Nos. 17-1618 and 17-1623

In the Supreme Court of the United States

GERALD LYNN BOSTOCK, PETITIONER

v.

CLAYTON COUNTY, GEORGIA

ALTITUDE EXPRESS, INC., ET AL., PETITIONERS

v.

MELISSA ZARDA, AS EXECUTOR OF THE ESTATE OF DONALD ZARDA, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE IN NO. 17-1618 AND REVERSAL IN NO. 17-1623

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QUESTION PRESENTED

Whether the prohibition in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a)(1), against employment discrimination "because of * * * sex" prohibits employment discrimination because of sexual orientation.

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INTEREST OF THE UNITED STATES

At issue here is the scope of the protections in Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253-266 (42 U.S.C. 2000e *et seq.*). The Attorney General enforces Title VII against public employers, and the Equal Employment Opportunity Commission (EEOC) enforces Title VII against private employers. Title VII also applies to the federal government as an

employer. See 42 U.S.C. 2000e-16. Accordingly, the United States has a substantial interest in the statute's proper interpretation.

STATEMENT

1. Title VII makes it "an unlawful employment practice" for certain employers, including federal, state, and local governmental employers, "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 * * * sex." 42 U.S.C. 2000e-2(a)(1); see 42 U.S.C. 2000e(b) and 42 U.S.C. 2000e-16(a) (2012 & Supp. V 2017). Congress did not define the term "sex," which "was added to Title VII at the last minute on the floor of the House." *Meritor Sav. Bank, FSB* v. *Vinson*, 477 U.S. 57, 63 (1986).

In *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), this Court held that an employer did not discriminate "because of * * * sex" within the meaning of Title VII when it refused to cover pregnancy in its disability-benefits plan. *Id.* at 135-140. Two years later, Congress amended Title VII by specifying that "[t]he terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions." Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (42 U.S.C. 2000e(k)). That remains Congress's only amendment to Title VII regarding the term "sex."

For more than 40 years, Congress has repeatedly declined to pass bills adding sexual orientation to the list of protected traits in Title VII. In 1975, Representative Bella Abzug introduced a bill to amend various antidiscrimination provisions in the Civil Rights Act of 1964, including the employment-discrimination provisions in

Title VII, "by adding after the word 'sex,' each time it appears[,] the words 'affectional or sexual preference.'" H.R. 166, 94th Cong., 1st Sess. § 6 (as introduced in the House on January 14, 1975). The bill died in committee. Similar bills seeking to add sexual orientation to the list of protected traits in Title VII have been introduced—but not enacted—in every Congress since, including earlier this year. See 17-1623 Pet. App. 106 n.23 (collecting many of those bills); 17-1623 Pet. 20 n.6 (same).

Of particular relevance here, in March 1991, bills were introduced in both the House and the Senate to add "affectional or sexual orientation" to Title VII's protected traits. H.R. 1430, 102d Cong., 1st Sess. § 2(d) (as introduced in the House on March 13, 1991); S. 574, 102d Cong., 1st Sess. § 5 (as introduced in the Senate on March 6, 1991). Like all of the other such bills over the years, neither of those bills was enacted. Instead, a few months later, Congress passed and President Bush signed the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, which enacted major amendments to Title VII—but left the operative language in 42 U.S.C. 2000e-2(a)(1) intact.

Congress enacted that overhaul against a uniform judicial and administrative backdrop. By 1991, at least four courts of appeals had held that discrimination "because of * * * sex" in Title VII does not encompass discrimination because of sexual orientation—and no court of appeals had held otherwise. See *Ruth* v. *Children's Med. Ctr.*, 940 F.2d 662, 1991 WL 151158 (6th Cir. 1991) (Tbl.) (per curiam); *Williamson* v. *A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) (per curiam), cert. denied, 493 U.S. 1089 (1990); *DeSantis* v. *Pacific Tel. & Tel. Co.*, 608 F.2d 327, 329-330 (9th Cir. 1979), abrogated on other grounds, *Nichols* v. *Azteca Rest.*

Enters., Inc., 256 F.3d 864, 874-875 (9th Cir. 2001); *Blum* v. *Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979) (per curiam). In addition, the Seventh Circuit had said the same in dicta, see *Ulane* v. *Eastern Airlines, Inc.*, 742 F.2d 1081, 1084 (1984), cert. denied, 471 U.S. 1017 (1985), and the Eleventh Circuit was bound by *Blum*, see *Northern Ins. Co.* v. *Chatham County*, 547 U.S. 189, 192 & n.1 (2006). The EEOC held that position, too. See *Dillon* v. *Frank*, EEOC Decision No. 01900157, 1990 WL 1111074, at *3 (Feb. 14, 1990).

Congress has not amended the relevant provisions of Title VII since then. By March 2017, all eleven courts of appeals that had addressed the issue agreed that Title VII does not prohibit discrimination because of sexual orientation. See, *e.g.*, *Higgins* v. *New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Simonton* v. *Runyon*, 232 F.3d 33, 36 (2d Cir. 2000); *Bibby* v. *Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001), cert. denied, 534 U.S. 1155 (2002); *Wrightson* v. *Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996); *Hamm* v. *Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1062 (7th Cir. 2003); *Medina* v. *Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005); *Evans* v. *Georgia Reg'l Hosp.*, 850 F.3d 1248, 1255 (11th Cir.), cert. denied, 138 S. Ct. 557 (2017). The Department of Justice had taken that position in litigation, too. See, *e.g.*, Def.'s Renewed Mot. to Dismiss at 16-19, *Terveer* v. *Billington*, No. 12-cv-1290 (D.D.C. Mar. 21, 2013).

In April 2017, however, the Seventh Circuit reversed itself and became the first court of appeals to hold that Title VII prohibits discrimination on the basis of sexual orientation. *Hively* v. *Ivy Tech Cmty. Coll.*, 853 F.3d 339, 345-349 (en banc). That decision followed the EEOC's own reversal two years earlier. Compare *Baldwin* v.

Foxx, EEOC Decision No. 0120133080, 2015 WL 4397641 (July 15, 2015), with, *e.g.*, *Angle* v. *Veneman*, EEOC Decision No. 01A32644, 2004 WL 764265, at *2 (Apr. 5, 2004) (recognizing that the EEOC had "consistently held that discrimination based on sexual orientation is not actionable under Title VII"), *Marucci* v. *Caldera*, EEOC Decision No. 01982644, 2000 WL 1637387, at *2-*3 (Oct. 27, 2000), and *Dillon*, *supra*.

2. Gerald Bostock, a gay man, was employed by Clayton County, Georgia, as a child welfare services coordinator. 17-1618 Pet. App. 27. According to Bostock, his involvement in a gay softball league in January 2013 was "openly criticized by" people "who had significant influence" over his employment. *Id.* at 7. Following an April 2013 audit of program funds that Bostock managed, the County fired Bostock for conduct unbecoming an employee. *Id.* at 28. Bostock timely filed a charge with the EEOC, asserting that the County's stated reason was pretextual and that he was actually fired "because of [his] sex (male/sexual orientation)." *Ibid.* (citation omitted). The EEOC issued a right-to-sue notice without making any findings. 17-1618 J.A. 39-40.

Bostock filed suit in federal district court. See 17-1618 Pet. App. 28. As relevant here, the second amended complaint alleged that the County violated Title VII because it fired Bostock "based on his sexual orientation and failure to conform to a gender stereotype." 17-1618 J.A. 11. The district court dismissed the complaint on the ground that Eleventh Circuit precedent foreclosed a Title VII claim based on sexual orientation, 17-1618 Pet. App. 31 (citing *Evans*, *supra*), and because the court found "not a single mention of or fact supporting gender stereotype discrimination" in the operative complaint, *id.* at 32. The court of appeals affirmed,

agreeing that *Evans* foreclosed the sexual-orientation claim and finding that Bostock had "abandoned" the gender-stereotyping claim by failing to raise it on appeal. *Id.* at 3.

3. a. Donald Zarda, a gay man, was employed by Altitude Express as a skydiving instructor. 17-1623 Pet. App. 11. In June 2010, Zarda told a female client that he was gay "to assuage any concern [she] might have about being strapped to a man for a tandem skydive." *Ibid.* The client, however, said that "Zarda inappropriately touched her and disclosed his sexual orientation to excuse his behavior." *Id.* at 12. Altitude Express fired Zarda based on the client's complaints. *Ibid.* Zarda timely filed a charge with the EEOC, alleging that he was actually fired "because [he] did not conform [his] appearance and behavior to sex stereotypes" and was thus "discriminated against, at least in part because of [his] sex." *Id.* at 178. Zarda further averred: "I am not making this charge on the grounds that I was discriminated on the grounds of my sexual orientation." *Ibid.* Zarda received a right-to-sue letter from the EEOC. 17-1623 Pet. Br. 4.

Zarda filed suit in federal district court against Altitude Express and its owner, alleging (as relevant here) that he "was fired because his behavior did not conform to sex stereotypes," in violation of Title VII. 17-1623 J.A. 28 (¶ 51). The district court granted summary judgment to the defendants on that claim, finding that Zarda had not adduced sufficient evidence to support it. 17-1623 Pet. App. 162-165. A panel of the Second Circuit affirmed, observing that Zarda's estate (Zarda having died in a skydiving accident before the appeal) had not appealed the district court's finding that he "failed to establish the requisite proximity between his termination and his

failure to conform to gender stereotypes." *Id.* at 150. The panel also explained that binding circuit precedent foreclosed a Title VII claim based directly on discrimination because of sexual orientation. *Id.* at 149-150 (citing *Simonton*, *supra*).

b. Following rehearing en banc, the Second Circuit reversed. 17-1623 Pet. App. 1-140.

i. Overturning its prior holdings in *Simonton* and other cases, the court of appeals concluded that Title VII's prohibition on discrimination "because of * * * sex" encompasses discrimination because of sexual orientation. 17-1623 Pet. App. 21-53. The court relied on three distinct rationales.

First, the court of appeals reasoned that "because sexual orientation is a function of sex and sex is a protected characteristic under Title VII, it follows that sexual orientation is also protected." 17-1623 Pet. App. 21. The court observed that "[i]n the context of sexual orientation, a woman who is subject to an adverse employment action because she is attracted to women would have been treated differently if she had been a man who was attracted to women." *Id.* at 34.

Second, the court of appeals determined that sexual-orientation discrimination is based on the stereotype that people should be attracted only to members of the opposite sex. 17-1623 Pet. App. 35-43. The court thus concluded that "an employer who discriminates against employees based on assumptions about the gender to which the employees can or should be attracted has engaged in sex-discrimination irrespective of whether the employer uses a double-edged sword that cuts both men and women." *Id.* at 43.

Third, the court of appeals held that discrimination because of sexual orientation is a form of associational

discrimination because it is based on opposition to association between particular sexes. 17-1623 Pet. App. 43-53. The court explained that "if a male employee married to a man is terminated because his employer disapproves of same-sex marriage, the employee has suffered associational discrimination based on his own sex because 'the fact that the employee is a man instead of a woman motivated the employer's discrimination against him.'" *Id.* at 47 (citation omitted).

ii. Judge Jacobs concurred in part and in the result (17-1623 Pet. App. 62-68), agreeing only with the majority's associational-discrimination rationale. Judge Cabranes concurred only in the judgment on the ground that "Zarda's sexual orientation is a function of his sex." *Id.* at 68. Judges Sack and Lohier also filed concurring opinions. *Id.* at 69-72.

iii. Judge Lynch dissented (17-1623 Pet. App. 72-136) on the ground that when Congress enacted Title VII in 1964, it "opted to prohibit only certain categories of unfair discrimination," and "did not then prohibit, and alas has not since prohibited, discrimination based on sexual orientation." *Id.* at 96. Judge Lynch explained that the majority's contrary reasoning would necessarily prohibit all sex-specific bathrooms, dress codes, and physical-fitness standards. *Id.* at 100-103.

Judge Lynch also disagreed with the majority's view that sexual-orientation discrimination is based on impermissible sex stereotyping, because "the homophobic employer is not deploying a stereotype about men or about women to the disadvantage of either sex." 17-1623 Pet. App. 117. Instead, Judge Lynch explained, the employer "is expressing disapproval of the behavior or identity of a class of people that includes both men and

women" based on "a belief about what *all* people ought to be or do." *Ibid.*

Finally, Judge Lynch rejected the majority's conclusion that sexual-orientation discrimination constitutes associational discrimination. 17-1623 Pet. App. 118-125. Judge Lynch observed that unlike employers who discriminate against employees in interracial relationships—and thus necessarily discriminate against those employees because of their race—employers who discriminate against employees in same-sex relationships do not do so because of the employee's sex: "[t]here is no allegation in this case, nor could there plausibly be, that the defendant discriminated against Zarda because it had something against *men*." *Id.* at 121. Judge Lynch emphasized that when, as here, courts are "interpreting an act of Congress, [they] need to respect the choices made by Congress about which social problems to address, and how to address them." *Id.* at 135.

iv. Judges Livingston (17-1623 Pet. App. 136-140) and Raggi (*id.* at 140) filed dissenting opinions expressing their agreement with Judge Lynch's statutory analysis.

SUMMARY OF ARGUMENT

A. Title VII's prohibition on discrimination because of sex does not bar discrimination because of sexual orientation. The ordinary meaning of "sex" is biologically male or female; it does not include sexual orientation. Congress has recognized in other antidiscrimination statutes that sexual orientation is different from sex. An employer thus discriminates "because of * * * sex" under Title VII if it treats members of one sex worse than similarly situated members of the other sex. Discrimination on the basis of sexual orientation, standing alone, does not satisfy that standard.

Even if sexual orientation were a "function" of sex, that would be insufficient, standing alone, to violate Title VII; otherwise, all sex-specific practices, including bathrooms, dress codes, and physical fitness standards, would be unlawful. Likewise misguided is the simplistic observation that sexual-orientation discrimination treats a female employee in a relationship with a woman worse than a male employee in a relationship with a woman. That comparison is logically flawed because it changes both the sex and the sexual orientation of the comparator; the two hypothetical employees are thus not similarly situated. The correct comparison is between a female employee in a same-sex relationship and a male employee in a same-sex relationship; they would be similarly situated—and they would be treated the same.

B. Sexual-orientation discrimination is not impermissible sex stereotyping because stereotyping is not a freestanding violation of Title VII; it is forbidden only insofar as it results in disparate treatment of similarly situated members of opposite sexes. For example, one could easily characterize a dress code requiring men to wear neckties as enforcing stereotypes about proper men's business attire. Yet nobody contends that Title VII prohibits all such sex-specific dress codes. By contrast, hiring only "masculine" men and "feminine" women would violate Title VII not because it relies on stereotypes per se, but because it treats effeminate men worse than effeminate women—and likewise masculine women worse than masculine men. Importantly, Title VII prohibits such disparate treatment *regardless* of sexual orientation. A gay man fired for being too effeminate has just as strong a claim as a straight man fired for that reason; he is not carved out from Title VII's protections.

C. Sexual-orientation discrimination does not constitute improper associational discrimination in the way that discrimination against employees in interracial relationships does. Because a difference in race rarely makes two otherwise similarly situated individuals dissimilar, nearly all race-based distinctions constitute unlawful race-based discrimination. By contrast, sex-based distinctions are not invariably invidious because they can reflect physiological differences between men and women, as the lawfulness of sex-specific bathrooms makes clear. An employer who discriminates against employees in same-sex relationships thus does not violate Title VII as long as it treats men in same-sex relationships the same as women in same-sex relationships.

D. Congress has ratified the settled understanding that Title VII does not prohibit sexual-orientation discrimination. Bills to add sexual orientation to Title VII have been introduced in every Congress since 1975, yet Congress has declined to enact them. And when Congress overhauled Title VII in 1991, it did not extend the statute to cover sexual-orientation discrimination, despite being aware of an "absence of Federal laws" prohibiting such discrimination. 137 Cong. Rec. 5261, 6161. Indeed, not long ago every court of appeals to have considered the issue, along with the EEOC and the Department of Justice, unanimously agreed that Title VII does not prohibit sexual-orientation discrimination. Congress's consistent refusal to change that aspect of Title VII in the face of that uniform understanding, while at the same time changing other aspects of Title VII and expressly barring sexual-orientation discrimination in other statutes, supports adhering to that understanding now.

ARGUMENT

TITLE VII DOES NOT PROHIBIT DISCRIMINATION BECAUSE OF SEXUAL ORIENTATION

The question here is not whether Congress may or should prohibit employment discrimination because of sexual orientation, but whether Congress did so in 1964. Title VII's plain language, this Court's previous decisions interpreting that statute, and the import of congressional conduct over the years make clear that Congress did not. Congress of course remains free to legislate in this area; and employers, including governmental employers, remain free to offer greater protections to their workers than Title VII requires. Cf. William P. Barr, *U.S. Department of Justice Equal Employment Opportunity Policy* (Apr. 4, 2019) (reiterating that "no applicant for employment or employee of our Department will be denied equal opportunity because of * * * sexual orientation, * * * gender identity, * * * or any other nonmerit-based factor"). But those are policy determinations currently left to political and private actors, not the courts.

A. Discrimination Because Of Sexual Orientation Does Not Constitute Discrimination Because Of Sex

1. "Sex" does not mean "sexual orientation"

Title VII's prohibition on discrimination "because of * * * sex," 42 U.S.C. 2000e-2(a)(2), does not encompass discrimination based on sexual orientation for the simple reason that "sex" does not mean "sexual orientation." Because Title VII does not define the term "sex," the term should "be interpreted as taking [its] ordinary, contemporary, common meaning." *Sandifer* v. *United States Steel Corp.*, 571 U.S. 220, 227 (2014) (citation

omitted). As Judge Lynch recognized below, "[i]n common, ordinary usage in 1964—and now, for that matter—the word 'sex' means biologically *male* or *female*; it does not also refer to sexual orientation." 17-1623 Pet. App. 89-90 (citation omitted). Contemporaneous dictionaries defined "sex" as "refer[ring] to [the] physiological distinction[]" between "male and female," *Webster's New International Dictionary* 2296 (2d ed. 1957), or as "[t]he sum of the peculiarities of structure and function that distinguish a male from a female organism; the character of being male or female," *Black's Law Dictionary* 1541 (4th ed. 1951). See, *e.g.*, *Hively* v. *Ivy Tech Cmty. Coll.*, 853 F.3d 339, 362-363 (7th Cir. 2017) (en banc) (Sykes, J., dissenting) (collecting dictionaries); Gov't Br. at 18 n.5, *R.G. & G.R. Harris Funeral Homes, Inc.* v. *EEOC*, No. 18-107 (collecting more). Neither Zarda nor Bostock has identified any contemporaneous dictionary or legal reference defining "sex" as including or referring to sexual orientation.

Even judges who have concluded that Title VII prohibits discrimination on the basis of sexual orientation acknowledge that in 1964 "sex" did not refer to "sexual orientation." In his concurring opinion below, Judge Jacobs recognized that "the word 'sex' as a personal characteristic refers to the male and female of the species" and that although "sexual orientation is a 'function of sex'" it "does not amount to sex itself as a term in Title VII." 17-1623 Pet. App. 65-66. So too Judge Posner, who observed that "what is certain is that the word 'sex' in Title VII had no immediate reference to homosexuality" in 1964 and that he and his colleagues, "who are judges rather than members of Congress, are imposing on a half-century-old statute a meaning of 'sex discrimination' that the Congress that enacted it would not

have accepted." *Hively*, 853 F.3d at 353, 357; see *id.* at 357 ("'Sex' in 1964 meant gender, not sexual orientation."); *id.* at 357 (nevertheless reading the statute to encompass sexual-orientation discrimination to "avoid placing the entire burden of updating old statutes on the legislative branch").

That the term "sex" in Title VII does not include sexual orientation is confirmed by Congress's express use of "sexual orientation" as a trait distinct from "sex" or "gender" in other antidiscrimination statutes. For example, Congress has prohibited discrimination in certain federally funded programs "on the basis of actual or perceived race, color, religion, national origin, *sex*, gender identity * * * , *sexual orientation*, or disability." 34 U.S.C. 12291(b)(13)(A) (Supp. V 2017) (emphasis added). Similarly, Congress has prohibited acts or attempts to cause bodily injury "because of the actual or perceived religion, national origin, *gender*, *sexual orientation*, gender identity, or disability of any person," 18 U.S.C. 249(a)(2)(A) and (c)(4) (emphasis added); provided federal assistance for state, local, and tribal investigations of crimes "motivated by prejudice based on the actual or perceived race, color, religion, national origin, *gender*, *sexual orientation*, gender identity, or disability of the victim," 34 U.S.C. 30503(a)(1)(C) (Supp. V 2017) (emphasis added); and defined a "hate crime" for purposes of sentencing enhancements as one committed "because of the actual or perceived race, color, religion, national origin, ethnicity, *gender*, disability, or *sexual orientation* of any person," Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, Tit. XXVIII, § 280003(a), 108 Stat. 2096 (emphasis added); see *Hively*, 853 F.3d at 364 (Sykes, J., dissenting) (documenting additional examples). In each of those statutes, Congress listed "sexual

orientation" as an *additional* basis for a discrimination claim, in contrast to its description of pregnancy discrimination as being "include[d]" within "sex" discrimination itself. 42 U.S.C. 2000e(k).

Those other statutes demonstrate not only that Congress knows how to prohibit discrimination based on sexual orientation, but that it considers sexual-orientation discrimination to be distinct from—and not a subset of—sex discrimination. Various state and local antidiscrimination statutes confirm that customary and commonplace understanding of the distinction between sex and sexual orientation. See, *e.g.*, D.C. Code § 2-1402.31 (LexisNexis 2001); 775 Ill. Comp. Stat. Ann. 5/1-103 (West 2011); see also *Hively*, 853 F.3d at 364 (Sykes, J., dissenting); 17-1623 Pet. App. 104-105 & n.21 (Lynch, J., dissenting). The absence of "sexual orientation" from Title VII's list of protected traits thus demonstrates that the statute does not prohibit discrimination on that basis. See *Wittmer* v. *Phillips 66 Co.*, 915 F.3d 328, 338 (5th Cir. 2019) (Ho, J., concurring) ("If Congress had meant to prohibit sexual orientation * * * discrimination, surely the most straightforward way to do so would have been to say so—to add 'sexual orientation' * * * to the list of classifications protected under Title VII.").

To be sure, "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils." *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998). But that unremarkable observation is not a license to rewrite or expand a statute to cover things that are not encompassed by the statutory text. In *Oncale*, for example, the Court concluded that under the plain text of Title VII, a male employer can be found to have sexually harassed a male employee "because of"

the latter's "sex" if the employer would not harass similarly situated women, even though such harassment was not the "principal evil" Congress sought to eliminate. *Id.* at 79-80. Here, by contrast, the ordinary meaning of "sex" does not include sexual orientation—not today, and not in 1964. No "ordinary 'fluent speaker of the English language'" could conclude otherwise. 17-1623 Pet. App. 112 (Lynch, J., dissenting) (citation omitted); see *id.* at 97.

2. Discrimination because of sexual orientation does not involve treating members of one sex less favorably than similarly situated members of the other

a. This Court has emphasized that Title VII "is directed only at '*discrimination* . . . because of . . . sex.'" *Oncale*, 523 U.S. at 80 (brackets omitted). The "'normal definition of discrimination' is 'differential treatment'" or, more specifically, "'less favorable' treatment." *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005) (citations omitted). Accordingly, the "central focus of the inquiry" in a Title VII case alleging sex discrimination "is always whether the employer is treating 'some people less favorably than others because of their * * * sex.'" *Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567, 577 (1978) (citation omitted). To prevail in that inquiry, a plaintiff must establish that "an employer intentionally treated a complainant less favorably than employees with the 'complainant's qualifications' but outside the complainant's protected class." *Young* v. *United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1345 (2015) (citation omitted); see *Texas Dep't of Cmty. Affairs* v. *Burdine*, 450 U.S. 248, 258 (1981) (explaining that "it is the plaintiff's task to demonstrate that similarly situated employees were not treated equally").

Sexual-orientation discrimination does not satisfy that standard. Instead, it involves less favorable treatment of gay or bisexual employees—men and women alike. So long as the employer treats similarly situated individuals of both sexes equally, it has not discriminated against either on the basis of sex. Unfavorable treatment of a gay or lesbian employee as such is not the consequence of that individual's sex, but instead of an employer's policy concerning a different trait—sexual orientation—that Title VII does not protect.

The Second Circuit's observation, echoed by Zarda (at 18) and Bostock (at 14), that "sexual orientation is a function of sex," 17-1623 Pet. App. 21, is irrelevant. If merely being "a function" of sex were enough for employment terms and conditions to violate Title VII, *every* sex-specific workplace policy—from sex-specific dress codes to sex-specific employee bathrooms—would violate Title VII, as Judge Lynch recognized. See *id.* at 100-102. Neither Zarda nor Bostock has provided a limiting principle to avoid that absurd result. As this Court has explained, "[t]he critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Oncale*, 523 U.S. at 80 (quoting *Harris* v. *Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)). Asking whether an employment condition is "a function" of sex does nothing to further that "critical" inquiry; an employment practice that unquestionably is "a function" of sex does not necessarily violate Title VII. Instead, the relevant question is whether an employment practice disadvantages members of one sex compared to similarly situated members of the other.

For example, sex-specific employee bathrooms comply with Title VII because they generally do not treat members of one sex worse than similarly situated members of the other; to the contrary, separate male and female bathrooms "protect the privacy of both sexes." *Wittmer*, 915 F.3d at 334 (Ho, J., concurring); see *Doe* v. *Luzerne County*, 660 F.3d 169, 175-176 (3d Cir. 2011) (collecting cases). Similarly, courts have "long recognized that companies may differentiate between men and women in appearance and grooming policies" when those policies "do[] not unreasonably burden one gender more than the other." *Jespersen* v. *Harrah's Operating Co.*, 444 F.3d 1104, 1109-1110 (9th Cir. 2006) (en banc). And an employer may use "physical fitness standards that distinguish between the sexes on the basis of their physiological differences" as long as they "impose an equal burden of compliance on both men and women." *Bauer* v. *Lynch*, 812 F.3d 340, 351 (4th Cir.), cert. denied, 137 S. Ct. 372 (2016) (No. 15-1489). As those examples demonstrate, employment conditions that are "a function" of sex nevertheless comply with Title VII as long they do not burden one sex more than the other.

Applying that test, sexual-orientation discrimination does not violate Title VII because it does not expose any women to disadvantageous workplace conditions that similarly situated men are spared from enduring—or vice versa. Even if such discrimination "requires *noticing* the gender of the person in question," that "simplistic" observation "has nothing to do with the type of unfairness in employment that Congress legislated against in adding 'sex' to the list of prohibited categories of discrimination in Title VII." 17-1623 Pet. App. 112 (Lynch, J., dissenting). An employer who treats

similarly situated men and women equally—affording the same terms and conditions of employment to heterosexual men and women alike, and the same terms and conditions of employment to gay or bisexual men and women alike—therefore has not engaged in "*discrimination* . . . because of . . . sex." *Oncale*, 523 U.S. at 80 (brackets omitted).

b. The Second Circuit's attempt to ferret out sex discrimination by applying what it called a "comparative test" is misguided. 17-1623 Pet. App. 29. According to the court of appeals, sexual-orientation discrimination constitutes improper sex discrimination because, for instance, "a woman who is subject to an adverse employment action because she is attracted to women would have been treated differently if she had been a man who was attracted to women." *Id.* at 34; see 17-1618 Pet. Br. 15-16 (asserting that sexual-orientation discrimination fails that "simple test"). That comparison is flawed for two reasons.

First, the comparison changes *both* the sex (from female to male) *and* sexual orientation (from gay to straight) of the comparator employee. A proper comparison would change the sex while holding the sexual orientation constant. Only a relative difference in treatment in *that* scenario would constitute sex discrimination. As Judge Sykes explained, a "comparison can't do its job of ruling in sex discrimination as the actual reason for the employer's decision * * * if we're not scrupulous about holding everything constant except the plaintiff's sex." *Hively*, 853 F.3d at 366 (emphasis omitted). For example, if "an employer is willing to hire gay men but not lesbians, then the comparative method has exposed an actual case of sex discrimination." *Ibid.* But

if an employer treats gay men and women the same, it has not engaged in sex discrimination.

Second, a mechanical application of the Second Circuit's comparative test would result in the conclusion that all sex-specific employment conditions—such as separate male and female bathrooms—would violate Title VII. After all, a man would never be prohibited from using the women's bathroom if he were a woman. The court of appeals brushed past that obvious flaw in its analysis by declaring "sex-specific bathroom and grooming policies" to be "a separate question from [its] inquiry"—without explaining how either the analysis or the answer would be any different. 17-1623 Pet. App. 34. Rote application of the comparative test to sexual-orientation discrimination does not resolve the "critical issue" of "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Oncale*, 523 U.S. at 80 (citation omitted).

The Second Circuit's reliance (17-1623 Pet. App. 29-31) on *City of Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702 (1978), and *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989), is misplaced. *Manhart* involved a facially discriminatory policy that required female employees to make higher monthly contributions to an employer-operated pension fund than male employees, on the ground that the average group life expectancy for women was higher than that for men. 435 U.S. at 704-705. *Price Waterhouse* involved an employer who passed over a woman for partnership because she was too aggressive and "macho," and was "a lady using foul language," even though the employer would have promoted a similarly situated man were he just as aggressive and foul-mouthed. 490 U.S. at 235,

250-251 (plurality opinion) (citations omitted). According to the Second Circuit, in both cases this Court employed a comparative test in which it changed the sex and the asserted trait (life expectancy in *Manhart*, aggressiveness in *Price Waterhouse*) of the hypothetical comparator, thereby justifying the court of appeals' failure to hold sexual orientation constant in its own comparative test here. See 17-1623 Pet. App. 30. That contention is incorrect.

In determining that the policy in *Manhart* violated Title VII, this Court found of "critical importance" that even individual women who could show they had the same life expectancy as a similarly situated man still had to make higher monthly contributions "simply because each of them is a woman, rather than a man." 435 U.S. at 711. Therefore, changing the employee's sex from male to female *while holding the individual's life expectancy constant* would result in a higher pension contribution. Likewise in *Price Waterhouse*, changing the employee's sex from female to male *while holding aggressiveness constant* would result in a different promotion outcome. The court of appeals thus erred in relying on *Manhart* and *Price Waterhouse* to justify its flawed comparative test here.

c. Zarda errs in relying (at 39-40) on *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977), for the proposition that "even a single employment policy that applies to both men and women can discriminate because of sex if the operation of the policy depends on the sex of the individual employee." 17-1623 Pet. Br. 39. So framed, that proposition would result in the invalidation of sex-specific bathrooms and dress codes, as they too "appl[y] to both men and women" and "depend[] on the sex of the individual employee." *Ibid.* *Dothard* did not sweep so

broadly; it involved two provisions related to employment in single-sex prisons: a statute establishing minimum height and weight requirements for prison guards, and a regulation allowing only men to serve in "positions requiring continual close physical proximity to inmates" in male-only prisons (and likewise women in female-only prisons). 433 U.S. at 325. This Court agreed that the plaintiffs had made out a prima facie case that the statutory height and weight requirements had a disparate impact on women, *id.* at 331; but that ruling is inapposite here because no one argues that sexual-orientation discrimination has a disparate impact on one sex.

As for the regulation, the Court correctly found it to "explicitly discriminate[] against women on the basis of their sex" because even women who satisfied the statutory height and weight requirements were prohibited from serving in the specified positions at male-only prisons. *Dothard*, 433 U.S. at 332. That ruling also is inapposite here; discrimination on the basis of sexual orientation does not "explicitly discriminate[] against women [or men] on the basis of their sex," as the regulation in *Dothard* did on its face. *Ibid.*

Similarly misplaced is Zarda's and Bostock's reliance on so-called "sex plus" cases, which involve alleged discrimination on the basis of sex combined with another trait (*i.e.*, discrimination against the subset of men or women who have that additional trait). See 17-1623 Pet. Br. 20-22; 17-1618 Pet. Br. 16-17. For example, Zarda incorrectly asserts (at 20) that the claims here "mirror[] the claim" in *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971) (per curiam). There, this Court held that an employer's policy barring the hiring of women (but not men) with preschool-age children was

facially discriminatory on the basis of sex. *Id.* at 543-544. Although the policy in *Phillips* did not discriminate *solely* on the basis of sex, it treated the subset of women with preschool-age children worse than the similarly situated subset of men (*i.e.*, men with preschool-age children). That is why it violated Title VII.

This Court's decisions in *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. 669 (1983), and *International Union* v. *Johnson Controls, Inc.*, 499 U.S. 187 (1991), likewise are distinguishable. Cf. 17-1618 Pet. Br. 16; 17-1623 Pet. Br. 21-22. *Newport News* involved an employer-sponsored health plan that provided less favorable benefits to spouses of male employees than to spouses of female employees. 462 U.S. at 671-672. *Johnson Controls* involved a "fetal-protection policy" prohibiting "fertile women," but not "[f]ertile men," from taking certain jobs involving exposure to high concentrations of lead, "[d]espite evidence in the record about the debilitating effect of lead exposure on the male reproductive system" as well. 499 U.S. at 197-198. In both cases, therefore, the employer treated subsets of men or women worse than similarly situated subsets of the opposite sex. By contrast, sexual-orientation discrimination, standing alone, does not involve such treatment: a gay or bisexual man is treated the same as a lesbian or bisexual woman.

B. Discrimination Because Of Sexual Orientation Does Not Constitute Prohibited Sex Stereotyping

Sexual-orientation discrimination also does not improperly discriminate based on sex stereotypes. Sex stereotyping is not a freestanding violation of Title VII; instead, it is forbidden only insofar as it results in "*disparate treatment* of men and women." *Manhart*, 435 U.S.

at 707 n.13 (emphasis added; citation omitted); see *Wittmer*, 915 F.3d at 339 (Ho, J., concurring) (observing that "under *Price Waterhouse*, sex stereotyping is actionable only to the extent it provides evidence of favoritism of one sex over the other"). As the *Price Waterhouse* plurality explained, "sex stereotypes do not inevitably prove that gender played a part in a particular employment decision," but "can certainly be *evidence* that gender played a part." 490 U.S. at 251; see *Hamm* v. *Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1068 (7th Cir. 2003) (Posner, J., concurring) ("'Sex stereotyping' should not be regarded as a form of sex discrimination, though it will sometimes, as in the *Hopkins* case, be evidence of sex discrimination."), overruled by *Hively*, *supra*.

Accordingly, "employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females," such as "[m]yths and purely habitual assumptions about a woman's inability to perform certain kinds of work" that result in an individual woman's being treated worse than a similarly situated man. *Manhart*, 435 U.S. at 707. Likewise, "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender" if the employer otherwise treats aggressive men more favorably. *Price Waterhouse*, 490 U.S. at 250 (plurality opinion). For sex-stereotyping claims, as for all Title VII disparate-treatment claims, the "critical issue" remains "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Oncale*, 523 U.S. at 80 (citation omitted).

Sexual-orientation discrimination, standing alone, does not result in that kind of disparate treatment. The Second Circuit (17-1623 Pet. App. 35-43), Zarda (at 23-31),

and Bostock (at 23-29) thus miss the mark in asserting that sexual-orientation discrimination relies on a stereotype or gender norm about opposite-sex attraction. As a threshold matter, that is not necessarily true: an employer may be relying on reasons that have nothing to do with gender norms, such as moral or religious beliefs about sexual, marital, and familial relationships. But even if true, it would be a *sex-neutral* stereotype that therefore does not violate Title VII. See *Hively*, 853 F.3d at 370 (Sykes, J., dissenting). Indeed, treating such sex-neutral stereotypes as prohibited by Title VII would lead to absurd results. For example, one could just as easily assert that a woman's insistence on using the men's bathroom does not conform to stereotypes about bathroom norms, or that a man's insistence on wearing a shirt without a necktie to an oral argument does not conform to stereotypes about proper men's courtroom attire. Yet no one can seriously contend that *Manhart* and *Price Waterhouse* outlawed all sex-specific bathrooms, dress codes, or physical-fitness standards, which courts have uniformly upheld absent an unequal burden on the sexes. See p. 18, *supra*.

Zarda likewise misses the mark in contending (at 38) that "a company that imposes female sex stereotypes on women and male sex stereotypes on men does not thereby insulate itself from liability under Title VII." That is true, but irrelevant. To use Zarda's example (at 38-39), an employer who "fires both a woman like Hopkins for being too 'macho' and a man for not being sufficiently 'manly'" does not violate Title VII because of a free-standing ban on stereotypes. Rather, the employer violates Title VII because it would be treating a subset of women (macho women) worse than a similarly situated subset of men (macho men) *and*—in a separate act of

discrimination—treating a subset of men (effeminate men) worse than a similarly situated subset of women (effeminate women). Each practice separately violates Title VII because each results in "disparate treatment of men and women." *Manhart*, 435 U.S. at 707 n.13 (citation omitted). By contrast, sexual-orientation discrimination, standing alone, does not result in any subset of either sex being treated worse than a similarly situated subset of the opposite sex.

To be clear, Title VII prohibits disparate treatment of men and women *regardless* of sexual orientation. Gay, lesbian, and bisexual employees, no less than straight employees, may invoke *Price Waterhouse* if they are subjected to gender-based stereotypes; a gay man who is fired for being too effeminate has just as strong a claim as a straight man who is fired for that reason. See *Prowel* v. *Wise Bus. Forms, Inc.*, 579 F.3d 285, 290 (3d Cir. 2009). "[G]ay, lesbian, and bisexual individuals do not have *less* protection under *Price Waterhouse* against traditional gender stereotype discrimination than do heterosexual individuals." *Christiansen* v. *Omnicon Grp., Inc.*, 852 F.3d 195, 200-201 (2d Cir. 2017) (per curiam). Accordingly, a holding that Title VII does not prohibit sexual-orientation discrimination in no way "carv[es] out lesbian, gay, and bisexual employees from the protections Title VII affords." 17-1623 Pet. Br. 31.

Nor would such a holding be "profoundly unworkable," as Bostock contends. 17-1618 Pet. Br. 47; see *id.* at 47-57. To return to the example above, if an employer fires an effeminate gay man, but does not fire effeminate women, the task under *Price Waterhouse* and 42 U.S.C. 2000e-2(m) would be to determine whether the man's effeminacy was a significant motivating factor in the firing or whether he was instead fired solely

on the basis of his sexual orientation. The former would be evidence of impermissible disparate treatment (because he would have been treated less favorably than effeminate women); the latter would not. As in all Title VII cases, the answer depends on whether a similarly situated employee without the asserted trait would be treated more favorably. For example, if the employer would not fire masculine gay men, that suggests it is impermissibly relying on effeminacy, not sexual orientation. The same conclusion might be inferred if the employer also fires effeminate straight men. By contrast, if the employer would fire all gay men (masculine and effeminate alike) but retain effeminate straight men, that suggests it is relying on sexual orientation rather than effeminacy.

As in all Title VII cases, determining those answers may require resolving difficult and contested factual issues. But that neither makes the statute unworkable nor justifies judicially rewriting the statute to avoid such difficulties. See *Sebelius* v. *Cloer*, 569 U.S. 369, 381 (2013). And although Bostock asserts that courts have "gone off the tracks" in applying *Price Waterhouse*, 17-1618 Pet. Br. 54 (citation omitted), that largely is because they have incorrectly treated sex stereotyping as a standalone violation of Title VII instead of merely as evidence of disparate treatment of members of one sex compared to similarly situated members of the other. Cf. *Hamm*, 332 F.3d at 1062. A correct understanding of sex-stereotyping claims under *Price Waterhouse* would solve that problem.

C. Discrimination Because Of Sexual Orientation Does Not Constitute Improper Associational Discrimination

Zarda (at 31-36) and Bostock (at 18-23) contend that sexual-orientation discrimination violates Title VII because it amounts to "associational discrimination" on the basis of sex in the same way that discrimination against employees in interracial relationships amounts to discrimination on the basis of race. See 17-1623 Pet. App. 43-53. That contention is incorrect and the analogy to racial discrimination is fundamentally inapposite.

In *Loving* v. *Virginia*, 388 U.S. 1 (1967), this Court observed that it "has consistently repudiated 'distinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.'" *Id.* at 11 (brackets and citation omitted). Reflecting the fact that race-based distinctions often are rooted in beliefs that one race is superior to another, see *ibid.*, nearly all such distinctions are invidious classifications that "seldom provide a relevant basis for disparate treatment," *Fisher* v. *University of Texas*, 136 S. Ct. 2198, 2208 (2016) (citation omitted). Employees who otherwise are similarly situated thus do not become dissimilar merely by virtue of a racially based distinction (such as being in an interracial relationship). Cf. *Michael M.* v. *Superior Court*, 450 U.S. 464, 478 (1981) (Stewart, J., concurring) (observing that "people of different races are always similarly situated"). So even if, for example, an employer refuses to hire both white and black applicants in interracial marriages, it violates Title VII because it has treated each subset of applicants (white applicants with black spouses and black applicants with white spouses) worse than a similarly situated subset of a different race

(*i.e.*, black applicants with black spouses and white applicants with white spouses, respectively). See pp. 25-26, *supra*.

That analysis does not extend to sex discrimination. Unlike race-based distinctions, sex-based distinctions are not invariably invidious, as for instance when they reflect physiological differences between men and women. See 17-1623 Pet. App. 99 (Lynch, J., dissenting). So unlike with race, a difference in sex *can* make two otherwise similarly situated people dissimilar "in certain circumstances." *Michael M.*, 450 U.S. at 469 (plurality opinion). That is why separate male and female bathrooms do not categorically violate Title VII—even though separate bathrooms for employees of different races would. See 17-1623 Pet. App. 103 (Lynch, J., dissenting). As this Court has recognized, "[p]hysical differences between men and women * * * are enduring" and "'the two sexes are not fungible.'" *United States* v. *Virginia*, 518 U.S. 515, 533 (1996) (brackets and citation omitted). Indeed, those differences may even "require alterations" to previously sex-neutral policies to make them sex-specific. *Id.* at 550 n.19. A distinction based on sex is therefore "discrimination" within the meaning of Title VII only if it results in treating members of one sex worse than similarly situated members of the other.

It follows that an employer who discriminates against employees in same-sex relationships does not engage in discrimination because of "sex" as long as the employer treats men in same-sex relationships the same as women in same-sex relationships. By contrast, the arbitrary and stigmatizing nature of race-based distinctions means that an employer who discriminates against employees in interracial relationships per se treats similarly situated employees differently on the

basis of race. The ordinary meanings of "discrimination because of race" and "discrimination because of sex" reflect that commonsense legal understanding. An employer who refuses to hire an applicant in an interracial relationship would rightly be branded a racist. But no ordinary speaker of English would call an employer who refuses to hire an applicant in a same-sex relationship a sexist.

D. Congress Has Ratified The Settled Understanding That Title VII Does Not Prohibit Discrimination Because Of Sexual Orientation

This Court has long held that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978). In *Texas Department of Housing & Community Affairs* v. *Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015), for example, the Court observed that in 1988, when Congress amended the Fair Housing Act (FHA), 42 U.S.C. 3601 *et seq.*, it "was aware of th[e] unanimous precedent" of the courts of appeals holding that the FHA authorized disparate-impact claims, and "with that understanding, [Congress] made a considered judgment to retain the relevant statutory text." 135 S. Ct. at 2519. The Court reasoned that "Congress' decision in 1988 to amend the FHA while still adhering to the operative language * * * is convincing support for the conclusion that Congress accepted and ratified" the prevailing interpretation of that language. *Id.* at 2520. As the Court explained, if "a word or phrase has been . . . given a uniform interpretation by inferior courts . . . , a later version of that act perpetuating the wording is presumed

to carry forward that interpretation." *Ibid.* (citation omitted).

Here, Congress reenacted Title VII's operative provisions in the Civil Rights Act of 1991 despite the unanimous interpretation at the time—binding in as many as six circuits and applied nationwide by the EEOC—that the statute did not prohibit sexual-orientation discrimination. See pp. 3-4, *supra*. No court of appeals had held otherwise. Congress is presumed to have been aware of that uniform and unanimous precedent. See *Inclusive Communities*, 135 S. Ct. at 2519-2520; *Lorillard*, 434 U.S. at 580-581. Indeed, the same Congress that enacted the 1991 amendments just months earlier had declined to pass a pair of bills to add "affectional or sexual orientation" to Title VII. See pp. 3-4, *supra*. As its sponsors themselves recognized, the proposed legislation was necessary because sex discrimination is different from sexual-orientation discrimination and there was an "absence of Federal laws" prohibiting the latter. 137 Cong. Rec. 5261, 6161 (1991) (statements of Sen. Cranston and Rep. Weiss). That express recognition belies any "inference that the existing legislation already incorporated the offered change." *Pension Benefit Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 650 (1990) (citation omitted).

The argument for congressional ratification of the uniform interpretation of Title VII's language is particularly strong here because the 1991 amendments expressly abrogated several decisions that Congress believed had "sharply cut back on the scope and effectiveness" of the statute. *Ricci* v. *DeStefano*, 557 U.S. 557, 624 (2009) (Ginsburg, J., dissenting) (quoting H.R. Rep. No. 40, 102d Cong., 1st Sess. Pt. 2, at 2 (1991)). For example, Congress modified the framework for disparate-impact claims in response to *Wards Cove Packing Co.* v.

Atonio, 490 U.S. 642 (1989), see 42 U.S.C. 2000e-2(k), and for mixed-motive claims in response to *Price Waterhouse*, see 42 U.S.C. 2000e-2(m) and 2000e-5(g)(2). Yet Congress let stand the unanimous interpretation of the statute as excluding claims of sexual-orientation discrimination. As in *Lorillard*, Congress's decision to override some (but not all) judicial and administrative interpretations of statutory language "strongly suggests that but for those changes Congress expressly made," it intended that the statute be read consistent with those well-established interpretations. 434 U.S. at 581-582.

Moreover, in the years since the 1991 amendments, Congress consistently and repeatedly has declined to enact bills adding sexual orientation to the list of Title VII's protected traits. See pp. 3-4, *supra*. Until recently, that was against the backdrop of an even more robust judicial and administrative consensus: by March 2017, all eleven courts of appeals that had addressed the issue had determined that Title VII does not prohibit sexual-orientation discrimination; the Department of Justice agreed with that unanimous view; and until 2015, the EEOC had consistently held for decades that sexual-orientation discrimination is not actionable under Title VII, including after this Court's decisions in *Price Waterhouse* and *Oncale*. See pp. 3-4, *supra*.

Congress "has not been shy" about amending anti-discrimination statutes to disapprove judicial or administrative interpretations that it deems unduly narrow. *General Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581, 594 n.7 (2004). Title VII is no exception, as the 1991 amendments demonstrate. In addition, Congress reacted swiftly to this Court's decision in *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), to make clear that

"[t]he terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions." 92 Stat. 2076. Yet Congress did not amend Title VII to add sexual orientation despite the once-unanimous view of eleven courts of appeals that sexual orientation is not covered by the statute. Such "congressional silence after years of judicial interpretation supports adherence to" that uniform interpretation. *Cline*, 540 U.S. at 594.

* * * * *

The question here is not whether Title VII should forbid employment discrimination because of sexual orientation, but whether it already does. The statute's plain text makes clear that it does not; discrimination because of "sex" forbids treating members of one sex worse than similarly situated members of the other—and discrimination on the basis of sexual orientation, standing alone, does not result in such treatment. Congress has amended other statutes expressly to cover sexual-orientation discrimination, and it remains free to do the same with Title VII. But until it does, this Court should enforce the statute as it is written.

CONCLUSION

The judgment of the court of appeals in No. 17-1618 should be affirmed and the judgment of the court of appeals in No. 17-1623 should be reversed.

Respectfully submitted.

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