Nos. 17-1618, 17-1623

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*.

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

BRIEF OF LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. AS *AMICUS CURIAE* IN SUPPORT OF THE EMPLOYEES

GREGORY R. NEVINS
Counsel of Record
Lambda Legal Defense
and Education Fund, Inc.
730 Peachtree Street NE
Suite 640
Atlanta, GA 30308
(404) 897-1880
gnevins@lambdalegal.org

KAREN L. LOEWY
OMAR GONZALEZ-PAGAN
Lambda Legal Defense and
Education Fund, Inc.
120 Wall Street, 19th Fl.
New York, NY 10005

SHARON M. MCGOWAN
Lambda Legal Defense
and Education Fund, Inc.
1776 K Street, NW, 8th Fl.
Washington, DC 20006

Counsel for Amicus Curiae

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is the nation's oldest and largest nonprofit legal organization working for full recognition of the civil rights of lesbian, gay, bisexual and transgender ("LGBT") people and everyone living with HIV through impact litigation, education, and policy advocacy. Lambda Legal has served as counsel of record or *amicus curiae* in seminal cases regarding the rights of LGBT people and people living with HIV. *See*, *e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *United States v. Windsor*, 570 U.S. 744 (2013); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Bragdon v. Abbott*, 524 U.S. 624 (1998); *Romer v. Evans*, 517 U.S. 620 (1996).

For over 45 years, Lambda Legal has striven to ensure that courts recognize and enforce the employment protections LGBT workers have under existing federal law. Of special relevance here, Lambda Legal successfully represented the plaintiff-appellant in *Hively v. Ivy Tech Cmty. Coll.,* 853 F.3d 339 (7th Cir. 2017) (en banc), and argued as *amicus curiae* in both *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (en banc), and *Wittmer v. Phillips 66 Co.*, 915 F.3d 328 (5th Cir. 2019). *See also, e.g.*, *Franchina v. City of Providence*, 881 F.3d 32 (1st Cir. 2018) (*amicus curiae*); *Evans v. Ga. Reg'l*

[1] No counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

Hosp., 850 F.3d 1248 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 557 (2017) (party counsel); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002) (en banc) (*amicus curiae*). Thus, the issue before the Court is of acute concern to Lambda Legal and the community it represents, who stand to be directly affected by the Court's ruling.

INTRODUCTION

The issue before the Court in these cases—whether employment discrimination against an individual based on their sexual orientation is "because of such individual's . . . sex" under Section 703(a) of the Civil Rights Act of 1964—has been the subject of extensive legal analysis, as lesbian, gay, and bisexual workers have sought redress for the employment discrimination to which they have been subjected. *See* 42 U.S.C. § 2000e-2(a). These employees have presented a range of explanations of why the discrimination they experienced was because of their sex and therefore is covered by Title VII, including the three primary arguments set forth in the briefs of Petitioner Bostock and Respondents Zarda and Moore.

These three arguments for Title VII's application to sexual orientation discrimination as a form of sex discrimination are deeply rooted in this Court's jurisprudence. Specifically, they are grounded in and necessarily follow from long-settled precedent handed down by this Court: (1) that Title VII does not "permit[] one hiring policy for women and another for men," *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971), such as treating women

with children differently from men with children; (2) that the "simple test" for whether Title VII is violated is if there is "treatment of a person in a manner which but for that person's sex would be different," *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978); (3) that that test is violated when men with dependents are treated worse than women with dependents, *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682-683 (1983); (4) that Title VII strikes "at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes," *Manhart*, 435 U.S. at 707 n.13 (quoting *Sprogis v. United Air Lines*, 444 F.2d 1194, 1198 (7th Cir. 1971)); (5) that Title VII mandates that "gender must be irrelevant to employment decisions" and that an employer cannot rely "upon sex-based considerations," *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240, 242 (1989); (6) that the same tests for liability apply across the statute's enumerated characteristics, *id.* at 243 n.9; and (7) that Title VII covers mistreatment motivated in any respect by the employee's sex irrespective of whether Congress contemplated that particular application, *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

While a majority of appellate judges to have addressed the issue at bar in the last decade have applied these bedrock principles and found convincing all or some of the arguments for Title VII's application to sexual orientation discrimination, not every jurist to consider those arguments has recognized the principles' applicability. Among the opinions to address and reject these straightforward arguments, three stand

out for their important contributions to deciding the question presented—specifically, Judge Sykes's dissent in *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 359-75 (7th Cir. 2017) (en banc) (Sykes, J., dissenting) ("*Hively* dissent"); Judge Lynch's dissent in *Zarda v. Altitude Express, Inc.,* 883 F.3d 100, 137-67 (2d Cir. 2018) (en banc) (Lynch, J., dissenting) ("*Zarda* dissent"), and Judge Ho's concurrence in *Wittmer v. Phillips 66 Co.*, 915 F.3d 328, 333-41 (5th Cir. 2019) (Ho, J., concurring) ("*Wittmer* concurrence")[2] (together, "the minority opinions").[3] These opinions raise counterarguments that, while ultimately unconvincing, warrant analysis and refutation. They pose the wrong questions, misapply doctrines of statutory interpretation, import nonexistent statutory prerequisites, fail to engage the actual arguments for application, posit principles that would undermine firmly settled law regarding discrimination based on impermissible stereotypes, and otherwise misapply or ignore principles of textualism this Court has long embraced.

By dissecting the analytical flaws in these three minority opinions, *Amicus* hopes to aid this Court in understanding how Title VII should be interpreted, and thereby provide clarity as to why, when Gerald

---

[2] *Wittmer* involved the employment discrimination claims of a transgender woman. Although Ms. Wittmer only claimed discrimination based on her transgender status, both the majority opinion and the concurrence by Judge Ho nonetheless also addressed whether Title VII's prohibition of sex discrimination applies to sexual orientation discrimination. 915 F.3d at 330 (majority opinion); *id.* at 333 (Ho, J., concurring).

[3] All references herein to *Hively*, *Zarda*, and *Wittmer* are to these dissents and concurrence, unless otherwise indicated.

Bostock and Donald Zarda were discharged for being gay, they were discriminated against "because of . . . sex."

ARGUMENT

I. THE EMPLOYEES STATE A VALID AND STRAIGHTFORWARD CLAIM OF DISCRIMINATION BECAUSE OF SEX UNDER TITLE VII.

The principal argument for why sexual orientation discrimination is per se discrimination "because of . . . sex" (often referred to as the "differential treatment" argument) is that treating a woman with attraction to women differently than a man with attraction to women is sex discrimination. This argument centers around the legally indistinguishable holding of this Court's Title VII ruling in *Phillips v. Martin Marietta Corporation*, 400 U.S. 542, 543 (1971), and the ease with which sexual orientation discrimination fits *Manhart's* "simple test" of Section 703(a)(1)'s application: 'treatment of a person that but for the person's sex would be different." 435 U.S. at 711.

Specifically, the direct applicability of *Phillips* and *Manhart* is manifest by the fact that all one need do is replace the relevant dependent clause in *Phillips—i.e.*, comparing women and men "each having pre-school age children,"—and instead draw the comparison between men and women "each

having a wife."[4] To be sure, *Phillips* has been cited rarely in sexual orientation decisions for its essential, simple sex-plus phrasing,[5] but the logic of the argument is undeniably applicable here. With the elimination of the legal barriers preventing men from marrying men, and women from marrying women, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), it is logically incoherent and legally unsupportable to suggest that a man may be penalized for marrying a man when a woman may do so without fear of losing her job.

---

[4] While this formulation uses the term "wife," the analysis does not hinge on the legal status of the same-sex relationship. Rather, any discrimination on the basis of an individual's same-sex sexual orientation results in a policy that differentiates on the basis of sex—*i.e.*, when a woman is penalized for her romantic attraction to women whereas a man is not, she has suffered discrimination because of her sex.

[5] In the very first such appellate decision on this issue, *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979), the Ninth Circuit rejected this argument by reframing it as an evenhanded refusal to hire anyone with a same-sex partner, a conclusion also drawn by the *Hively* dissent and *Wittmer* concurrence. As discussed, *infra* at IB, this reframing runs afoul of *Manhart*'s mandate that Title VII requires assessment of whether each individual worker is experiencing adverse action because of their sex, not whether there is equality of group treatment. The sex-plus framing disappeared from circuit case law until *Hively*, with the exception of two cases cited by the *Wittmer* concurrence against coverage: *Higgins v. New Balance Athletic Shoe, Inc.,* 194 F.3d 252, 259 (1st Cir. 1999), in which a sex-plus argument was held waived, and *Dillon v. Frank*, No. 90-2290, 1992 WL 5436, at *4 (6th Cir. Jan. 15, 1992), which seemed to accept the sex-plus framing, but concluded that the employee did not plead it sufficiently.

A. The minority opinions cannot evade the result dictated by the differential treatment analysis by changing the question or recasting plainly sex-based actions in ostensibly sex-neutral phrasing.

The *Hively* and *Zarda* dissents commit two key errors in their attempt to avoid the result that necessarily flows from the differential treatment analysis. First, rather than actually address the question presented—whether discriminating against a gay, lesbian, or bisexual employee was "because of . . . sex"—they simply assert the uncontroversial but inconsequential point that the terms "sex" and "sexual orientation" are not synonymous. Second, their assessment that these employees have no Title VII claim is inconsistent with the elements of such a claim and assumes additional prerequisites that imply do not exist.

1. The question before the Court is not whether "sex" means "sexual orientation," but whether discrimination based on sexual orientation is a form of discrimination based on sex.

A person reading the minority opinions might have a hard time surmising that the question upon which *certiorari* would be granted is whether sexual orientation discrimination is discrimination "because of . . . sex" under 42 U.S.C. § 2000e-2(a)(1). The *Hively* and *Zarda* dissents focus instead on whether sex and sexual orientation are identical or

interchangeable. *See, e.g.*, *Hively*, 853 F.3d at 363 ("The two terms are never used interchangeably . . . ."); *Zarda*, 883 F.3d at 148 ("discrimination based on sexual orientation is not the same thing as discrimination based on sex"). Yet the answer to the question presented in these cases does not turn on whether "sexual orientation" and "sex" are synonyms or interchangeable. As the *Hively* majority recognized, "[r]epeating that the two [*i.e.*, sex and sexual orientation] are different . . . does not advance the analysis" as set forth in this Court's jurisprudence. *See Hively*, 853 F.3d at 347. Judge Flaum, too, recognized this, explaining that he would be "[s]etting aside the treatment in the majority and dissenting opinions of sexual orientation as a freestanding concept," thereby freeing him to focus on the statute's text and to "conclude [that] discrimination against an employee on the basis of their homosexuality is necessarily, in part, discrimination based on their sex." *Hively*, 853 F.3d at 358 (Flaum, J., concurring). Judge Flaum's measured approach demurs to the existence of ways in which "sexual orientation discrimination" and "sex discrimination" may differ, and yet declares those distinctions irrelevant to the question actually presented in these cases.[6]

---

[6] The *Hively* dissent also insists on adherence to Title VII's "original public meaning" —employing a phrase popular among some professors but wholly absent from the Supreme Court's voluminous Title VII jurisprudence. *See Hively*, 853 F.3d at 360, 362. Ascertaining Title VII's "original public meaning" is not, moreover, the simple exercise that the *Hively* dissent assumes. *See generally* Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 Harv. L. Rev. 1307 (2012). And even under a narrow definition of sex discrimination, sexual orientation discrimination fits the

The *Hively* dissent further attempts to give analytical significance to the distinction between sex and sexual orientation discrimination by relying on a passage in *Price Waterhouse* suggesting that, when determining whether sex was a motivating factor for an employment decision, it would be important to know whether a truthful answer would reveal that the decision was made because the employee was a woman. 853 F.3d at 369-70 (*citing Price Waterhouse*, 490 U.S. at 251). From this language, the dissent argues that because Ivy Tech's truthful answer as to why it fired Kim Hively would be because of her sexual orientation, its actions are immune from liability under Title VII.

But an assessment of whether an employer's action violates the statute should be made in the vocabulary of the statute. While Ivy Tech may well say that it fired Kim Hively because she is a lesbian, that is the substantive equivalent of saying that it fired her "because she is a woman attracted to women." *See Hively v. Ivy Tech. Comm. Coll.*, 830 F.3d 698, 717 (7th Cir. 2016) ("It is true that Hively has not made the express claim that she was discriminated against based on her relationship with a woman, but that is, after all, the very essence of sexual orientation discrimination."), *overruled on*

---

definition. *See Hively*, 853 F.3d at 345-46. Regardless, nothing in this Court's two most recent cases on statutory interpretation would suggest any need to raise the issue of "original public meaning." *See Wis. Cent. Ltd. v. United States*, 138 S.Ct. 2067, 2074 (2018); *New Prime Inc. v. Oliveira*, 139 S. Ct. 532 (2019); *see also generally* Br. of Statutory Interpretation and Equality Law Scholars as *Amici Curiae* in Support of the Employees [hereinafter "Br. of Statutory Interpretation Scholars"].

other grounds, 853 F.3d 339 (7th Cir. 2017). Once it is clarified that a man attracted to women would not have been fired, there can be no denying that a valid Title VII claim has been alleged.

2. The minority opinions err by imposing statutory prerequisites to a valid Title VII claim that are not found in the text of the statute.

With the proper inquiry focused on whether sexual orientation discrimination is discrimination "because of . . . sex," the only remaining objections to the application of this Court's disparate treatment analysis rest on cramped understandings of the statute's non-discrimination mandate, the scope of its application, and the specific precepts this Court has set forth in determining whether an individual has stated a claim "because of such individual's . . . sex." Each of these objections fails under the words of the statute and this Court's precedent.

a. Title VII broadly prohibits sex-based distinctions in employment decisions.

The *Zarda* dissent invokes the significance of "discrimination *against*," citing the Oxford English Dictionary for a definition that connotes prejudice rather than mere differentiation. 883 F.3d at 149. The text of the statute demonstrates this is wrong in two ways. First, the statute's declaration of unlawful employment practices is not solely framed in terms of "discrimination against" the employee.

The statute declares it "an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's" enumerated characteristic. 42 U.S.C. § 2000e-2(a) (emphasis added). This logically means that it is unlawful to fail or refuse to hire an individual because of any enumerated characteristic; to discharge an individual because of any enumerated characteristic; or to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of an enumerated characteristic. Both Messrs. Zarda and Bostock alleged that they were "discharged" because of sex, situating their allegations clearly within the four corners of the statute and rendering this argument wholly inapposite.

Second, and perhaps more importantly, the *Zarda* dissent's attempt to imbue the term "against" with additional significance simply cannot be reconciled with either the text of Title VII or the decisions of this Court interpreting it. Notably, the statutory text does not add any qualification to its delineation of unlawful employment practices regarding necessary invidious motive. To be covered, adverse employment actions need only be "because of [an] individual's" protected characteristic. As this Court made clear in *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991), there is no such invidious motive requirement. "[T]he absence of a malevolent motive

does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination." *Id*. at 199. Employers may violate Title VII based on neutral or even protective motives. *See, e.g.*, *Manhart*, 435 U.S. at 711 (differential pension contributions for men and women based on actuarial principles held to be "in direct conflict with both the language and the policy of" Title VII); *Johnson Controls*, 499 U.S. at 198 (sex-based job exclusion based on "ostensibly benign" motive of "protecting women's unconceived offspring" held to violate Title VII).

Thus, the *Zarda* dissent's effort to import an invidious motive requirement is undermined by both the statute's plain language and established Title VII jurisprudence.

b. The validity of a Title VII claim does not turn on whether a favorable resolution will assist in tearing down barriers to equal employment opportunity for women.

Relatedly, focusing on the concerns Congress had in enacting Title VII's sex discrimination provisions does not alter the viability of the employees' claims under the statute's plain text. The *Zarda* dissent questions whether recognizing sexual orientation discrimination as a form of sex

discrimination stands in line with other judicial interpretations of Title VII's reach, such as sexual harassment or hostile work environment. 883 F.3d at 145-48. That opinion posits that recognizing sexual harassment as violating Title VII depends on the fact that "[s]exual exploitation has been a principal obstacle to the equal participation of women in the workplace" and does not follow from a "simplistic application of a formal standard, along the lines of 'well, the employer wouldn't have asked the same of a man, so it's sex discrimination.'" *Id.* at 146-47. But this limited view runs directly afoul of *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80 (1998), which recognized that a claim of sexual harassment did not turn on such a simplistic formulation. To categorically exclude sexual orientation claims despite the fact that they meet the statutory requirements repeats the mistake of the courts that refused to recognize same-sex sexual harassment claims. *See Goluszek v. Smith*, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988), *abrogated by Oncale*, 523 U.S. at 79. As this Court noted, "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.

Thus, *Oncale* forecloses any attempt to add requirements to a Title VII claim beyond what is on the face of the statute. This includes importing the laudable goals of the legislation as a limitation on its reach. While it may be true that Title VII was "aimed at employment practices that differentially disadvantage men vis-à-vis women or women vis-à-

vis men," *see Zarda*, 883 F.3d. at 156, that is not the only form of discrimination that the statute addresses. Celebrating the statute's success in combatting "a serious obstacle to the full and equal participation of women in the workplace" does not require slamming the courthouse doors on claims that may not advance that goal but do meet the statute's requirements. *Id*. at 159.

c. A valid Title VII claim is established when the discrimination would not have occurred but for the worker's sex.

This Court's decision in *Manhart* sets forth that liability under Title VII attaches when "the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.'" *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978).[7] In determining whether discrimination would not have occurred but for the worker's sex, all other variables remain constant; the only variable that changes is the individual's sex. Specifically, when we "evaluat[e] a comparator for a gay, lesbian, or bisexual plaintiff" to determine whether sex discrimination has occurred, "we must hold every fact except the sex of the plaintiff constant—changing the sex of *both* the plaintiff and his or her partner would no longer be a 'but–for–the–

[7] While but-for causation is not *required*, *see, e.g., EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2032 (2015), it is unquestionably sufficient to establish a violation of Title VII.

sex–of–the–plaintiff' test." *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 203 (2d Cir. 2017) (Katzmann, C.J., concurring). Thus, when using a comparator method to determine whether an employer has discriminated against a gay male plaintiff because of his sex, the relevant inquiry is whether the employer treats a man attracted to men differently than it treats a woman attracted to men.

The *Hively* dissent argues that comparing a man attracted to a man with a woman attracted to a man involves changing "*two* variables—the plaintiff's sex *and* sexual orientation," and therefore the comparison fails because it does not "hold everything constant *except* the plaintiff's sex." 853 F.3d at 366. The logic of this counterargument, however, unravels on inspection. First of all, sexual orientation does not necessarily change when you alter the sex of the individuals involved in the equation. Specifically, with respect to bisexuals, only one thing would have changed, since changing a bisexual man attracted to men to a bisexual woman attracted to men does not change the employee's sexual orientation at all. *See* Nancy C. Marcus, *Deeply Rooted Principles of Equal Liberty, Not "Argle Bargle": The Inevitability of Marriage Equality After Windsor*, 23 Tul. J.L. & Sexuality 17, 59 (2014).

Second, by highlighting the fact that a man attracted to men and a woman attracted to men have different sexual orientations, the dissent acknowledges (implicitly, and perhaps unwittingly) that a person's sexual orientation is necessarily defined, in part, by his or her own sex. That acknowledgment effectively concedes the employees'

point.

Put more simply, the *Hively* dissent cheats by including the "sum" in the equation. In the case of lesbians and gay men, the label does change from being a person who prefers to form exclusively same-sex relationships (lesbian or gay) to being a person who prefers to form exclusively different-sex relationships (heterosexual), but that is only because those terms are relational terms that are dependent on the sex of the employee. Therefore, if you change the person's sex, you have changed how we would describe their sexual orientation (except in the case of a bisexual person, as explained above). This does not really mean that you changed two things any more than changing someone's race in the context of employees fired for being in different-race relationships changed not only their race but also how we would, as a result of changing their race, describe their relationship as being interracial or not. If the dissent's view were correct that the comparison fails for this reason, that could defeat any application of the comparator method. For example, one could argue that a company's policy of firing women with small children cannot properly be compared to its policy of hiring men with small children, because such a comparison changes too many variables; rather than simply comparing women to men, it compares women who are *mothers* to men who are *fathers*. This absurd application of the comparator method, however, should and would fail. *See Phillips*, 400 U.S. at 544.

Perhaps recognizing that its argument falls flat, the *Hively* dissent denigrates the very exercise of

comparator framing. *See* 853 F.3d at 366 ("[T]he comparative method of proof is an evidentiary test; it is not an interpretive tool. It tells us *nothing* about the meaning or scope of Title VII."). The dissent cites no support for its theory that courts can learn "*nothing*" about Title VII's scope by comparing the treatment of men and women, and case law does not support this untenable argument. There was no evidentiary dispute before the Court in *Phillips*, for example; rather, the Justices compared the employer's policy on employing women with small children to the employer's very different policy on employing men with small children, and held that the Fifth Circuit "erred in reading [Title VII] as permitting one hiring policy for women and another for men." 400 U.S. at 544. This isn't a claim about facts or evidence, but about the "meaning and scope" of Title VII's protections.

B. The *Wittmer* concurrence's "favoritism" approach has been directly rejected by this Court.

Judge Ho's concurrence in *Wittmer* provides a helpful framework for assessing Title VII claims by positing two theories of interpretation, each being internally consistent and offering a mechanism for resolving application questions. *See Wittmer*, 915 F.3d at 334. Under the "favoritism" view, Title VII prohibits employers from favoring men over women, or vice versa. *Id.* "By contrast," under the "blindness" approach**,** "Title VII does more than prohibit favoritism toward men or women—it requires employers to be entirely blind to a person's sex." *Id.*

This concurrence correctly recognizes that the question before the Court is what it means to "discriminate 'because of . . . sex,'" and then provides, under each theory, an answer regarding Title VII's application to sexual orientation discrimination. Such discrimination is permissible under the favoritism theory, despite the fact that there is favoritism towards heterosexual workers, because the favoritism theory concerns itself only with favoritism of men over women, or women over men as classes. Under the favoritism theory, a refusal to hire gay men or lesbians is permissible because it does not favor one sex over another. But the blindness theory condemns all anti-LGBT discrimination, because under this theory, it does "not matter that the company isn't favoring men over women, or women over men. All that matters is that company policy treats people differently based on their sex . . . ." *Id.* at 334. Sexual orientation discrimination is therefore forbidden because it requires that "only women, not men, may marry men." *Id.* The concurrence then chooses the favoritism theory over the blindness theory. *Id.*

Under *Price Waterhouse* and *Manhart*, however, that choice plainly is wrong, and thus the opinion's framework actually provides a powerful endorsement of the employees' position. The plurality opinion in *Price Waterhouse* emphatically declares that "gender must be irrelevant to employment decisions." 490 U.S. at 240, a point with which Justice O'Connor strongly agreed, *id.* at 265 (O'Connor, J., concurring) ("There is no doubt that Congress considered reliance on gender or race in

making employment decisions an evil in itself."). This is the very premise of the blindness theory.

Rejection of the favoritism theory, and with it any notion that Title VII tolerates consideration of sex on an individual basis so long as, writ large, men and women are treated equally is mandated by *Manhart*, which struck down a policy requiring higher contributions to a pension fund by women based on the generalization that women live longer. 435 U.S. at 707-08. The Court held that requiring all women to pay more regardless of whether they themselves would live longer violated the statute, stating "[e]ven a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply." *Id.* at 708. Though all women living to their life expectancy and beyond would be treated better than men from a payout/recovery standpoint, *id.* at 708-09, the statute dictates that consideration of the individual's sex is the standard to be applied, even when some unfairness to a class necessarily results.

As Judge Easterbrook noted in his dissent, later adopted by the Court in *Johnson Controls*, *Manhart* delivered a death blow to the argument that consideration of sex in individual situations is permissible so long as equality of group treatment is achieved:

> That this criterion [consideration of sex] produced equal outcomes for groups was irrelevant in the Court's view, because Title VII requires employees to be treated *as individuals*. To say that

> sex had been considered in order to achieve equal group averages, the Court believed, was to confess a violation of the law.

Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc., 886 F.2d 871, 910 (7th Cir. 1989) (en banc) (Easterbrook, J., dissenting), rev'd, 499 U.S. 187 (1991). This Court has repeatedly reaffirmed its holding in *Manhart* regarding Title VII's focus on the individual. *See Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1084-86 (1983)); *Connecticut v. Teal*, 457 U.S. 440, 455 (1982) (rejecting argument that Title VII is satisfied by bottom line fair treatment).

The assumption baked into the minority opinions that Title VII cannot require sex-blindness rests on concerns about the results that would obtain when applied to certain circumstances, some based on physical and physiological differences and privacy concerns, *see Zarda*, 883 F.3d at 150-51, and others based on the effect on sex-segregated facilities. *See Wittmer*, 915 F.3d at 334, 337, 338. Whether employers may put policies in place on these bases turns on the meaning of the terms "adversely affect" or "discriminate" rather than the meaning of "because of . . . sex." This answer may be unsatisfying to those endorsing an interpretation excluding sexual orientation discrimination from Title VII's sex discrimination prohibition, but it is the only answer this Court can provide. As Justice Scalia said for a unanimous Court: "it is not our task to assess the consequences of each approach and

adopt the one that produces the least mischief. Our charge is to give effect to the law Congress enacted." *Lewis v. City of Chicago*, 560 U.S. 205, 217 (2010). "If that effect was unintended, it is a problem for Congress, not one that federal courts can fix." *Id.*

In sum, while the *Wittmer* concurrence reached the wrong conclusion based on the Court's precedent, its thoughtful explication of why sexual orientation discrimination is not barred under the favoritism theory, but is prohibited if Title VII is deemed to preclude consideration of sex in employment decisions, actually provides helpful insight into why the employees' position is correct.

II. THE EMPLOYEES' CLAIMS ARE VALID SEX STEREOTYPING CLAIMS UNDER *PRICE WATERHOUSE*.

Another theory supporting Title VII's applicability to discrimination based on sexual orientation derives from this Court's recognition in *Price Waterhouse* that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group." 490 U.S. at 251; *see also id.* at 272 (O'Connor, J., concurring) (a female plaintiff discharges her burden upon showing that the employer "permitt[ed] stereotypical attitudes towards women to play a significant, though unquantifiable, role in its decision") (quotation omitted). *Price Waterhouse* provides an additional powerful reason for application to discrimination against "'all gay, lesbian and bisexual persons[, because they] fail to comply with the sine qua non of

gender stereotypes—that all men should form intimate relationships only with women, and all women should form intimate relationships only with men.'" *Hively*, 853 F.3d at 342 (majority opinion) (quoting *Hively*, 830 F.3d at 711).

Rejoinders to the sex stereotyping argument often assert that sex stereotyping is merely evidence of sex discrimination and that a plaintiff must show that sex played a role in the employment decision. *See Hively,* 853 F.3d at 369; *Wittmer*, 915 F.3d at 339. Specifically, they seek to muddy the analytical waters by taking the second and third sentences of the passage below out of the context provided by the preceding and succeeding sentences, which clarify that the Court is merely saying that "stray remarks" that constitute sex stereotyping will not suffice:

> Remarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision. The plaintiff must show that the employer actually relied on her gender in making its decision. In making this showing, stereotyped remarks can certainly be *evidence* that gender played a part. In any event, the stereotyping in this case did not simply consist of stray remarks.

Price Waterhouse, 490 U.S. at 251.

The remaining arguments regarding sex stereotypes are resolved by *Price Waterhouse*'s requirement that sex be irrelevant in employment

decisions. The sex-blind requirement necessarily disposes of the argument that it is lawful for an employer to require heterosexuality of all employees. *See Zarda*, 883 F.3d at 158. An employer's belief that married couples should be monogamous is not a sex-based stereotype, because broken down by sex, the rule for both a man and a woman is the same. By contrast, a stereotype that all people should be heterosexual cannot be treated as merely "a belief about what *all* people ought to be or do—to be heterosexual," *id.*, because translated at an individual level as *Manhart* requires, it is a requirement that men date only women, and women date only men. And of course, in order to hold nonconformity against an employee, one would have to consider the employee's sex, in contravention of *Price Waterhouse* itself. Ergo, Title VII is violated.

The sex-blind requirement also disposes of any notion that favoritism is required or that the gender-nonconforming attribute held against the worker is an attribute helpful or necessary to perform the job. These would plainly run afoul of *Price Waterhouse*'s requirement that sex be irrelevant in adverse employment decisions. *See Price Waterhouse*, 490 U.S. at 242; *id.* at 265 (O'Connor, J., concurring). The notion that Title VII tolerates a sex-neutral preference for heterosexuality or a stereotype that all people be heterosexual, *see generally Zarda*, 883 F.3d at 158 (framing the discrimination as a belief of "what *all* people ought to be or do—to be heterosexual"), ignores that this stereotype is rooted in a consideration of not only the sex of one individual but two—the worker's and their partner's. Invoking *Manhart*, the ostensibly sex-neutral

stereotype that everybody be heterosexual can only be evaluated on an individual basis, where the command to men necessarily translates to "don't date men" and to women as "don't date women." *See* 435 U.S. at 708 (the statute's focus on the individual is "unambiguous").

Further, this Court stated plainly in *Price Waterhouse* that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group." 490 U.S. at 251. That is true whether or not the assessment is made in connection with their specific job functions. Here, the relevant stereotype is that, because they are men, Bostock and Zarda should only be attracted to women. By evaluating these men on that basis, their employers violated Title VII and the minority opinions offer no persuasive reason against the proposition that the employees have a valid sex stereotyping claim.

III. THE EMPLOYEES' CLAIMS ARE ANALOGOUS TO TITLE VII INTERRACIAL ASSOCIATION CASES.

In order to assess properly the minority opinions' response, or non-response, to what is termed the "interracial relationship analogy," it is crucial to understand what the argument is and what it is not. For decades, the unanimous view of the courts and the EEOC has been that discrimination based on an employee's interracial marriage or interracial friendships is manifestly and irrefutably race discrimination proscribed by Title VII. *See*, *e.g.*,

Holcomb v. Iona Coll., 521 F.3d 130 (2d Cir. 2008); *Tetro v. Elliot Popham Pontiac, Oldsmobile, Buick & GMC Trucks*, 173 F.3d 988, 994 (6th Cir. 1999); *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 891-92 (11th Cir. 1986).[8] It is impossible to reconcile this consensus with an argument that discrimination based on one's same-sex intimate relationships is not sex discrimination. The same principles of construction apply to determining what constitutes discrimination "because of race" and "because of . . . sex," and thus should dictate the same treatment of relationships involving the enumerated characteristics in Title VII.

Contrary to the critiques by the minority opinions, *see Hively,* 853 F.3d at 367-69; *Zarda*, 883 F.3d at 158-163; *Wittmer*, 915 F.3d at 339-40, this analysis does not turn on either *Loving v. Virginia*, 388 U.S. 1 (1967), or on an undifferentiated assertion or assumption that sex-based or sexual orientation-based discrimination is just like race-based discrimination. Instead, similar treatment is in keeping with a particular statutory scheme that strongly prefers the same approach across the statute's enumerated characteristics. *See* Victoria Schwartz, *Title VII: A Shift From Sex to Relationships*, 35 Harvard J.L. & Gender 209, 258 (2012) ("*Loving* involved a constitutional argument, and sex and race are not treated identically in the constitutional context. By contrast, the argument made in this Article is based on a statute, Title VII, which treats race and sex identically for the

[8] *See* Victoria Schwartz, *Title VII: A Shift From Sex to Relationships*, 35 Harvard J.L. & Gender 209, 221-32 (2012) (addressing consensus case law).

purposes of this discussion.").

The consensus of the courts that discrimination because of an employee's interracial relationship is discrimination because of race turned on the recognition that the discrimination is tied to the race of the employee, even when the disdain was for the person with whom the employee had the relationship. Specifically, the universe of individuals who can invoke Section 703(a)(1) includes anyone whose protected characteristic led to an adverse employment action, meaning that a white employee can bring a claim based on their relationship with a Black person "even though the root animus for the discrimination is a prejudice against" that other person. *Tetro*, 173 F.3d at 994. If "because of" takes its literal, minimalist meaning of a causal link between one's race and the mistreatment, then the white plaintiff meets the statutory requirements.

This approach is supported by this Court's ruling that, even when a category of discrimination is directed at someone else, the individual actually affected by the employer's discrimination has a Title VII claim. *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682-683 (1983) (validating claims of men where employer provided lesser pregnancy benefits to spouses of male employees than it gave to female employees); *cf. Thompson v. N. Am. Stainless, LP*, 562 U.S. 170 (2011) (recognizing standing of employee to bring Title VII claim when fired in retaliation for fiancée's protected conduct). This analysis applies directly to sexual orientation discrimination because "[n]o matter which category is involved, the essence of the

claim is that the *plaintiff* would not be suffering the adverse action had his or her sex, race, color, national origin, or religion been different." *Hively*, 853 F.3d at 349 (majority opinion).

The minority opinions largely ignore this body of Title VII law,[9] asserting that the analogy to interracial relationships cannot support recognizing sexual orientation discrimination as a form of sex discrimination because (a) the Supreme Court has analyzed interracial marriage differently than the exclusion of same-sex couples from marriage, and (b) restrictions on interracial marriage are racist. *Wittmer*, 915 F.3d at 340; *Zarda*, 883 F.3d at 158-63; *Hively*, 853 F.3d at 368-69. But there are no such broad exceptions. First, the opinions' characterization of this Court's analysis of restrictions on the fundamental right to marry are both erroneous, *see Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015) (identifying the same liberty interests underlying the right to marry for both same-sex and interracial couples, citing *Loving*), and

---

[9] The *Zarda* dissent purports to honor this case law by citing to language from *Barrett v. Whirlpool Corporation*, 556 F.3d 502, 512 (6th Cir. 2009), but loses the forest for the trees in doing so. In *Barrett*, the Sixth Circuit reaffirmed its earlier decision in *Tetro*, which made clear that the white plaintiff in that case stated a viable Title VII claim due to her relationship with her biracial child, "even though the root animus for the discrimination [was] a prejudice against the biracial child." *Barrett*, 556 F.3d at 512 (quoting *Tetro*, 173 F.3d at 994). The *Zarda* dissent loses its way by focusing on the fact that Zarda's employer bore no prejudice against men, rather than realizing that the key consideration was the fact that it was Zarda's association with men (*i.e.*, his being gay) that triggered the adverse employment action.

irrelevant to the analysis of race and sex as equally protected characteristics under Title VII. Second, this Court employed the "harmonizing" principle to carry both the recognition of a hostile work environment claim and the standards to evaluate such a claim over from race to sex, despite the often profound differences in those claims—and did so with a recognition of this country's racial history. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986); *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 n.1 (1998). It also bears noting that the Court's equal treatment of all characteristics barred from consideration under Title VII in *Meritor* and in *Oncale* emphasizes the importance of doing so in situations where the refusal to do so might undermine the viability of an entire category of claims. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998).

The minority opinions seem to suggest that the harmonizing principle does not apply when racism was important to establishing the principle sought to be harmonized. They do so by suggesting that a law or policy that draws distinctions based on race or sex should not be analyzed as a racial or sex-based classification unless it aims to promote racial supremacy or the subjugation of women. But their relentless focus on the lack of comparable historical animus is irrelevant; these opinions continue to import an invidious animus requirement that does not exist under Title VII or even the Equal Protection Clause, ignoring decades of constitutional and statutory case law. *See, e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 226-27 (1995) (holding that "all racial classifications" by

governmental actors trigger strict judicial scrutiny, regardless of motive). Specifically, Title VII does not require an employee to prove the decisions were made with hostility toward a protected characteristic, only that the characteristic played a role in the decision. *Johnson Controls*, 499 U.S. at 200 ("The beneficence of an employer's purpose does not undermine the conclusion that an explicit gender-based policy is sex discrimination under § 703(a) and thus may be defended only as a BFOQ."); *see also Manhart* 435 U.S. at 712-13. Moreover, the statutory inquiry into whether the worker experienced discrimination "because of such individual's race" actually de-emphasizes the employer's "root animus;" a man who alleges that he lost his job because of his interracial relationship "'alleges, by definition, that he has been discriminated against because of *his* race.'" *Holcomb*, 521 F.3d at 139 (quoting *Parr*, 791 F.2d at 892) (emphasis in original).

The minority opinions also err in their interpretation of Title VII by placing undue emphasis on the role of white supremacy in this Court's jurisprudence regarding interracial marriage bans. In *Loving*, the Supreme Court held that treating all members of interracial relationships the same, but less favorably than members of intraracial relationships, was a race–based classification. The Court expressly stated that it was invalidating Virginia's anti-miscegenation law not only because it endorsed "White Supremacy," 388 U.S. at 11, but also, and independently, based on the racial classification on the law's face, *see id.* at 8-9. Moreover, *Loving* was preceded by *McLaughlin v.*

Florida, 379 U.S. 184 (1964), which invalidated a Florida law criminalizing interracial cohabitation—without any discussion of white supremacy. *See id.* at 188, 191-92, 195 (holding that law impermissibly classified based on race even though law applied equally to "all whites and [blacks] who engage in the forbidden conduct"). As one scholar has explained, "*McLaughlin* did not rely on any claims whatsoever about the motive for the law or about the class that was harmed by the law," yet "noted that there was a racial classification and applied heightened scrutiny"; the "sex discrimination argument for protecting [lesbians, gay men, and bisexuals] from discrimination requires nothing more." Andrew Koppelman, *Defending the Sex Discrimination Argument for Lesbian and Gay Rights: A Reply to Edward Stein*, 49 U.C.L.A. L. Rev. 519, 522-23 (2001).

IV. THE MINORITY OPINIONS' APPROACH TO THE PROPER ROLE OF CONGRESS AND THE RELEVANCE OF PRIOR CASE LAW CANNOT UNDERMINE THE EMPLOYEES' CLAIMS UNDER A PRINCIPLED, TEXT-BASED INTERPRETATION OF TITLE VII.

The employees' claims present a straightforward question of whether the discrimination they experienced was "because of . . . sex." Under basic principles of statutory construction, the statutory language must be interpreted according to its plain meaning. *See Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018); *New Prime Inc. v. Oliveira*,

139 S. Ct. 532 (2019). The minority opinions err by straying beyond the statute's text. Moreover, their attribution of significance to congressional inaction, their emphasis on the quantity rather than the quality of previous appellate opinions, and their mischaracterization of this Court's overall LGBT jurisprudence all result in an erroneous interpretation of Title VII.

A. Congressional inaction to amend the statute cannot control what the text of Title VII does or does not mean.

Notwithstanding this Court's clear instruction that "Congressional inaction lacks 'persuasive significance,'" and its specific admonition that it is "particularly dangerous" to rely on "a proposal that does not become law" as a basis for interpreting a prior statute, *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990)), the *Zarda* dissent cites Congressional inaction as supposed proof that the statute does not encompass the claims of the employees. 883 F.3d at 152-56.

Emblematic of this view is the conclusion that "the basic reason that Congress did not pass" an amendment to add explicit protections was "that there was not yet the political will to do so." *Zarda*, 883 F.3d at 155. To the extent Congress was aware of the minority case law, however, the "amendment" being proposed was the restoration of protection that Congress passed in 1964 that various courts of appeals incorrectly read out of the statute. As explained well by Justice Scalia and Judge Easterbrook, it is not only legally incorrect to accede

to legislative inaction generally, but especially when invoked regarding a proposal to overrule a judicial decision that took a politically unpopular provision out of what was an acceptable compromise on broad principles. *See* Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 Cornell L. Rev. 422, 428-29 (1988) (citing *Johnson v. Transp. Agency*, 480 U.S. 616 (1987) (Scalia, J., dissenting)).

The dissent's broader point that discrimination against LGBT people differs in kind than discrimination against African-Americans and women is wholly irrelevant to the ask of this Court in these cases. The error lies in subscribing to the view that asking a court to view sexual orientation discrimination as meeting the statutory definition of discrimination because of sex is fundamentally irreconcilable with a simultaneous legislative effort to add "sexual orientation" explicitly to the statute. As the statutory interpretation scholars note, there are many instances in which a judicial interpretation in favor of application, instead of obviating the need to enact explicit protections, actually led to their enactment. *See* Br. of Statutory Interpretation Scholars at 19. Efforts to enact the Equality Act will likely continue, even after a ruling for the employees, because that legislation is significantly broader in scope than Title VII. While that legislation's enactment may provide the nation's pronouncement that it "take[s] a firm and explicit stand against" sexual orientation discrimination and gender identity discrimination, by those names, *see Zarda*, 883 F.3d at 167, its potential passage or its previous non-passage has no bearing on the statutory interpretation question before the Court:

whether the discrimination experienced by lesbian, gay, and bisexual workers is discrimination "because of . . . sex" within the existing language of Title VII.

B. The minority opinions correctly cabin the relevance of prior circuit court opinions while misconstruing this Court's constitutional jurisprudence regarding the LGBT community.

The minority opinions' treatment of the circuit court decisions prior to *Hively* that opined on Title VII's application to sexual orientation discrimination focused almost exclusively on their longevity and consistency, underscoring from a stare decisis standpoint that this would compel a considerable effort to secure an overruling. None of them, however, actually relied on the analysis or arguments set forth in those opinions. The closest that any of the minority decisions come to endorsing the prior case law on the merits is the *Wittmer* concurrence: "[i]f the first forty years of uniform circuit precedent nationwide somehow got the original understanding of Title VII wrong, no one has explained how." *Wittmer*, 915 F.3d at 336. Neither the *Hively* nor the *Zarda* dissent expend any energy attempting to defend these decisions on their merits, merely acknowledging instead that these decisions reflected, until recently, the consensus approach to the question of Title VII's coverage of sexual orientation claims. *See Hively*, 853 F.3d at 361; *Zarda*, 883 F.3d at 155 n.25. Collectively, the dissenting opinions cite fourteen cases from the eleven numbered circuits, each declining to apply

Title VII to sexual orientation discrimination pre-*Hively*.

This Court is, of course, not constrained by that body of case law in any way, including by the notion of statutory stare decisis. *See*, *e.g.*, *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2413 (2015) (defining "statutory stare decisis" as when "*this Court* interprets and Congress decides whether to amend"). As the majority in *Hively* pointed out, this Court, when pronouncing definitively the law of the land, has not been shy about rejecting the view of the law held by the overwhelming majority of lower Courts, when there was a fundamental error in the analysis those courts employed. *See Hively*, 853 F.3d at 350 n.6 (citing, *e.g.*, *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994) (disapproving a rule of statutory interpretation followed by all regional courts of appeals for decades); *Milner v. Dep't of the Navy*, 562 U.S. 562, 585 (2011) (Breyer, J., dissenting) (noting that the Court's decision rejected an interpretation that had been consistently followed or favorably cited by every lower court to consider it for over 30 years)).

Substantively, this Court should not be constrained by the pre-*Hively* decisions because, as noted by Chief Judge Katzmann in the *Zarda* majority, of the "three arguments" for application to sexual orientation discrimination currently presented, "none [was] previously addressed by this Court." *Zarda*, 883 F.3d at 108 (citing *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 202 (2d Cir. 2017) (Katzman, C.J., concurring); *see also Baldwin v. Foxx*, EEOC DOC 0120133080, 2015 WL 4397641

(July 15, 2015) (noting, among many other analytical flaws, that "courts have often failed to view claims of discrimination by lesbian, gay, and bisexual employees in the straightforward manner" applied to other application questions under Title VII).

As to precedent from this Court, the minority opinions misconstrue both the relevance and content of decisions over the last quarter century involving the LGBT community. The relevance of these decisions may be viewed largely in terms of their consequences, as opposed to providing the legal basis to resolve this case. As the *Zarda* dissent correctly notes, this Court's "decisions upholding the rights of gay Americans" do not "depend on the" resolution of whether sex discrimination was involved. *Zarda*, 883 F.3d at 163.

But the other two opinions go further, incorrectly arguing that this Court has ruled that sexual orientation discrimination is not sex discrimination in the equal protection context. *Hively*, 853 F.3d at 372; *Wittmer*, 915 F.3d at 340. Those cases did no such thing. The only cited case that could be said to have specified that it was applying rational basis scrutiny, *Romer v. Evans*, 517 U.S. 620 (1996), merely reflects an approach of considerable vintage that, in striking down a measure, the Court should invoke no higher level of scrutiny than needed. *See Reed v. Reed*, 404 U.S. 71 (1971). Beyond that, any depiction of this Court having meticulously "assigned these two distinct forms of discrimination to different analytical categories for purposes of equal-protection scrutiny," *Hively*, 853 F.3d at 372, is not widely shared. *See*

Campaign for S. Equal. v. Miss. Dep't of Human Servs., 175 F. Supp. 3d 691, 709 (S.D. Miss. 2016) (noting that *Obergefell* did not reference any specific test in its Equal Protection analysis. "That omission must have been consciously made given the Chief Justice's full-throated dissent. 135 S. Ct. at 2623 (Roberts, C.J., dissenting) ('Absent from this portion of the opinion, however, is anything resembling our usual framework for deciding equal protection cases . . . .')"); *United States v. Windsor*, 570 U.S. 744, 793 (2013) (Scalia, J., dissenting) ("The opinion does not resolve and indeed does not even mention what had been the central question in this litigation: whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality.").

In sum, nothing in the constitutional jurisprudence constrains this Court from reaching the conclusion that discrimination on the basis of sexual orientation is cognizable as a form of discrimination "because of . . . sex."

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Court of Appeals for the Eleventh Circuit in *Bostock* and affirm the judgment of the Court of Appeals for the Second Circuit in *Zarda*.

Respectfully Submitted,

KAREN L. LOEWY
OMAR GONZALEZ-PAGAN
Lambda Legal Defense and Education Fund, Inc.
120 Wall Street
19th Fl.
New York, NY 10005

SHARON M. MCGOWAN
Lambda Legal Defense and Education Fund, Inc.
1776 K Street, NW
8th Fl.
Washington, DC 20006

GREGORY R. NEVINS
Counsel of Record
Lambda Legal Defense and Education Fund, Inc.
730 Peachtree Street NE, Suite 640
Atlanta, GA 30308
(404) 897-1880
gnevins@lambdalegal.org

Counsel for Amicus Curiae

Date: July 3, 2019