'archaic and overbroad' generalizations . . . or 'old notions,' . . . such as 'assumptions as

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10. *See* City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. 702, 708 (1978) ("Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply."); *Reed*, 404 U.S. at 76 ("To give a mandatory preference to members of either sex over members of the other, merely [on the grounds of administrative convenience] is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause. . . .").
11. *Weinberger*, 420 U.S. at 652–53.
12. *Weinberger*, 420 U.S. at 652.
13. *Califano*, 430 U.S. at 199–206.

to dependency,' . . . that are more consistent with 'the role-typing society has long imposed. . . .'"[14]

Mississippi University for Women v. Hogan[15] represented the culmination of the Supreme Court's jurisprudence of sex equality articulated through claims brought by men. In *Hogan*, the Court struck down the admissions policies of a state-run nursing school that refused to admit men on the ground that such a policy perpetuates "the stereotyped view of nursing as an exclusively woman's job."[16]

The Supreme Court treated each of these cases in which male plaintiffs successfully challenged policies that discriminated against them on the basis of their non-conformance with gender stereotypes, not as strange outliers that pushed the boundaries of the sex equality norm, but rather as central cases in which the Court articulated its core commitments to sex-based equality. "The fact that the classification expressly discriminates against men rather than women does not protect it from scrutiny."[17]

What is more, the normative force of these cases lay in the manner in which the policies at issue punished men who chose to defy larger cultural expectations with respect to *parenting* responsibilities.[18] Indeed, in *Orr*, Justice Brennan was troubled by a rule that failed to recognize "family units [that] defied the stereotype and left the husband dependent on the wife."[19]

The Supreme Court's modern sex discrimination jurisprudence has primarily taken aim at two forms of sex stereotyping: policies and practices that reward conformance to certain over-broad and unfounded class-based assumptions about the relative strengths and weaknesses of men and women, and policies and practices that punish men and women for their failure to conform to stereotypic expectations about who men and women are or should be. Thus, by 1978 the Court was comfortable concluding that "[i]t is now well recognized that employ-

14. *Califano*, 430 U.S. at 207 (citations omitted). *See also* Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 152 (1980) (Missouri workers' compensation death benefit paid to widows but not widowers held to discriminate on the basis of sex).

15. 458 U.S. 718 (1982).

16. *Hogan*, 458 U.S. at 729.

17. Orr v. Orr, 440 U.S. 268, 279 (1978) (citations omitted). "[G]ender-based discriminations against men have been invalidated when they do not 'serve important governmental objectives and (are not) substantially related to the achievement of those objectives.'" Califano v. Goldfarb, 430 U.S. 199, 209 n.8 (citations omitted).

18. *See, e.g.*, Caban v. Mohammed, 441 U.S. 380, 389 (1978); Weinberger v. Wiesenfeld, 420 U.S. 636, 652 (1974). Regarding who should be the "breadwinner" in the family, see, e.g., *Orr*, 440 U.S. at 282–84; *Califano*, 430 U.S. at 199.

19. *Orr*, 440 U.S. at 282.

ment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females."[20]

The Court's stereotyping jurisprudence reached its most mature stage in *Price Waterhouse v. Hopkins*,[21] in which Ann Hopkins was denied partnership at a prominent accounting firm because the firm's male partners considered her to be too masculine. In fact, Price Waterhouse's partners placed Hopkins in an impossible double bind: "[a]n employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22."[22] Thus the Court held that "[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."[23] Here, as in the Court's earlier sex discrimination cases, sex stereotyping lay at the core of the discriminatory wrong: "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group. . . ."[24]

In light of this well-established precedent, the trial court's holding in this case fails to appreciate the nature of the wrong of sex discrimination as articulated by the Supreme Court over the last three decades. Rosa's claim that he was discriminated against on the basis of his sex when he was refused a loan application by defendant Park West Bank raises an issue of sex-based disparate treatment no less central to anti-discrimination law than that raised by Joseph Frontiero and Leon Goldfarb, men who were economically dependent upon their wives; Stephen Wiesenfeld, a man who wanted to be the primary caretaker for his children; Joe Hogan, a man who wanted to be a nurse; or Ann Hopkins, a woman who was told she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[25] In essence, Mr. Rosa was told that he would be given a loan application from Park West Bank if, and only if, he would walk more masculinely, dress more masculinely, remove his makeup, have his hair cut, and wear no jewelry. In other words, if he

20. City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 (1978).
21. 490 U.S. 228 (1989).
22. *Price Waterhouse*, 490 U.S. at 251.
23. *Price Waterhouse*, 490 U.S. at 250.
24. *Price Waterhouse*, 490 U.S. at 251.
25. *Price Waterhouse*, 490 U.S. at 235 (internal quotations omitted).

conformed to traditional stereotypes about what a man is supposed to look like and how he is supposed to behave.[26]

Indeed, it is well-settled in the First Circuit that prohibitions against sex discrimination include improper sex stereotyping. In *Higgins v. New Balance Athletic Shoe, Inc.*,[27] Judge Selya wrote that, "just as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity,[28] a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity."[29]

For a man to be denied access to credit on the basis of traits that would have been welcome if found in a woman is sex discrimination, plain and simple. Judge Freedman's ruling below i) that "the issue in this case is not his sex," (Bench Order at I), and ii) that there is no set of facts upon which the gender non-conformance of a man might constitute sex discrimination, ignores the Supreme Court's and First Circuit's repeated insistence that sex discrimination laws are designed to "'strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'"[30] Whatever its ultimate strength on the facts, this claim is not amenable to dismissal as a matter of law on a 12(b)(6) motion.

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26. *See* Mary Anne C. Case, *Disaggregating Gender From Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 47 (1995). *See also* Flynn v. Goldman, Sachs & Co., No. 91 Civ. 0035 (KMW), 1993 WL 336957, at *4 (S.D.N.Y. Sept. 2, 1993) (defendant's summary judgment motion denied where female plaintiff who had been demoted and then terminated from employment "has produced sufficient evidence for a rational factfinder to infer that Scott's rejection of plaintiff was motivated by a male coworker's belief that plaintiff was too aggressive.").
27. 194 F.3d 252 (1st Cir. 1999).
28. *See Price Waterhouse*, 490 U.S. at 250–51.
29. *Higgins*, 194 F.3d at 261 n.4. *See also* Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 96 (1995) ("If a woman cannot be punished or harassed for failing to demonstrate her femininity in accordance with some acceptable norm, then the same can and must be said about men and masculinity.")
30. *Price Waterhouse*, 490 U.S. at 251, (citing *Manhart*, 435 U.S. at 707 (quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971))). *See also* Thomas v. Eastman Kodak Co., 183 F.3d 38, 59 (1st Cir. 1999).

B. *There Is a Close Relationship Between Clothing and Sex Discrimination*

As *amici* have shown above, Rosa has stated a claim of sex discrimination that comfortably fits within the Supreme Court's sex-stereotyping jurisprudence. In addition, the District Court's holding that the ECOA "does not prohibit discrimination based on the manner in which someone dresses," (Bench Order at 1–2), ignores both the role of dress reform in the history of struggles for women's equality, as well as social science research documenting the close link between clothing and sex stereotypes.

1. Clothing Has Always Played a Role In Struggles For Women's Equality

Laws requiring women and men to wear particular clothing, or prohibiting men and women from wearing the "wrong" clothing, find their origins in Elizabethan sumptuary laws,[31] and were reflected in the first sets of laws enacted by early settlers in North America. Indeed, the governors of the Massachusetts Bay colony considered it essential to the public order that colonists' dress be strictly regulated, and a Boston judge held in 1638 that "the elders' wives were themselves party to the general disorder of apparel."[32]

The reform of gendered clothing norms has always figured centrally in movements for women's equality in the United States. Antebellum feminists explicitly and consistently connected demands for women's equality to reform of oppressive clothing norms for women.[33]

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31. *See* ALAN HUNT, GOVERNANCE OF THE CONSUMING PASSION: A HISTORY OF SUMPTUARY LAW 17–41(1996). Hunt convincingly demonstrates that laws regulating clothing have always been based in status distinctions. Originally adopted as a means of enforcing social and economic class-based distinctions by prohibiting one from "dressing above one's rank," *id.* at 39, toward the end of the thirteenth century the law began to enforce sharp sexual distinctions in clothes. *Id.* at 217.

32. DAVID FLAHERTY, PRIVACY IN COLONIAL NEW ENGLAND 185 (1972); NATHANIEL SHURTLEFF, THE RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY COMPANY [1853] (1968); ALAN HUNT, GOVERNANCE OF THE CONSUMING PASSIONS: A HISTORY OF SUMPTUARY LAW 38–39 (1996).

33. *See, e.g.*, SARAH M. GRIMKÉ, LETTERS ON EQUALITY OF THE SEXES, AND THE CONDITION OF WOMAN (1838) (Characterizing women's clothing as "absurd" and "degrading," commentators in the 1850's observed that "your dress movement involves the whole Woman's Rights Cause.") Gerrit Smith, THE SIBYL: A REVIEW OF THE TASTES, ERRORS, AND FASHIONS OF SOCIETY, DEVOTED TO DRESS REFORM 178

In the 1890s a group of women in Massachusetts interested in advancing dress reform formed an organization called the Dress Reform Club of Boston, and staged various public demonstrations to illustrate the need for more practical clothing for women.[34] The significance of clothing reform to women has persisted in 20th Century struggles for women's equality in challenges to workplace rules that prohibited women from wearing pants,[35] forced them to wear sexually suggestive attire,[36] or demanded that they wear high heels.[37]

Thus, the District Court's order, severing clothing norms from the subject of sex discrimination, denies a history in which dress reform has played a key role in the struggles for women's equality.

2. Psychological Research Has Demonstrated a Clear Link Between Clothing and Gender Stereotypes

Quite frequently, courts have turned to social science research in order to identify exactly the nature and scope of the "entire spectrum" of sex-stereotyping.[38] For present purposes, ample psychological research has documented the manner in which masculine clothing communicates competence; femininity communicates incompetence; men have less freedom than women to dress in gender non-conforming ways; and men who do not wear "appropriately masculine" attire suffer considerable discrimination in a spectrum of settings. All of this research demonstrates the manner in which gendered clothing norms reflect and perpetuate sex-stereotyping of the type proscribed by federal sex dis-

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(June 1, 1857); Robert E. Riegel, *Women's Clothes and Women's Rights*, 15 AM. Q. 390, 390 (1963).

34. *See* Riegel, *supra* note 33, at 398.

35. *See* Lanigan v. Bartlett and Co. Grain, 466 F. Supp. 1388 (W.D. Mo. 1979).

36. *See* EEOC v. Sage Realty Corp., 507 F. Supp. 599 (S.D.N.Y. 1981); Priest v. Rotary, 624 F. Supp. 571, 581 (N.D. Cal. 1986).

37. *See, e.g.*, Marc Linder, *Smart Women, Stupid Shoes, and Cynical Employers: The Unlawfulness and Adverse Health Consequences of Sexually Discriminatory Workplace Footwear Requirements for Female Employees*, 22 J. CORP. L. 295 (1997).

38. *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989); Harper v. Southeast Alabama Med. Ctr., 998 F. Supp. 1289, 1296–97 (M.D. Ala. 1998); Butler v. Home Depot, 984 F. Supp. 1257, 1259 (N.D. Cal. 1997); Mann v. Montgomery, No. 84 C 11020, 1994 WL 383905, at *3 (N.D. Ill. July 19, 1994); Robinson v. Jacksonville Shipyards, 760 F. Supp. 1257, 1486, 1502–09 (M.D. Fla. 1991); Namenwirth v. Bd. of Regents, 769 F.2d 1235, 1239 n.2 (7th Cir. 1985).

crimination laws, and recognized by the Supreme Court in *Price Waterhouse*.[39]

Current research by cognitive psychologists is helpful in illuminating the ways in which gender-based stereotypes are activated immediately upon meeting a person, through a process termed "implicit stereotyping."[40] These seemingly automatic cognitive shortcuts allow us to perceive other people by grouping them into preexisting social categories—by sex, race, or age for instance—and, then treating category members alike, thus "avoid[ing] the effort involved in perceiving each person as a wholly new stimulus about whom they know nothing."[41]

"Implicit stereotyping" allows us to engage in this kind of category-based perception by applying, *inter alia*, gender-based schemas to the interpretation of other people's behavior or physical demeanor. We use these gender-based schemas unless there is some reason to believe otherwise: people act "as if the *burden of proof* lies on showing that the [gender] characteristics are not relevant to their task."[42]

Thus, these cognitive short cuts operate as a kind of "labor-saving device,"[43] that both reflect and perpetuate gender stereotypes particularly where, as here, the parties' encounter is both short and relatively superficial.

There are particular dangers at risk when gender-based schemas are used to determine loan-worthiness, managerial abilities, or other business-related criteria in the workplace and financial or other market–based contexts. This is the case because masculinity and femininity are not regarded as symmetrical social statuses. To be interpreted according to a masculine schema is to be attributed a higher status than if one were assigned the traits associated with feminine schema. Masculinity typically denotes dominance, autonomy, aggressiveness, competence, objectivity, competitiveness, dependability and leadership, whereas femininity typically translates as deference, nurturance, passivity,

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39. *Price Waterhouse*, 490 U.S. at 250–52.

40. *See generally* Mahzarin Banaji & Curtis D. Hardin, *Automatic Stereotyping*, 7 PSYCHOL. SCI. 136 (1996); Mahzarin R. Banaji, Curtis D. Hardin & Alexander J. Rothman, *Implicit Stereotyping in Personal Judgement*, 65 J. OF PERSONALITY AND SOC. PSYCHOL. 272 (1993).

41. Peter Glick & Susan T. Fiske, *Gender, Power Dynamics, and Social Interaction, in* REVISIONING GENDER 365, 371 (Myra Marx Ferree, Judith Lorber & Beth B. Hess eds., 1999).

42. Joseph Berger, D.G. Wagner & Morris Zelditch, *Introduction: Expectation States Theory: Review and Assessment, in* STATUS, REWARDS, AND INFLUENCE: HOW EXPECTATIONS ORGANIZE BEHAVIOR (Joseph Berger & Morris Zelditch, Jr., eds., 1985).

43. *See* Glick & Fiske, *Gender, Power Dynamics, and Social Interaction, supra* note 41, at 371.

cooperativeness and incompetence.[44] Thus, as cognitive psychologists have found, those people who are "read" as feminine are treated as lower status, while those people "read" as masculine are treated as higher status.[45]

These "facts" of social cognition have been born out in a number of different contexts, and have formed the basis of more complex studies of the ways in which asymmetrical gender norms operate in market-based interactions. For instance, banking executives and marketing managers were shown to perceive applicants for management positions as more forceful, aggressive, dynamic, and decisive in direct proportion to how masculinely the applicant dressed. *This was true regardless of the sex of the interviewer.*[46] Similarly, in *Gender Trials*, Jennifer L. Pierce undertook an in-depth study of the ways in which gender stereotypes work in large law firms. She found that masculine behavior, understood as aggressiveness, adversarialness, machoness, dominance, and "Rambo" litigation style was rewarded in both male and female attorneys, and that those who exhibited feminine behavior enjoyed lower status and positions within most firms.[47] Indeed, those men who failed to "do dominance" according to the gender-based expectations at work in the firms were feminized in the process,[48] and thereby enjoyed lower status in their firm.

In roughly twenty-five years, many workplaces and other market contexts have evolved in the enforcement of gender norms from regimes that required women to wear dresses, to laws making it illegal to refuse to permit an employee to wear pants.[49] As women have entered the wage labor market in greater numbers, they have been encouraged to present themselves in more masculine demeanor, given that competence and

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44. *See, e.g.*, Deborah L. Best and John E. Williams, *A Cross-Cultural Viewpoint, in* THE PSYCHOLOGY OF GENDER 215 (Anne E. Beall & Robert J. Sternberg, eds., 1993); Virginia Ellen Schein, *The Relationship Between Sex Role Stereotypes and Requisite Management Characteristics*, 57 J. OF APPLIED PSYCHOL. 95, 98 (1973).

45. *See, e.g.*, Michael Conway, et al., *Status, Communality, and Agency: Implications for Stereotypes of Gender and Other Groups*, 71 J. OF PERSONALITY AND SOC. PSYCHOL. 25 (1996).

46. Sandra M. Forsythe, *Effect of Applicant's Clothing on Interviewer's Decision to Hire*, 20 J. OF APPLIED SOC. PSYCHOL. 1579 (1990).

47. *See* JENNIFER L. PIERCE, GENDER TRIALS 50–82 (1995).

48. PIERCE, *supra* note 47, at 52.

49. *Compare* Lanigan v. Bartlett and Co. Grain, 466 F. Supp. 1388 (W.D. Mo. 1979) (employer permitted to refuse women the right to wear pants in the workplace) *with* CAL. GOV'T CODE § 12947.5 (West 1994) ("[i]t shall be an unlawful employment practice for an employer to refuse to permit an employee to wear pants on account of the sex of the employee.").

success are defined in masculine terms.[50] Indeed, these principles have been brought into the courtroom as well—surely a domain that demands decorum, professionalism and appropriate attire of the counsel who appear therein.[51]

Thus, robust enforcement of sex discrimination laws in various aspects of public life have afforded women a broader range of acceptable attire. A case filed today similar to *Lanigan v. Bartlett & Co. Grain*,[52] in which a female employee was fired for wearing pants to work, would surely be viewed by almost any court as presenting an easy case of sex discrimination. Yet men have not similarly benefitted from the victories of sex discrimination litigation over the last quarter century. While it is acceptable for women to perform what has been traditionally regarded as men's work (e.g., practicing medicine or law) as well as women's work (e.g., nursing or childcare), and women have the option of dressing in more feminine or masculine clothing, men continue to confront rigid gender norms that form the basis of chastisement or disapprobation when they perform women's work or dress in more feminine manners.[53]

Again, the social science literature has documented an asymmetry in the ways gender norms are enforced against women and men. Saul Feinman has shown how and why boys who perform cross-sex-role behavior receive more disapproval than do girls.[54] First, his results indicate that boys pay a much higher price when they act "like girls," than do girls when they act "like boys"; "it is worse to be a sissy than a tomboy."[55] But he also found that "male-role behavior is more highly approved than female-role behavior for male and female actors."[56] His findings revealed that when females acted femininely they were regarded

50. Yet, there is a limit to the extent to which decision-makers will tolerate masculinity in women. Ann Hopkins encountered that limit. *See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

51. *See In re* De Carlo, 357 A.2d 273, 274–75 (1976) (reversal of contempt order issued against female attorney who appeared in court in slacks [and a sweater]); NYCLA Eth. Op. 688, 1991 WL 755944, at *3 (N.Y. Cty. Law. Assn. Comm. Prof. Eth.) ("The Code of Professional Responsibility does not prohibit a female lawyer from wearing appropriately tailored pant suits or other pant-based outfits in a court appearance").

52. *Lanigan*, 466 F. Supp. at 1388.

53. *See, e.g.*, Susan Hesselbart, *Women Doctors Win and Male Nurses Lose: A Study of Sex Role and Occupational Stereotypes*, 4 SOC. OF WORK AND OCCUPATIONS 49 (1977).

54. *See* Saul Feinman, *Why Is Cross-Sex-Role Behavior More Approved for Girls than for Boys? A Status Characteristic Approach*, 7 SEX ROLES 289 (1981).

55. Fineman, *supra* note 54, at 297.

56. Fineman, *supra* note 54, at 297.

as enacting female-role *behavior*, and when they acted masculinely they were seen as enacting *person-role behavior*. However, for males, performance of masculine behavior satisfied the person-role and the male-role, yet the performance of feminine behavior satisfied no role behavior expectations.[57] In other words, masculine-behaving females were understood to be acting like a person, and feminine-behaving males were understood to be strange.

Thus, Judge Freedman's characterization of Rosa's complaint as having nothing to do with sex discrimination, but merely addressing "discrimination on the basis of the manner in which someone dresses," (Bench Order at 1–2), is to overlook, if not to deny, the cultural significance of the clothes Rosa was wearing when he was summarily rejected for a loan application. The notion that there is proper men's clothing and proper women's clothing is, without question, grounded in cultural gender norms.[58] These norms operate differently for men than they do for women, in so far as women are given greater latitude to dress in either masculine or feminine attire, and femininity has been shown to represent lower status and lower competence. As such, this Court should reject an interpretation of the ECOA that denies any connection between sex discrimination, gender norms and clothing. If Judge Freedman were correct that distinctions based upon clothing or other attire are irrelevant to sex discrimination prohibitions, then a loan officer would be free to deny a loan to a woman because she looked too "frilly," on the assumption that women who dress in an extremely feminine manner most likely have not had experience managing financial matters, or to prefer extending credit to men who wear masculine business attire, since that business attire might indicate greater experience handling financial affairs. In either of these cases, the loan officer would be making credit-worthiness determinations based on gendered stereotypes, the precise evil the ECOA was enacted to prevent.

57. *See* Fineman, *supra* note 54, at 297.

58. *See* Franke, *supra* note 29, at 58–69.

Conclusion

For the foregoing reasons, this Court should determine that the plaintiff has stated a valid claim of sex discrimination under the ECOA and remand the case to the District Court for further proceedings.

Date: February 3, 2000