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

In the Supreme Court of the United States

GERALD LYNN BOSTOCK,

Petitioner,

v.

CLAYTON COUNTY, GEORGIA,

Respondent.

ALTITUDE EXPRESS, INC., and RAY MAYNARD,

Petitioners,

v.

MELISSA ZARDA and WILLIAM MOORE, JR., CO-INDEPENDENT EXECUTORS OF THE ESTATE OF DONALD ZARDA,

Respondents.

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

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and AIMEE STEPHENS,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE ELEVENTH, SECOND, AND SIXTH CIRCUITS

BRIEF OF WILLIAM N. ESKRIDGE JR. AND ANDREW M. KOPPELMAN AS *AMICI CURIAE* IN SUPPORT OF EMPLOYEES

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Apple Inc. v. *Pepper*,
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Boutilier v. *INS*,
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Burrage v. *United States*,
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Cty. of Wash. v. *Gunther*,
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Cases—continued

DeBoer v. *Snyder*,
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EEOC v. *R.G. &. G.R. Harris Funeral Homes, Inc.*,
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Hively v. *Ivy Tech Cmty. Coll.*,
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Lamie v. *United States Tr.*,
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Loving v. *Virginia*,
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McLaughlin v. *Florida*,
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Medina v. *Income Support Div., N.M.*,
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Monessen Sw. Ry. v. *Morgan*,
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Nev. Dep't of Human Res. v. *Hibbs*,
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Newport News Shipbuilding & Dry Dock Co. v. *EEOC*,
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Oncale v. *Sundowner Offshore Servs., Inc.*,
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Parker Drilling Mgmt. Servs. v. *Newton*,
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Prowel v. *Wise Bus. Forms, Inc.*,
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Rehaif v. *United States*,
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Saint Francis Coll. v. *Al-Khazraji*,
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Seven-Sky v. *Holder*,
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Shtilman v. *Makram*,
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Smith v. *City of Salem*,
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Cases—continued

Solid Waste Agency of N. Cook Cty. v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) 27

Tex. Dep't Hous. & Cmty. Affairs v. *Inclusive Cmtys. Project*, 135 S. Ct. 2507 (2015) 25

UAW v. *Johnson Controls, Inc.*, 499 U.S. 187 (1991) 2, 8

Ulane v. *Eastern Airlines*, 742 F.2d. 1081 (7th Cir. 1984) 25

Univ. of Tex. Sw. Med. Ctr. v. *Nassar*, 570 U.S. 338 (2013) 5, 10

Vickers v. *Fairfield Med. Ctr.*, 453 F.3d 757 (6th Cir. 2006) 11

Williamson v. *A.G. Edwards & Sons*, 876 F.2d 69 (8th Cir. 1989) 25

Wittmer v. *Phillips 66 Co.*, 915 F.3d 328 (5th Cir. 2019) 17, 18

Wright v. *West*, 505 U.S. 277 (1992) 26

Yates v. *United States*, 135 S. Ct. 1074 (2015) 30

Zarda v. *Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) ..... *passim*

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42 U.S.C. § 2000e(k) 2, 14

42 U.S.C. § 12211(a) 32

42 U.S.C. § 13925(b)(13)(A) 29

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Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 ..... 10, 24, 26

Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 32

Higher Education Amendments of 1998, Pub. L. No. 105-244, § 486(e)(1)(A), 112 Stat. 1581 29

Mathew Shepard and James Byrd Hate Crimes Prevention Act of 2009, Pub. L. No. 111-84, §§ 4704(a)(1)(C), 4704(a), 123 Stat. 2835 29

Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, § 5306(a)(3), 124 Stat. 119 29

Tex. Penal Code § 21.06 7

Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 ..... 28, 29

Other Authorities

118 Cong. Rec. 9314 (1972) 22

A. Dean Byrd, *Gender Complementarity and Child-rearing: Where Tradition and Science Agree,* 6 J.L. & Fam. Stud. 213 (2004) 12

Other Authorities—continued

Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 Stan. L. Rev. 901 (2013).....29, 30

American College Dictionary (1960).....21

Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination,* 69 N.Y.U.L. Rev. 197 (1994).....11

Antonin Scalia & Bryan A. Garner, *Reading Law* (2012).....20

Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 Am. U.L. Rev. 715 (2014).....12

Civil Rights Amendments Act of 1979: Hearing Before the Subcomm. on Equal Employment of the House Comm. On Education and Labor, 96th Cong., 2d Sess. (1980).....28

Edward Stein, *The "Accidental Procreation" Argument for Withholding Legal Recognition for Same-Sex Relationships,* 84 Chi.-Kent L. Rev. 403 (2009).....13

Equal Rights 1970: Hearing on S.J. Res. 61 and S.J. Res. 231 Before the Comm. on the Judiciary, 91st Cong. (1970).....22

Funk & Wagnalls Standard Dictionary (1963).....21

H.R. Rep. No. 101-604, pt. 1 (1990).....10

H.R. Rep. No. 110-406, pt. 1 (2007).....28

Other Authorities—continued

Linda C. McLain, *"God's Created Order," Gender Complementarity, and the Federal Marriage Amendment*, 20 BYU J. Pub. L. 313 (2006) 12

Maggie Gallagher, *(How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman,* 2 St. Thomas L.J. 33 (2004) 13

Note, *The Legality of Homosexual Marriage*, 82 Yale L.J. 573 (1973) 22

Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 Tex. L. Rev. 1 (2011) 23

Webster's New International Dictionary of the English Language (2d unabridged ed. 1961) 21

William N. Eskridge, Jr., *Latter-day Constitutionalism: Sexuality, Gender, and Mormons*, 2016 U. Ill. L. Rev. 1227 22

William N. Eskridge Jr., *Title VII's Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 Yale L.J. 322 (2017) 10

Zachary R. Herz, Note, Price*'s Progress: Sex Stereotyping and Its Potential for Antidiscrimination Law*, 124 Yale L.J. 396 (2014) 14

INTEREST OF THE *AMICI CURIAE*[1]

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Amici have written extensively to support rigorous enforcement of statutes and constitutional provisions barring discrimination because of race, religion, national origin, color, and sex.

SUMMARY OF ARGUMENT

Section 703(a)(1) of Title VII provides that it is unlawful for an employer "to discriminate against any individual * * * because of such individual's * * * sex." 42 U.S.C. § 2000e-2(a)(1). Donald Zarda and Gerald Lynn Bostock claim that their employers fired them because they were men who dated men. Aimee Stephens claims that her employer fired her because it categorized her as a man. The employers, allegedly, would not have discriminated against Zarda and Bostock if they had been women who dated men or against Stephens if she had a female sex assigned at birth. The regulatory variable—the item whose alteration produced discriminatory treatment by each employer—was the "sex" of the individual employee.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to its preparation or submission. The parties' counsel of record received timely notice of the intent to file this brief and consented to its filing.

Stated another way, the pleading in each case "shows 'treatment of a person in a manner which but for that person's sex would be different.'" *L.A. Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 711 (1978). But for Zarda's and Bostock's male sex, their employers would not have objected to their dating men. But for Stephens' sex assigned at birth, her employer would not have objected to her sex presentation.

Coverage under the statutory text is clear, because there is no reasonable way to disentangle sex from same-sex attraction or transgender status. *Zarda* v. *Altitude Express, Inc.*, 883 F.3d 100, 136 (2d Cir. 2018) (en banc) (Lohier, J., concurring). If there were ambiguity, this Court should consider the statutory plan or purpose. Title VII's stated purpose is to purge the workplace of criteria that Congress found unrelated to an employee's "ability or inability to work." § 701(k), 42 U.S.C. § 2000e(k). One prohibited classification is sex, and the precedents of this Court have, from the first case, found that the congressional plan was to outlaw job decisions based upon "stereotyped characterizations of the sexes," *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542, 544–45 (1971) (Marshall, J., concurring), including "prescriptive" sex-stereotypes, where the employer dictates appropriate gender roles for its female and/or male employees. *E.g.*, *UAW* v. *Johnson Controls, Inc.*, 499 U.S. 187 (1991); *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989). In each of these appeals, the employees alleged that their employers were imposing their own stereotype-based understanding of what makes a man or a woman suitable for the workplace. In each appeal, imposing stereotypes is unrelated to the employee's "ability or inability to work."

In the lower courts, some judges sought to narrow the statutory text to be consistent with what they felt were the 1964 Congress's expectations or with a handful of lower court decisions they felt Congress had silently ratified in its 1991 Amendments. Such arguments are inconsistent with the plain meaning of the 1964 statute and its 1991 amendments; with this Court's objective approach to statutory interpretation, *Henson* v. *Santander Consumer USA, Inc.*, 137 S. Ct. 1718, 1725 (2017) (declining to speculate about Congress's original intent or understanding); and with this Court's Title VII precedents. *E.g.*, *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) (rejecting precisely these arguments to hold that Title VII bars same-sex harassment if because of the employee's sex).

The primary text-based argument the dissenting judges made was the following: because Congress in unrelated statutes, enacted decades after Title VII, has sometimes added "sexual orientation" or "gender identity" to "sex" as prohibited classifications, this Court is barred by the rule against surplusage from considering discrimination on the basis of same-sex attraction or sex identity to be a subset of sex discrimination in Title VII. We are not aware of any case where this Court has departed from a statute's plain meaning based upon alternate usages in other provisions of the U.S. Code, and the Court rejected this argument in *Saint Francis College* v. *Al-Khazraji*, 481 U.S. 604, 613 (1987) (reading the 1866 race discrimination law to include Arab ethnicity, even though Title VII specifically barred discrimination because of national origin as well as race). Congress and its statutory beneficiaries should not be penalized for following the normal legislative practices of ad hoc

amendments to unrelated statutes and of "belt and suspenders" bill drafting, where legislators over time combine classifications that overlap, sometimes completely.

ARGUMENT

I. Title VII's Statutory Text, Structure, And History Support Liability For Employers Who Discriminate Against Employees Because Of Their Same-Sex Relationships Or Their Sex Identities.

The lodestar for interpreting statutes is the ordinary, grammatical meaning of the relevant text, understood in light of the entire statute (as amended) and this Court's precedents interpreting the statute. *Parker Drilling Mgmt. Servs.* v. *Newton*, No. 18-389 (2019), slip op. 5–6; *Apple Inc.* v. *Pepper*, No. 17-204 (2019), slip op. 4–5; see William N. Eskridge Jr., *Interpreting Law* chs. 1–3 (2016) (surveying this Court's practice).

Section 703(a)(1) of Title VII provides that it is unlawful for an employer "to fail or refuse to hire or to discharge * * * or otherwise to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). As hypothetical examples, assume that Employers 1, 2, and 3 all refuse to hire Kim as a nurse. E1 says it only hires women for that position, and Kim is a man who is masculine; E2 is happy to hire men but objects that Kim is a man who has sex with other men; E3 won't hire Kim because E3 thinks that Kim's sex is female because that was the sex he was assigned at birth.

As a matter of ordinary meaning, all three employers have violated the directive of § 703(a)(1): zthey have refused to hire Kim "because of Kim's sex," as a self-identified man.[2] The statute's logic is that an employer violates the law if it (1) takes negative employment action (2) that is causally linked to (3) the sex of the employee or applicant. Under its strictest standard of causation for Title VII, this Court has asked "whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.'" *Manhart*, 435 U.S. at 711, followed in *Univ. of Tex. Sw. Med. Ctr.* v. *Nassar*, 570 U.S. 338, 346–47 (2013); cf. *Burrage* v. *United States*, 571 U.S. 204, 211–12 (2014) (but-for test is met even when other context contributed to the result). Kim would have been qualified for the job "but for" his sex; if Kim had been a woman or had been presenting as a woman, Kim would have qualified for employment consideration by E1, E2, and E3.

The employer in *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. 669 (1983), provided health insurance to its female employees that included pregnancy benefits, but such benefits were not available for the spouses of male employees. Following and quoting *Manhart*, this Court ruled that the employer violated Title VII, because it "treat[ed] a male employee with dependents 'in a manner which but for that person's sex would be different.'" *Id.* at 483. The same logic applies to E1, E2, and E3 in our Kim hypothetical.

E2 might object that it discriminated against Kim "because of his sexual orientation," not "because of his

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[2] In the alternative, the claim against E3 may be that Kim is a woman, and E3 objects to her presenting as a man.

sex." But that is just playing games with words: it's like E1 saying it discriminated against Kim "because of his masculinity," not "because of his sex." In E1's case, you cannot discuss Kim's masculinity in ordinary parlance without reference to his male sex. Likewise, in E2's case, you cannot discuss Kim's same-sex attraction—his homosexuality—in ordinary parlance without reference to his male sex.

Another parallel to E2's case would be the case of E4, who refuses to hire Kim because he is married to a person of a different race. E4 does not object to having employees of color but does not want to hire "interracial-sexuals," people attracted to persons of another race. E4's action discriminates because of race in a but-for manner, and it would be no defense for E4 to claim it was merely discriminating because of the employee's "sexual orientation," namely, the employee's romantic preference for persons of another race. *Loving* v. *Virginia*, 388 U.S. 1, 11 (1967); *McLaughlin* v. *Florida*, 379 U.S. 184, 192 (1964); *Zarda* v. *Altitude Express, Inc.*, 883 F.3d 100, 124–25 (2d Cir. 2018) (en banc) (lower court consensus that employers disfavoring workers in different-race relationships or marriages "discriminate because of race" under Title VII).

The punchline is that E2 cannot escape the plain language of the statute by recharacterizing its discriminatory reasoning, for the discrimination will always ultimately depend on Kim's sex. You can't say gay without classifying Kim by his sex. The Court encountered the same phenomenon in *Lawrence* v. *Texas*, 539 U.S. 558 (2003). The Texas "Homosexual Conduct Law" statute criminalized "deviate sexual intercourse with another individual of the same sex,"

Tex. Penal Code § 21.06. Although this Court treated the statute as one that pervasively harmed "homosexual persons," *Lawrence*, 539 U.S. at 567, 575, the statutory text rested upon a distinction "between the sexes insofar as concerns the partner with whom the sexual acts are performed: men can violate the law only with other men, and women only with other women." *Id.* at 599–600 (Scalia, J., dissenting). If John Lawrence had been a woman having "deviate" sex with a man, there would have been no statutory crime.

Title VII also says that employers cannot discriminate because of an individual's religion. E5 will not hire Kim because he is a Catholic, a patent violation of Title VII, and it is no less a violation if E5 says it won't consider Kim because he is involved in an interfaith relationship (the religion-based parallel to *Loving*). E6 is happy to consider Catholics but will not hire Kim because Kim has converted from Presbyterian to Catholic. Surely, E6 also violates Title VII—for the same reason that E3 does: both discriminate because of a statutory classification when they refuse to hire Kim because of his understanding of what his religion or sex currently is, which has no relationship to Kim's ability to work. *Schroer* v. *Billington*, 577 F. Supp. 2d 293, 306–07 (D.D.C. 2008). Just as it makes no legal difference that "convert" does not appear in Title VII's text, so it makes no legal difference that "transgender" does not appear in the statute.

If E2 and E3 were desperate for an argument, they might claim that "discriminate because of an individual's sex" is limited to cases where all or most men are treated differently from all or most women.

That argument was emphatically rejected in *Manhart*, which held that Title VII's "focus on the individual is unambiguous" and that "the statute requires that we focus on fairness to individuals, rather than fairness to classes." 435 U.S. at 708; accord *Connecticut* v. *Teal*, 457 U.S. 440, 452 (1982) (holding that an individual may object that an employment test used in making promotion decisions has a discriminatory impact under Title VII even if the class of which he is a member has not been disproportionately denied promotions).

For this reason, this Court has repeatedly rejected class-based arguments that would diminish the protections of the statute for individuals. In *Martin Marietta*, the Court's first sex discrimination case under Title VII, the employer's hiring policy was to exclude women with small children. Even though most of the hires were women, some women were not hired simply because they were women and not men (but-for causation). This Court summarily rejected the defense that not all women were subjected to discrimination. 400 U.S. at 543–44 (per curiam); accord *Johnson Controls*, 499 U.S. at 211 (invalidating employer's policy that prohibited females of childbearing age from working with dangerous chemicals); *Oncale*, 523 U.S. at 80–81 (identifying instances where same-sex harassment would be discrimination because of sex).

Hopkins is very close to the cases before the Court. Price Waterhouse promoted some women, but Hopkins claimed she was passed over for partnership because the employer did not consider her sufficiently feminine. Stephens has the same grievance. Zarda and Bostock similarly claim that they lost their jobs

because their employers did not consider them sufficiently masculine. Following *Manhart,* a plurality of this Court said that "gender must be irrelevant to employment decisions," *Hopkins*, 490 U.S. at 240, and a majority ruled that § 703(a)(1) prohibited employment decisions based upon sex-stereotyping. *Id.* at 242–43, 250–51 (plurality); *id.* at 266, 272–73 (O'Connor, J. concurring in the judgment) (agreeing with the plurality that "failure to conform to [sex] stereotypes" is a discriminatory criterion but disagreeing on the employer's burden in a mixed-motives case).

"These precedents," namely, *Hopkins, Johnson Controls*, and *Oncale*, as well as *Manhart* and *Newport News* discussed above, "confirm our understanding of [Title VII]. Although none decided the precise question before us, much of [this Court's] prior discussion of the [statute] would make little sense" if Title VII offered no protection for employees penalized because the employer believed their self-presentation did not match the employer's view of the sex-based traits properly displayed by men and women. *Parker Drilling*, No. 18-389, slip op. 13; cf. *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 550 U.S. 618, 628 (2007) (applying Title VII's text, structure, and precedents).

As a last resort, E2 might respond that it was mainly discriminating against Kim because of his sexuality, and not just because of his sex. As before, E2 would be playing a word game, but even if its characterization were credited, § 703(m) of the statute says that an employer is culpable of an "impermissible consideration of * * * sex" when sex "was a motivating factor for any employment practice," even if the employer was also motivated by "other factors." 42

U.S.C. § 2000e-2(m). E3 fares no better. "[I]t is analytically impossible to fire an employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex." *Harris Funeral Homes*, 884 F.3d at 575. As a trigger for liability, the statute makes clear, "at least in part" is enough.[3]

Section 703(m) was added to Title VII by the 1991 Amendments, Pub. L. No. 102-166, 105 Stat. 1071, which overrode the *Hopkins* treatment of "mixed motive" employer decisions with a more liberal burden of proof rule. *Nassar*, 570 U.S. at 348–49, 353. This Court has ruled that the 1991 Amendments ratified this Court's sexual harassment precedents, consistent with the goal of the 1991 Amendments to expand workplace protections. *Faragher* v. *City of Boca Raton,* 524 U.S. 775, 804 n.4 (1998). Legislators understood *Hopkins* to hold that "evidence of sex-stereotyping is sufficient to prove gender discrimination," H.R. Rep. No. 101-604, pt. 1, at 29 n.17 (1990), and thoroughly approved that holding.[4]

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[3] As argued above, Kim would have no need to resort to the motivating factor test (which, in certain circumstances could limit the remedies available to him), because Kim's sex was the "but for" reason for discrimination by our hypothetical employers.

[4] William N. Eskridge Jr., *Title VII's Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 Yale L.J. 322, 375–76 (2017); see *Gross* v. *FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009) (Congress's alteration of the burden of proof in Title VII confirmed that the burden of proof in a related statute remained unchanged; "[w]hen Congress amends one statutory provision but not another, it is presumed to have acted intentionally").

"[J]ust as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity * * * a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity." *Higgins* v. *New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 (1st Cir. 1999) (citing *Hopkins*, 490 U.S. at 250–51).[5] In the wake of *Hopkins* and the 1991 Amendments, the courts of appeals have allowed LGBT employees to bring suit under Title VII if they allege harassment or other discriminatory treatment based upon sex-stereotyping—and these have included courts of appeals rejecting claims based on same-sex attraction alone. See *Prowel* v. *Wise Bus. Forms, Inc.*, 579 F.3d 285, 290–91 (3d Cir. 2009); *Vickers* v. *Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006); *Medina* v. *Income Support Div., N.M.*, 413 F.3d 1131, 1135 (10th Cir. 2005); *Evans* v. *Ga. Reg'l Hosp.*, 850 F.3d 1248 (11th Cir. 2017). As a practical as well as textual matter, this is an unstable compromise, because anti-gay harassment is deeply intertwined with sex-stereotyping.

Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination,* 69 N.Y.U.L. Rev. 197, 208 (1994), has documented the many ways that anti-gay feelings are linked to rigid assumptions about proper sex roles. The thesis is

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[5] Accord *EEOC* v. *Boh Bros. Constr. Co.*, 731 F.3d 444, 454 (5th Cir. 2013) (en banc); *Smith* v. *City of Salem*, 378 F.3d 566, 571–72 (6th Cir. 2004); *Lewis* v. *Heartland Inns of Am., L.L.C.*, 591 F.3d 1033, 1038–39 (8th Cir. 2010); *Costa* v. *Desert Palace, Inc.*, 299 F.3d 838, 861 (9th Cir. 2002) (en banc), aff'd, 539 U.S. 90 (2003); *Glenn* v. *Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011).

illustrated by dozens of reported cases. As evidence of discrimination, gay male employees point to being called "sissy," *e.g.*, *Christiansen* v. *Omnicom Grp., Inc.*, 852 F.3d 195, 200 (2d Cir. 2017), and "princess" and "pussy," *e.g.*, *EEOC* v. *Boh Bros. Constr. Co.*, 731 F.3d 444, 457 (5th Cir. 2013). Lesbian employees are baited as "butch" and "bulldagger," *e.g.*, *Eldridge* v. *Morrison*, 970 F. Supp. 928, 934 (M.D. Ala. 1996), *aff'd*, 120 F.3d 275 (11th Cir. 1997). Transgender employees are called "she-males," *e.g.*, *Shtilman* v. *Makram*, No. 14-cv-6589 (NSR), 2018 WL 3745670, at *3 (S.D.N.Y. Aug. 6, 2018). See generally Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 Am. U.L. Rev. 715 (2014) (detailed survey of the cases).

The same-sex marriage debate also illustrated Koppelman's connection between homosexuality, prescriptive sex-stereotyping, and sex-based roles. Starting with the Hawaii marriage trial in 1996, *Baehr* v. *Miike*, No. 91-1394, 1996 WL 694235 (Haw. Ct. App. Dec. 3, 1996), the main argument against same-sex marriage was that children need both a mother and a father as role models, a notion grounded upon assumptions about biology-based parenting and sex "complementarity." *E.g.*, *DeBoer* v. *Snyder*, 973 F. Supp. 2d 757, 765–68 (E.D. Mich. 2014) (rejecting that argument).[6] By the time the state marriage litigation reached this Court, the states were

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[6] A. Dean Byrd, *Gender Complementarity and Child-rearing: Where Tradition and Science Agree*, 6 J.L. & Fam. Stud. 213 (2004); Linda C. McClain, *"God's Created Order," Gender Complementarity, and the Federal Marriage Amendment*, 20 BYU J. Pub. L. 313 (2006).

emphasizing another argument that was more respectful of gay people but even more explicitly reliant on sex-based assumptions about reproduction and family roles: because only men and women could procreate together, and often did so accidentally, marriage as an institution was needed to domesticate straight men and to protect nurturing mothers from having to raise children alone. *DeBoer* v. *Snyder*, 772 F.3d 388, 404–05 (6th Cir. 2014), *rev'd sub nom. Obergefell* v. *Hodges*, 135 S. Ct. 2584 (2015).[7]

Reviewing the cases, Judge Rovner found it difficult to disaggregate gay employees' claims based upon sex-stereotyping, which are valid under *Hopkins* and the 1991 Amendments, and those based upon same-sex attraction, which are at issue in these appeals. *Hively* v. *Ivy Tech Cmty. Coll.*, 830 F.3d 698, 705–09 (7th Cir. 2016), *vacated*, 853 F.3d 339 (7th Cir. 2017) (en banc). It would be even harder to disaggregate the claims of transgender employees based upon sex-stereotyping and those based upon a distinction between the person's sex and the sex she was assigned at birth. Accordingly, the rule suggested by the employers in these cases is harder for the judiciary to administer than the rule sought by the employees—as frequently is the case when parties are asking this Court to rewrite the statute's text. United States v. Tinklenberg, 563 U.S. 647, 666 (2011) (Scalia, J., concurring in part and concurring in the judgment).

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[7] Maggie Gallagher, *(How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman*, 2 St. Thomas L.J. 33, 44 (2004); Edward Stein, *The "Accidental Procreation" Argument for Withholding Legal Recognition for Same-Sex Relationships,* 84 Chi.-Kent L. Rev. 403, 403–04 (2009).

The foregoing analysis is not only consistent with but is required to carry out the statutory plan of Title VII, as Congress articulated it in the text and structure of the law. Title VII's purpose is to purge the workplace of criteria that Congress found unrelated to an employee's "ability or inability to work." § 701(k), 42 U.S.C. § 2000e(k). One prohibited classification is sex, which this Court has understood to include prescriptive stereotyping, where the employer imposes its understanding of proper sex-based traits upon employees.[8] In *Hopkins*, this Court ruled that it violated the norms of the merit-based workplace for an employer to mandate that its employees adhere to traditional traits associated with their respective sex. *Hopkins*, 490 U.S. at 235 (plurality opinion); *id.* at 272–73 (O'Connor, J., concurring in the judgment).

Likewise, LGBT employees who are able to do their jobs ought not be required to conform to the employer's sex-based preferences. "[W]hen a woman alleges * * * that she has been discriminated against because she is a lesbian, she necessarily alleges that she has been discriminated against because she failed to conform to the employer's image of what women should be—specifically, that women should be sexually attracted to men only." *Evans*, 850 F.3d at 1261 (Rosenbaum, J., concurring in part and dissenting in part). And "an employer cannot discriminate on the basis of transgender status without imposing its stereotypical notions of how sexual organs and

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[8] Zachary R. Herz, Note, Price*'s Progress: Sex Stereotyping and Its Potential for Antidiscrimination Law*, 124 Yale L.J. 396, 405–06 (2014) (distinguishing between ascriptive stereotypes describing group traits and prescriptive stereotypes instructing members of a group on how they should present themselves).

gender identity ought to align." *Harris Funeral Homes*, 884 F.3d at 576.

II. The Court Should Not Subtract Groups From Title VII Based On Historic Stereotypes And Prejudice And Should, Instead, Apply The Public Meaning Of The Text Enacted And Amended By Congress.

In the recent en banc court of appeals cases, the overwhelming majority of participating appellate judges agreed with some version of the foregoing analysis. Skeptics responded that it is not "even remotely plausible that in 1964, when Title VII was adopted, a reasonable person competent in the English language would have understood that a law banning employment discrimination 'because of sex' also banned discrimination because of sexual orientation." *Hively* v. *Ivy Tech Cmty. Coll.*, 853 F.3d 339, 352 (7th Cir. 2017) (en banc) (Sykes, J., dissenting); accord *Zarda* v. *Altitude Express, Inc.*, 883 F.3d 100, 137–52 (2d Cir. 2018) (en banc) (Lynch, J., dissenting). This response misunderstands the statutory inquiry. "[W]hile it is of course our job to apply faithfully the law Congress has written, it is never our job to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have done had it faced a question that, on everyone's account, it never faced." *Santander Consumer*, 137 S. Ct. at 1725; accord *Zarda*, 853 F.3d at 136–37 (Lohier, J., concurring).

Consider the radical implications of the Sykes-Lynch analysis: if a background belief was so entrenched in the culture at the time of a law's enactment that it was broadly shared, then one can rely on that background belief in order to *subtract* meaning

from the plain language of a statute, to limit its extension in order to exclude applications that people at the time would not have thought of. By this reasoning, this Court was wrong to say that the statute "strike[s] at the entire spectrum of disparate treatment." *Manhart*, 435 U.S. at 707 n.13. According to Judges Sykes and Lynch, there are gaps in the spectrum, blown open by the background culture at the time of enactment (here, arbitrarily limited to 1964).

It is appropriate to exclude something from coverage from the literal meaning when it does not implicate the statutory plan or purpose. "No vehicles in the park" doesn't apply to baby carriages.[9] But the Sykes-Lynch view would exempt from the statute's coverage violations that *are* implicated by the purpose, but which were unreflectively unquestioned at the time of enactment, such as sexual harassment, *Zarda*, 883 F.3d at 114 (recounting how, even as late as the 1970s, it was hard for judges and other officials to see how "sexual" harassment could be discrimination "because of sex"). When it is applied to statutes that aim at broad social transformation, the subtractive move would cabin and undermine the very laws it purports to interpret. Laws that aim to counteract prejudice, by their nature, press against the background culture. If that culture is taken to be a limiting principle on their meaning, then what was enacted as a broad principle will be pruned down to include only its paradigmatic cases, tightly encased by

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[9] Eskridge, *Interpreting Law* 15–16. This is why Title VII does not in general prohibit separate restrooms for men and women, because in most circumstances employees are not disadvantaged by the existence of separate men's and women's rooms. *Zarda*, 883 F.3d at 118–19.

the prejudices of the surrounding culture at the time of enactment.

The sex discrimination claim for sex-based minorities is, concededly, surprising to many. Judge Ho says that its surprising character implicates the principle that Congress "does not alter the fundamental details of a regulatory scheme in vague or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Wittmer* v. *Phillips 66 Co.*, 915 F.3d 328, 336 (5th Cir. 2019) (Ho, J., concurring) (quoting *Whitman* v. *Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001)). But in these cases, it is the principle against sex discrimination that is the elephant. The statute attacks an injustice that is present in virtually every known civilization. What would be surprising would be if that broad project did not have surprising implications, as this Court confessed in *Oncale*, which rejected an argument from original understanding to hold that "male-on-male sexual harassment" was actionable under Title VII. "[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils." 523 U.S. at 79.

The exclusion of a class of persons from otherwise express protection on the basis of prejudice against them at the time of enactment does not have an admirable history. Its *locus classicus* is *Dred Scott* v. *Sandford*, 60 U.S. (19 How.) 393 (1857), holding that free African Americans could not be "citizens" under Article III. Rebuffing the claim, in the Declaration of Independence, that "that all men are created equal," the Court explained, from historical evidence, that "it is too clear for dispute, that the enslaved African race were not intended to be included." *Id.* at 410; cf. *Hively*, 853 F.3d at 362 (Sykes, J., dissenting, quoted

above). The Framers "spoke and acted according to the then established doctrines and principles, and in the ordinary language of the day, and no one misunderstood them." 60 U.S. (19 How.) at 410. Chief Justice Taney relied on historic military and marriage exclusions to demonstrate the original understanding. *Id.* at 413–16; cf. *Zarda*, 883 F.3d at 137–52 (Lynch, J., dissenting) (relying on anti-homosexual exclusions in 1964). See also *Plessy* v. *Ferguson*, 163 U.S. 537, 544 (1896) (rejecting an anti-segregationist reading of the Fourteenth Amendment, because "in the nature of things, it could not have been intended to abolish distinctions based upon color").

Judge Lynch says that protecting LGBT people means improperly extending the statute's protection of women to "an entirely different category of people." *Zarda*, 883 F.3d at 145 (dissenting); accord *Wittmer*, 915 F.3d at 335 (Ho, J., concurring). Judge Lynch's version of the subtractive move is inconsistent with the statutory structure, which regulates by classification and not by social class, and anachronistically assumes that new social classes do not present new issues.[10] His analysis could eviscerate the statutory plan. Liability in any novel sex discrimination case could be avoided by recharacterizing the sex-based classification as affecting an unanticipated social class—such as "persons discriminated against based on gender stereotypes" (*Hopkins*), "married

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[10] Judge Lynch anachronistically refers to "gay women and men," *Zarda*, 883 F.3d at 140 (dissenting), but his assumed social category was not recognized by the government in 1964. "Homosexuals" were a largely invisible social group understood to be afflicted with "psychopathic personality" disorder in that era. *Boutilier* v. *INS*, 387 U.S. 118, 118 (1967).

men" (*Newport News*), or even "mothers" (*Martin Marietta*). In *Oncale,* the employer argued that Title VII should not be read "literally" to protect against male-on-male harassment, because "homosexual" assault or boys-on-boys hazing was too far afield Congress's "paradigm case" of a qualified woman not hired "because she is female." Resps. Br. at 10, 20–21, 37–44, *Oncale*, *supra* (No. 96-658). This Court unanimously rejected the subtractive argument and applied the statutory text.

Another response to our argument is that, while an employer might refuse to hire men who date men, there's no sex discrimination if the employer also will refuse to hire women who date women. But the same response is available to an employer who rejects employees who are in interracial relationships. As this Court held in *McLaughlin* and *Loving*, this is race discrimination, and it is no defense for the employer to say that the law's protection of African Americans should not be extended to an entirely different category of people, namely, white interracial-sexuals. The flaw in this response, like the flaw in the employers' position in the instant cases, is the same: a person was discriminated against for being, in the employer's opinion, the wrong race or sex.

The subtractive move allows judges to cite elements of the culture that resisted the social change a law undertook to bring about, in order to disregard the law's plain language. Judges would have the option of sticking with the plain language, if they found its entailments congenial. A license to draw statutory meaning from the background culture at the time of enactment, multivocal and contestable as

culture always is, allows the interpreter to find justification for pretty much whatever she feels like doing with a statute. Justice Scalia objected to reliance on legislative history, because the proliferation of possible sources of law placed the interpreter in a position much like "entering a crowded cocktail party and looking over the heads of the guests for one's friends." Antonin Scalia & Bryan A. Garner, *Reading Law* 377 (2012). If one can go beyond the legislative record to the entire background culture outside the legislature, the crowd becomes mighty thick. Sooner or later you'll find a friendly face. The background culture "can be either hewed to as determinative or disregarded as inconsequential—as the court desires." *Id.* at 377–78. When judicial discretion is expanded, the rule of law takes a hit.

In 1964, the terminology "discriminate because of such individual's sex" would have had an objective, public meaning much as we are arguing in this *amicus* brief. Judge Sykes says, without support, that "sex" in 1964 had a public meaning narrowly limited to "biological" differences between men and women, *Hively*, 853 F.3d at 362 (dissenting), a definition that supports the claims of the employees under *Manhart*. But when you consult the 1961 edition of *Webster's Second*, you find that *sex* had a much broader public meaning:

- "[o]ne of the two divisions of organisms formed on the distinction of male and female," or *sex as biology* (man, woman);
- "[t]he sphere of behavior dominated by the relations between male and female," or *sex as gender* (masculine, feminine);

- "the whole sphere of behavior related even indirectly to the sexual functions and embracing all affectionate and pleasure-seeking conduct," or *sex as sexuality*.

Webster's New International Dictionary of the English Language 2296 (2d unabridged ed. 1961).[11] If anything, the original public meaning of Title VII is broader than what we have been arguing.

Judges Sykes and Lynch are also wrong in assuming that 1964 is the only date relevant to the "original meaning" of Title VII. In 1972, Congress extended Title VII to protect governmental employees—an amendment that this Court described as "prophylactic legislation," barring employer gender-stereotyping, for such practices undermine the merit-based workplace guaranteed by Title VII. *Nev. Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 730 (2003). The 1972 Amendments built upon this Court's opinion, especially the concurring opinion, in *Martin Marietta*.

The same year that Congress amended Title VII, Congress also passed the Equal Rights Amendment (ERA), which would have amended the Constitution to prohibit government discrimination "on account of sex," similar to the Title VII language. In 1970, constitutional scholar Paul Freund told Congress that

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[11] Another leading dictionary defined "sex" as "the sum of the anatomical and physiological differences with reference to which the male and the female are distinguished, or the phenomena depending on these differences [*sex as biology or gender*]. 3. the instinct or attraction drawing one sex toward another, or its manifestation in life and conduct [*sex as sexuality or gender*]." *American College Dictionary* 1109–10 (1960); see *Funk & Wagnalls Standard Dictionary* 2241 (1963) (similar definition of "sex").

this language would give new constitutional rights to "homosexuals," still a despised minority. Under exactly the same logic this Court applied in *Loving* and *McLaughlin,* which protected different-race intimacies and relationships, Freund demonstrated that the ERA would protect same-sex intimacies and relationships. *Equal Rights 1970: Hearing on S.J. Res. 61 and S.J. Res. 231 Before the Comm. on the Judiciary*, 91st Cong. 74–75 (1970); see Note, *The Legality of Homosexual Marriage*, 82 Yale L.J. 573, 574 (1973).

Senator Sam Ervin introduced an amendment to the ERA on the floor of the Senate: "This article [the ERA] shall not apply to any law prohibiting sexual activity between persons of the same sex or the marriage of persons of the same sex." 118 Cong. Rec. 9314 (1972). Citing testimony by Professors Freund (Harvard), James White (Michigan), and Thomas Emerson (Yale), Senator Ervin explained that if the ERA were adopted, "laws and activities which are allowed to members of different sexes will have to be extended to members of the same sex." *Id.* at 9315. The Senate sponsor quizzed Ervin about homosexuality, which irritated Ervin and may have motivated him not to press his amendment. *Id.* at 9315–17. If "original" public meaning were relevant to Title VII, why is the "public meaning" of the ERA terminology in 1972 not relevant? The Freund-Ervin argument was one of the main claims made by STOP ERA and its allies in their successful campaign to prevent ratification of that amendment.[12]

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[12] William N. Eskridge, Jr., *Latter-day Constitutionalism: Sexuality, Gender, and Mormons*, 2016 U. Ill. L. Rev. 1227, 1236.

Also relevant is public meaning in 1991, when Congress again amended Title VII to add text relevant to these appeals—especially the addition of § 703(m), which liberalizes the burden of proof in "mixed motive" cases. Would reasonable persons—like Judges Flaum and Ripple, *Hively*, 853 F.3d at 357–58 (concurring)—not be able to say in 1991 that the sex of the employee is at the very least "a motivating factor" when the employee is fired for dating or marrying someone of the same sex? Or when the employee is fired for announcing a sex that is different from that the employer attributes to the employee? After *Hopkins*, which was ratified in the 1991 Amendments, could a reasonable person—like Chief Judge Katzmann, *Zarda*, 883 F.3d at 114 (majority opinion), and Judge Cabranes, *id.* at 135 (concurring)—not think that sex-stereotyping is a motivating factor when an employee is fired because she is not following her "natural gender role" of hooking up with persons of the "opposite sex"?

Public meaning is an inquiry into the widely accepted meaning of language, with consideration of how broadly expressed the text might be. Although legislators and sponsors associated the Fourteenth Amendment with protecting the rights of black people, the bite of the Equal Protection Clause should not be limited to race, because the language is broad and its text-based purpose sweeping. Application of public meaning might yield surprising results when applied to social circumstances that could not have been anticipated by Congress and the ratifying states. *E.g.*, Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 Tex. L. Rev. 1 (2011).

III. Arguments From Congressional Inaction Or Amendments To Other Statutes Do Not Justify Narrowing Title VII's Plain Meaning.

Our analysis focuses on the statute Congress enacted, the amendments Congress passed, and the language Congress voted on. In the proceedings below, the Department of Justice argued from congressional inaction in 1991 and from congressional action in statutes passed long after the 1964 Civil Rights Act. Joining Judges Sykes, Lynch, and Pryor, see *Evans*, 850 F.3d at 1261 (concurring), the Department maintained that judges should demand more specific text from Congress. We cannot think of a case, even in the criminal law context subject to the rule of lenity, where this Court has leapfrogged the plain meaning of a statutory text *and* its own precedents to demand that Congress use "magic words." The Department's approach risks imposing on the already overstuffed congressional agenda and shirking the rule of law duties that form the core of this Court's responsibilities.

A. The 1991 Congress Ratified *Hopkins*, But Did Not Acquiesce In Random Lower Court Decisions Denying Relief To Employees Subjected To Gender-Stereotyping.

Section 3(4) of the 1991 Amendments announced Congress's purpose "to respond to recent Supreme Court decisions by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination," such as Ann Hopkins. 105 Stat. 1071, codified at 42 U.S.C. § 1981 note. In the teeth of this statutory text, the Department of Justice filed an *amicus* brief with the Second Circuit that claimed the 1991 Congress had

acquiesced in two pre-1991 circuit court decisions holding that employees had no Title VII claim for anti-gay discrimination, and in one pre-1991 circuit court decision holding that employees had no Title VII claim for gender identity discrimination.[13] Although there was a great deal of congressional deliberation regarding *Supreme Court* decisions interpreting Title VII, such as *Hopkins*, there was no congressional deliberation regarding these three perfunctory *lower court* decisions.

We are not aware of any precedent where this Court has found that Congress acquiesced in so few lower court decisions,[14] or where this Court invoked acquiescence in even a larger number of lower court decisions as a reason to revise a clear statutory text. *E.g.*, *Rehaif* v. *United States*, No. 17-9560 (2019) (Alito, J., dissenting), slip op. 1 (objecting that the Court's plain meaning holding had been rejected by all

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[13] U.S. Amicus Br. at 10, *Zarda* v. *Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (No. 15-3775), claiming that Congress acquiesced in *DeSantis* v. *Pacific Telephone & Telegraph Co.*, 608 F.2d 327, 329–30 (9th Cir. 1979) (Title VII provides no relief for gay employees); *Williamson* v. *A.G. Edwards & Sons*, 876 F.2d 69, 70 (8th Cir. 1989) (similar); and *Ulane* v. *Eastern Airlines*, 742 F.2d. 1081, 1085–86 (7th Cir. 1984) (Title VII provides no relief for transgender employees). The Department also claimed acquiescence in a fourth case, *Blum* v. *Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979), but its brief cited only dicta that referenced a circuit gender-stereotyping precedent that was superseded by *Hopkins.*

[14] Contrast *Tex. Dep't Hous. & Cmty. Affairs* v. *Inclusive Cmtys. Project*, 135 S. Ct. 2507, 2519–20 (2015) (relying on the consensus interpretation reached by nine courts of appeals, with no dissent, that the enacting coalition of a 1988 amendment had explicitly discussed and relied on); *Monessen Sw. Ry.* v. *Morgan*, 486 U.S. 330, 337–38 (1988) (similar).

the courts of appeals). As noted, the text of the 1991 Amendments ought to disqualify this argument. Section 3(4) stated that the purpose of the 1991 Amendments was "to respond to recent *Supreme Court* [not isolated court of appeals] decisions by *expanding the scope* [not narrowing the scope] of relevant civil rights statutes in order to provide adequate protection to victims of discrimination [not to provide adequate protection to sex-stereotyping employers]." 105 Stat. 1071 (emphasis and brackets supplied).

B. No Inference Ought To Be Drawn From Congress's Failure To Enact Sexual Orientation And Gender Identity Job Discrimination Proposals.

In the proceedings below, the Department of Justice also claimed that dozens of bills had been proposed in Congress between 1974 and 2016 that would have barred sexual orientation and (after 2007) gender identity discrimination in the workplace. The Department argued that Congress's refusal to enact these proposals was evidence that "discriminate because of sex" does not include sexual orientation discrimination. *Hively*, 853 F.3d at 344; accord *id.* at 363 (Sykes, J., dissenting). As before, this Court's doctrine precludes reliance on this kind of congressional inaction. Not only is "subsequent legislative history" an unreliable guide to interpreting prior statutes, *e.g.*, *Bruesewitz* v. *Wyeth LLC*, 562 U.S. 223, 240–43 (2011); *Pension Benefit Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 650 (1990), but subsequent legislative inaction or, even worse, failure to consider later proposals is all but worthless. *E.g.*, *Wright* v. *West*, 505 U.S. 277, 295 n.9 (1992) (plurality opinion);

Patterson v. *McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989).

Presumably for reasons such as these, this Court has rejected such an argument in the context of Title VII. In *Oncale*, the employer argued that Title VII provides no remedy for homosexual (i.e., same-sex) harassment, because it prohibits only sex and not sexual orientation discrimination. The employer's primary evidence was that, between 1974 and 1996, at least 37 bills had been proposed that would have prohibited workplace discrimination because of an employee's "sexual orientation" or "sexual preference" or "affectional orientation" etc., and Congress had acted on none of them. Resps. Br. at 5, 21–22, *Oncale*, *supra* (No. 96-568). Writing for a unanimous Court, Justice Scalia rejected that argument out of hand. He conceded that

> male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.

Oncale, 523 U.S. at 79; accord *Patterson*, 491 U.S. at 175 n.1 (dismissing arguments based on actual floor debates where Congress explicitly rejected proposals that the Court ultimately found supported by the statutory text).

Another problem with subsequent legislative inaction is that no one knows exactly why bills do not become law. *Solid Waste Agency of N. Cook Cty.* v.

U.S. Army Corps of Eng'rs, 531 U.S. 159, 169–70 (2001). The usual reason is that the congressional agenda has no room to consider them; other reasons are that the bills are poorly drafted, do not have needed exemptions, or address a problem that courts or agencies are handling in an acceptable case-by-case manner. During 1979 hearings, for example, EEOC Chair Eleanor Holmes Norton agreed with minority counsel that Title VII was susceptible to the Freund interpretation of the ERA.[15] In 2007, the House Education and Labor Committee reported the proposed Employment Non-Discrimination Act favorably. The report noted that by 2007 many federal circuit courts had interpreted Title VII to reject claims by lesbian and gay employees—but concluded that those lower court decisions should not be treated as authoritative, because they were inconsistent with *Hopkins* and *Oncale*. H.R. Rep. No. 110-406, pt. 1, at 19–22 (2007). Ironically, legislators perceived the clash between this Court's precedents and the lower court's precedents earlier than some lower court judges did.

C. Language In Other Statutes Does Not Supersede Title VII's Plain Meaning And This Court's Precedents.

To buttress their arguments based upon what Congress did *not* do in Title VII, Judge Sykes, *Hively*, 853 F.2d at 363–65 (dissenting), and the Department of Justice point to what Congress *did* outside Title VII almost half a century later: in the last 21 years, Congress has occasionally added "sexual orientation"

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[15] *Civil Rights Amendments Act of 1979: Hearing Before the Subcomm. on Equal Employment of the House Comm. On Education and Labor*, 96th Cong., 2d Sess. 15–16 (1980).

or "gender identity" to laws that barred discrimination on the basis of sex. For example, the Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 3(b)(4), 127 Stat. 54, 61, amended the earlier statute to prohibit funded programs and activities from discriminating "on the basis of actual or perceived race, color, religion, national origin, *sex*, *gender identity*, * * * *sexual orientation*, or disability." 42 U.S.C. § 13925(b)(13)(A) (emphasis added). See also Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, § 5306(a)(3), 124 Stat. 119, 626; Mathew Shepard and James Byrd Hate Crimes Prevention Act of 2009, Pub. L. No. 111-84, §§ 4704(a)(1)(C), 4704(a), 123 Stat. 2835, 2837, 2839; Higher Education Amendments of 1998, Pub. L. No. 105-244, § 486(e)(1)(A), 112 Stat. 1581, 1743.

Their argument is that sexual orientation has got to mean something different from sex, because Congress is assumed to make every word add something to the statute's meaning, and so Congress's failure to add those "magic words" to Title VII has policy significance and legal bite. The assumption that Congress never includes "surplusage" is unfounded. As generations of judges have recognized, Congress typically legislates in a more ad hoc fashion and often *ex abundanti cautela* ("with an abundance of caution"). *Brown* v. *United States*, 12 U.S. (8 Cranch) 110, 150–51 (1814) (Story, J., dissenting); *Seven-Sky* v. *Holder*, 661 F.3d 1, 38 (D.C. Cir. 2011) (Kavanaugh, J., dissenting), *abrogated by Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519 (2012). A recent empirical survey of congressional drafters and staff found a great deal of support for what staffers call "belt and suspenders" drafting and very little familiarity with (and some shock regarding judicial

reliance on) a presumption against surplusage. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 Stan. L. Rev. 901, 934–36 (2013); accord *Yates* v. *United States*, 135 S. Ct. 1074, 1096 (2015) (Kagan, J., dissenting) ("presence of [two overlapping or duplicative provisions] in the final Act may have reflected belt-and-suspenders caution"); *Lamie* v. *United States Tr.*, 540 U.S. 526, 536 (2004) (similar).

The VAWA provision quoted above exemplifies belt-and-suspenders drafting. It bars discrimination of "actual or perceived race, color, [and] national origin" (among other things). Race adds nothing or virtually nothing to "actual or perceived color or national origin," but no one thinks this is poor drafting practice or that the VAWA would have a narrow meaning if any of the three terms were dropped. The same idea might apply to "sex, gender identity, [and] sexual orientation." Judge Pryor, for example, joined a ruling that gender-identity discrimination is a form of sex discrimination. *Glenn* v. *Brumby*, 663 F.3d 1312, 1316–17 (11th Cir. 2011) (relying on *Hopkins* to find that state discrimination based on gender identity is a form of constitutional discrimination because of sex). Most judges agree with Judge Pryor, and we doubt the broader VAWA drafting would dissuade them.

Out of deference to congressional drafting practices and the ad hoc nature of lawmaking over time, this Court has noted that drafting inconsistencies, even within a single statute, should not be deployed to undermine the statutory plan. *E.g.*, *Gomez-Perez* v. *Potter*, 553 U.S. 474, 486 (2008). And an insistence on

exact consistency between different statutes enacted by different Congresses in different decades has not, to our knowledge, been the basis for this Court to decline to follow the plain meaning of a statute that is itself internally consistent. The issue in *Al-Khazraji*, was whether the Civil Rights Act of 1866, which bars private contracts from preferring "white" people, would apply to discrimination by a European American against an Arab American (both considered "white" today). This Court interpreted the civil rights law sensibly, to include national origin discrimination, because race-based discrimination had a broad public meaning in 1866. 481 U.S. at 610–13. The defendant pointed out that Congress in the Civil Rights Act of 1964 prohibited discrimination because of national origin and color as well as race, and argued that the Court should not import into the 1866 law coverage that had been more clearly included in the subsequent statute. Pets. Br. at 19, 37–38, *Al-Khazraji*, supra (No. 85-2169). This Court unanimously rejected that argument in favor of plain meaning, and a concurring opinion acknowledged the more explicit terminology in Title VII without any doubt that the majority was correct. 481 U.S. at 614 (Brennan, J., concurring).

If this Court were tempted to compare the language in Title VII with that in other statutes, there are closer parallels than the laws cherry-picked by Judge Sykes and the Department of Justice. "[N]egative implications raised by disparate provisions" might, at best, be weighed in those instances in which the relevant statutory provisions were "considered simultaneously when the language raising the implication was inserted." *Lindh* v.

Murphy, 521 U.S. 320, 330 (1997), followed in *Gomez-Perez*, 553 U.S. at 486.

The Congress that debated and enacted the Civil Rights Act in 1963–64 was the same Congress that enacted the Equal Pay Act of 1963 ("EPA"), Pub. L. No. 88-38, 77 Stat. 56. The EPA prohibited employers from discriminating "on the basis of sex" by paying wages to employees "at a rate less than the rate at which he pays wages to *employees of the opposite sex*" for similar work. 29 U.S.C. § 206(d)(1) (emphasis added). As this Court has held, employees enjoy a much broader scope of protection under Title VII than under the EPA. *County of Washington* v. *Gunther*, 452 U.S. 161, 189 (1981).[16]

Consider another contrast. At the same time Congress was considering amendments to Title VII, it enacted the Americans with Disabilities Act of 1990 ("ADA"), Pub. L. No. 101-336, 104 Stat. 327. Section 511(b) excluded from the ADA's definition of "disability," which triggers the anti-discrimination protections, "homosexuality and bisexuality." 42 U.S.C. § 12211(a). The next year, Congress enacted the 1991 Amendments that significantly revised Title VII. Under the Department of Justice's concept of meaningful variation, it is significant that Congress

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[16] *Gunther* ruled that § 703(h), 42 U.S.C. § 2000e-2(h), incorporated the EPA's affirmative defenses to wage claims into Title VII but rejected the employer's argument that the amendment narrowed Title VII's definition of discrimination because of sex, because "engrafting all the restrictive features of the Equal Pay Act onto Title VII" would undercut Title VII's broad remedial purpose. 452 U.S. at 174–75. "We must therefore avoid interpretations of Title VII that deprive victims of discrimination of a remedy, without clear congressional mandate." *Id.* at 178.

in 1991 failed to revise its definition of "sex" to specifically exclude "homosexuality and bisexuality," terms that it had just used in the ADA.

Shopping for contrasting language all around the U.S. Code disrespects the operation of the legislative process, is unsupported by doctrine and precedent, and works mischief on the text, structure, and history of Title VII. If you follow Alice down the rabbit hole of searching the U.S. Code for parallels and contrasts, you are opening the door to a wonderland of manipulations far afield from the purpose of the statute that should be the focus of attention. Statutory interpretation ought not be an exercise in looking out over the crowd and picking out your friends.

CONCLUSION

Title VII is a landmark statute. Its mandate that individual employees must not be discriminated against because of their sex, race, religion, national origin, or color is a great national commitment, repeatedly reaffirmed by Congress, implemented liberally by the EEOC and by precedents from this Court, and internalized by employers.

Gerald Bostock, Donald Zarda, and Aimee Stephens were able to do their jobs, and their jobs were important to them. Because the plain meaning of Title VII's broad text dovetails with the statutory plan, this Court should not hesitate to apply the law to protect these employees. Accordingly, this Court should affirm the judgments of the Second and Sixth Circuits and reverse the judgment of the Eleventh Circuit.

Respectfully submitted.

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