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., *ET AL.*, *Petitioners*,
v.
MELISSA ZARDA, AS EXECUTOR OF THE ESTATE OF DONALD ZARDA, *ET AL.*, *Respondents*.

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

Brief *Amicus Curiae* of Public Advocate of the United States, Conservative Legal Defense and Education Fund, Poll Watchers, Policy Analysis Center, Eagle Forum Foundation, Pastor Chuck Baldwin, Restoring Liberty Action Committee, and Center for Morality in Support of the Employers

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INTEREST OF THE *AMICI CURIAE*[1]

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Some of these *amici* previously filed two *amicus* briefs in this case:

- Brief *Amicus Curiae* of Public Advocate of the United States, *et al.*, in the U.S. Court of Appeals for the Second Circuit on rehearing *en banc* (July 26, 2017); and

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

- Brief *Amicus Curiae* of Public Advocate of the United States, *et al.*, in the Supreme Court of the United States on Petition for Certiorari (July 2, 2018).

Additionally, some of these *amici* previously filed two briefs addressing a related issue in Harris Funeral Homes v. EEOC (now before this Court as No. 18-107; oral argument scheduled for October 8, 2019):

- Brief *Amicus Curiae* of Public Advocate of the United States, *et al.*, in the U.S. Court of Appeals for the Sixth Circuit (May 24, 2017); and
- Brief *Amicus Curiae* of Public Advocate of the United States, *et al.*, in the Supreme Court of the United States on Petition for Certiorari (July 2, 2018). (This was the only *amicus* brief filed in support of the petition for certiorari.)

STATEMENT OF THE CASE

The sole question now before the Court is whether the provision of Title VII of the Civil Rights Act of 1964, which prevents employment discrimination based on "sex,"[2] prohibits discrimination based on

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[2] *See* 42 U.S.C. § 2000e-2. "It shall be an unlawful employment practice for an employer — (1) 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 race, color, religion, **sex**, or national origin...." (Emphasis added.)

"sexual orientation." The Eleventh Circuit determined that it did not. *See* Bostock v. Clayton Cty. Bd. of Comm'rs, 723 Fed. Appx. 964 (11th Cir. 2018), *rehearing denied* 894 F.3d 1335 (11th Cir. 2018).

A panel of the Second Circuit initially agreed that the Civil Rights Act did not prohibit such discrimination, based on prior decisions of the Second Circuit.[3] However, the Second Circuit then ordered rehearing *en banc* to review and reconsider its prior decisions.[4] *See* Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018) *en banc* ("Zarda"). After *en banc* review and over vigorous dissents, on February 26, 2018, the Second Circuit determined that the meaning of one word contained in a 1964 law — "sex," a provision which had not been amended in the ensuing 54 years — now had a new meaning never before realized by that circuit or any other circuit court — until Hively v. Ivy Tech Comm. College of Ind., 853 F.3d 339 (7th Cir. 2017) was decided by the Seventh Circuit on April 4, 2017. Until that decision 10 months earlier, eleven circuit courts, including the Second Circuit, had considered the question, and all had concluded that, by its terms, Title VII does not prohibit sexual orientation discrimination, and until 2015, this

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[3] The panel had correctly understood that two earlier Second Circuit decisions had definitively ruled that sexual orientation was not included in Title VI's prohibition of discrimination based on "sex": Simonton v. Runyon, 232 F.3d 33 (2d Cir. 2000); and Dawson v. Bumble & Bumble, 398 F.3d 211 (2d Cir. 2005). *See* Zarda v. Altitude Express, 855 F.3d 76, 80-81 (2d Cir. 2017).

[4] Zarda v. Altitude Express, 2017 U.S. App. LEXIS 13127 (2d Cir. 2017).

also had been the position of the Equal Employment Opportunity Commission ("EEOC"). *See* Zarda at 155, n.25 (Lynch, J., dissenting).

SUMMARY OF ARGUMENT

In wild abandon of its own recent precedents to the contrary, the U.S. Court of Appeals for the Second Circuit, sitting *en banc,* ruled that discrimination "because of sex," as it appears in Title VII of the 1964 Civil Rights Act comprehends discrimination "because of sexual orientation." To reach this result, the *en banc* Court rushed right past numerous canons of statutory interpretation, disregarding the supremacy of the text, the ordinary meaning, the fixed meaning, the omitted case, the general terms, and the grammar canon. In justification of this roughshod treatment, the Second Circuit's Chief Judge pronounced that "legal doctrine evolves." Law is not only what the judges say it is, but in the bosom of every judge are laws yet to emerge by judicial fiat, should that be necessary to keep the law abreast of changing times and needs. Applying these tenets of evolutionary law to Title VII's definition of "sex," the courts have waited long enough for Congress to bring the law up to snuff. It was time for the courts to act.

Now that the courtroom door has been opened, the court's mission is changed from a search to comprehend the rules designed by Congress to implementing a new national policy on sex discrimination in the workplace with a new set of rules. Boldly, Zarda proposes that policy to be that Title VII protect American workers from

discrimination because of their sex by striking at the "entire spectrum" of sex-based disparate treatment. To reach this goal, Zarda lays down two rules. First, unless it can be shown that a sex-based rule relates directly to a worker's capacity to do the job, there can be no such sex-based rule. Second, there can be no rules denying equal employment opportunity based on moral beliefs about sex. As applied to Zarda, Title VII was violated because there was no evidence that his being a gay man interfered in any way with his job competence, and his dismissal from his employment for being gay was impermissibly based upon his employer's moral prejudice against his sexual identity as a gay man.

Applying these rules across-the-board of sexual stereotypes, could not a serial adulterer, a predator, or a pedophile be discriminated against and denied equal employment opportunity if dismissed for their exhibiting behavior in violation of a sex-based stereotype? Any person terminated would assert that none of these sex-based categories has anything to do with job competence, and thus dismissal would be based upon the impermissible ground of his sexual identity. Should the Second Circuit's re-writing of Title VII be imposed nationally by this Court, the flood gates will open and soon the nation will learn that gays, lesbians and bisexuals are not the only categories of persons who violate sex-based stereotypes and can be protected by judicially crafted legal theories.

ARGUMENT

I. THE SECOND CIRCUIT'S EFFORT TO BAN DISCRIMINATION BASED ON SEXUAL ORIENTATION IS NOT GROUNDED IN THE STATUTORY TEXT.

A. The Zarda Decision Violates Numerous Principles of Statutory Interpretation.

The Second Circuit's *en banc* majority opinion was unable to locate a ban on "sexual orientation" in the text of Title VII by applying traditional canons of statutory interpretation. The Brief for Petitioners Altitude Express, Inc., and Ray Maynard ("Altitude Express Br.") in Zarda and the Brief for Respondent Clayton County in Bostock ("Clayton County Br.") systematically identify and apply each applicable rule of construction, and persuasively explain how the conclusion reached by the Second Circuit violates multiple canons of statutory interpretation, including:

- the supremacy-of-text principle;
- the ordinary-meaning canon;
- the fixed-meaning canon;
- the omitted-case canon;
- the general-terms canon; and
- the grammar canon.

See Clayton County Br. at 10-17; Altitude Express Br. at 11-29.

The comprehensive dissent in Zarda by Judges Lynch and Livingston correctly pointed out the

impossibility of Congress actually intending to prohibit sexual orientation discrimination. They explained that, at the time that the 1964 Act was considered, "[d]iscrimination against gay women and men ... was not on the table for public debate.... Illinois ... [just] had become the first state to repeal laws prohibiting private consensual adult relations between members of the same sex.... In addition to criminalization, gay men and women were stigmatized as suffering from mental illness." Zarda at 140 (Lynch, J., dissenting).

The first reason given by Chief Judge Katzmann for the majority's conclusion that it should not be limited by the statutory text was its view that "legal doctrine **evolves**." Zarda at 107 (emphasis added).[5] The parameters of the court's evolutionary view were not identified, leaving unanswered many questions, such as the following:

- What causes statutory text to evolve and how do we know when it happens — a change in judicial personnel, or a felt change in the mood of the body politic?
- Who decides when a law evolves to have a new meaning — judges?[6]

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[5] This evolutionary rationale was repeated and enforced in the summary of the decision — "[s]ince 1964, the legal framework for evaluating Title VII claims has **evolved substantially**." Zarda at 131 (emphasis added).

[6] During an oral argument, Justice Scalia exposed the illogic of bestowing upon judges the power to first decide when law evolves.

> Justice Scalia: We don't prescribe law for the future. We ... decide what the law is. I'm curious, **when** ... did it become unconstitutional to exclude

- Can a judge determine that the law evolves to take away rights previously believed to be given by Congress, or can it only grant new rights?
- When new rights are granted, need the judge consider whether they come at the cost of limiting the rights of others?

Thus, the notion that words in a statute "evolve" is at war with the principle that a court should seek out what Judge Sykes referred to as the "original public meaning" of a statute. *See* Hively at 360, 362 (Sykes, J., dissenting). A reference to the evolution of a statute is nothing more than a rationalization used by judges who wish to usurp Article I legislative authority to implement their personal agenda by fiat — not a principle of law deserving of respect.

For a second reason given to support its opinion, the Second Circuit offered a 2015 ruling by the EEOC that, for the first time, held that "'sexual orientation is

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> homosexual couples from marriage? 1791? 1868, when the Fourteenth Amendment was adopted?.... **When** do you think it became unconstitutional? Has it always been unconstitutional? ...
> Mr. Olson: It was constitutional **when we — as a culture determined** that sexual orientation is a characteristic of individuals that they cannot control, and that that —
> Justice Scalia: I see. **When** did that happen?
> Mr. Olson: There's **no specific date** in time. This is an **evolutionary** cycle. [Hollingsworth v. Perry, 570 U.S. 693 (2013) oral argument at 38-39 (emphasis added).]

inherently a "sex-based consideration," and accordingly, that an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII.'" Zarda at 107. However, this new agency ruling was not binding on any federal court and was at odds with eleven federal circuit court decisions.[7] Moreover, the EEOC principally grounded its decision on a weak argument:

> Complainant's claim of sexual orientation discrimination alleges that the Agency relied on sex-based considerations and **took his sex into account** in its employment decision ... therefore, has stated a claim of sex discrimination.... A complainant alleging that an agency took his or her sexual orientation into account in an employment action necessarily alleges that the agency took his or her sex into account. [Baldwin v. Foxx, EEOC Decision No. 0120133080, 2015 EEOPUB LEXIS 1905, 2015 WL 4397641 at 13 (July 16, 2015) (emphasis added).]

The Second Circuit never delved into the reasons that the EEOC changed its long-standing statutory interpretations, or how such a radical change in agency policy should be viewed by the court. (In Section II, *infra*, these *amici* discuss the utter unworkability of the EEOC policy change to prevent employers from taking sex into account in any

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[7] *See* Zarda at 115, n.25 (Lynch, J., dissenting).

employment decision. *See also* Altitude Express Br. at 52-59.)

Third, to justify *en banc* review, the Second Circuit then referenced two circuit court opinions. The first was Evans v. Ga. Regional Hosp., 850 F.3d 1248 (11th Cir. 2017). However, in that case, decided in March 2017, the month before Hively was decided, the Eleventh Circuit refused to adopt the new theory. Thus, this decision provided no actual support for the Second Circuit's desire to change the meaning of the statute. The only favorable court decision[8] cited to support rehearing *en banc* was Hively v. Ivy Tech Cmty. College of Ind., 853 F.3d 339 (7th Cir. 2017) (*en banc*) as providing a "potential persuasive force" to support protection for sexual orientation. Zarda at 108. However, Hively could scarcely be viewed as an exercise in statutory interpretation. In that case, concurring Judge Posner actually chided the *en banc* majority for lacking candor, vainly attempting to justify its decision based on law when it was really based on policy or political considerations with virtually no support in law. Judge Posner explained how such a revolutionary decision legitimately could be reached by a court: by changing the meaning of an unambiguous statute. Judge Posner's analysis returned to the same notion embraced by Judge Katzmann — that the law evolves, and the judges will tell us when it occurs and how it occurs. Using antitrust law as an illustration, Judge Posner came

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[8] The majority opinion by Judge Katzmann also cited a prior concurring decision which he had written in 2017.

out forthrightly in support of a judicial power to rewrite laws as the courts feel necessary.

> Finally and most controversially, interpretation can mean giving a **fresh meaning** to a statement (which can be a statement found in a constitutional or statutory text) — a meaning that infuses the statement with vitality and significance today.... **Times have changed**.... [J]udicial interpretation ... consists **of making old law satisfy modern needs** and understandings. And a common form of interpretation it is, despite its flouting "original meaning." Statutes and constitutional provisions frequently are interpreted on the basis of **present need** and **present understanding rather than original meaning** — constitutional provisions even more frequently, because most of them are older than most statutes. [Hively at 352-53 (emphasis added) (Posner, J., concurring).]

Thus, former Judge Posner admitted that he viewed his role as a federal judge to include the exercise of legislative power vested in Congress. He used that power to reach what he believed to be "a sensible resolution of this dispute," instead of saying what the law is and applying the law in an impartial manner. This is not the rule of law — it is the rule of judges exercising will instead of judgment.[9] Judge

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[9] *See* Osborn v. Bank of the United States, 22 U.S. 738, 866 (1824) ("Judicial power is never exercised for the purpose of giving effect

Posner simply follows in the footsteps of his hero[10] Justice Oliver Wendell Holmes, Jr. *See* Fred V. Cahill, Judicial Legislation (Ronald Press Co.: 1952) at 37-45. This apparently is the same judicial school of thought to which Chief Judge Katzmann belongs. As Holmes explained his view: "The Life of the law has not been logic; it has been experience." O.W. Holmes, Jr., The Common Law, Lecture 1 (1881).

The majority opinion addressed directly the "original public meaning" argument. To its credit, it set out a clear statement of that view by citing Judge Sykes' excellent dissenting opinion in Hively. Judge Sykes posed the question — "[i]s it even remotely plausible that in 1964, when Title VII was adopted, a reasonable person competent in the English language would have understood that a law banning employment discrimination 'because of sex' also banned discrimination because of sexual orientation?" Hively, at 362 (Sykes, J., dissenting). The majority opinion dismissed this argument and tried to show that the meanings of laws change, by referencing a 1974 district court[11] decision which rejected a Title VII claim based on sexual harassment in the workplace, since such claims are now recognized to lie under Title VII. An argument built on one outlier district court

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to the will of the Judge," but "always for the purpose of giving effect ... to the will of the law.").

[10] *See* A. Mendenhall, "Richard Posner Is a Monster," *Los Angeles Review of Books* (Dec. 1, 2016).

[11] Barnes v. Train, 1974 U.S. Dist. LEXIS 7212, 1974 WL 10628, at *1 (D.D.C. 1974).

case, issued in the 1970s, which was then reversed by the relevant Circuit, provides scant support for his argument.

Lastly, the Second Circuit belittles the statutory argument and the arguments advanced in what it terms the Lead Dissent (by Judges Lynch and Livingston), but never actually rules on it:

> We take no position on the substance of the dissent's discussion of the legislative history or the zeitgeist of the 1960s, but we respectfully disagree with its approach to interpreting Title VII.... [Zarda at 115.]

The Second Circuit characterizes a search for the "original public meaning" of the statutory language as a search for "legislative history" and "zeitgeist" so as to marginalize its importance. However, its decision to "take no position" on the meaning of the statutory text reveals that perceived "evolution" trumped a search for objective meaning of the text in the minds of a majority of the Second Circuit judges.

B. The Zarda Decision Violates Important Constitutional Principles.

By expanding the coverage of the statutory language to include activity that was not prohibited by the statute itself, the Second Circuit has amended the statute. Several constitutional principles are violated when courts amend statutes. First, and probably foremost, is the violation of the separation of powers, the primary purpose of which is to protect the liberty

of the People from encroachments on their rights by their representatives in government. Madison explained this in no uncertain terms:

> The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed, or elective, may justly be pronounced the very definition of tyranny. [Federalist No. 47, G. Carey & J. McClellan, The Federalist (Liberty Fund: 2001).]

Quoting Montesquieu, Madison warned that "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for THE JUDGE would then be THE LEGISLATOR." *Id.*

With respect to the independent judiciary taking on the roles of other branches of government, particularly the legislative role, Hamilton also warned:

> It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature.... The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. [Federalist No. 78.]

Hamilton believed that there are two protections for the people against threats to liberty by the legislative branch. First, the legislature is elected by the people, and thus answerable to the people. Second, "the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments." Federalist No. 78. If the judiciary chooses to exercise "will" (the creation of law) instead of "judgment" (the application of law to specific cases), then both of the protections Hamilton pointed to will be lost.

Thus, if this Court violates constitutional principles in order to reach a particular result — amending a statute, in effect — then it violates the Rule of Law. The Rule of Law protects the liberties of all individuals, including certain favored minorities. Without the Rule of Law, no individual's liberties are safe, but rights of any group of people depend on the whim of the judge before whom their case is brought. For this reason alone, this Court is urged to reject the call to amend Title VII.

II. ZARDA WRONGFULLY PRESUMES THAT TITLE VII STRIKES AT THE ENTIRE SPECTRUM OF SEX-BASED DISPARATE TREATMENT.

A. Zarda Interprets Title VII to Protect Homosexuals First, but Not Only.

The theory relied on by the Second Circuit to bring sexual orientation under the statutory term "sex" is irrational and limitless.

The Second Circuit explained how it reached its view that sexual orientation discrimination is a subset of sex discrimination:

> We now conclude that sexual orientation discrimination is **motivated, at least in part, by sex** and is thus a subset of sex discrimination. Looking first to the text of Title VII, the most natural reading of the statute's prohibition on discrimination "because of ... sex" is that it extends to sexual orientation discrimination because **sex is necessarily a factor** in sexual orientation. [Zarda at 112 (emphasis added).]

The Second Circuit's decision summarizes in one sentence the essence of its holding.

> Logically, 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. [Zarda at 113 (emphasis added).]

Thus, the Second Circuit's decision can be summarized to prohibit any employment decision where sex "is a factor" or which "is a function of sex." The Court's rule could not be more broad or unworkable.

This central holding as to the meaning of the statute was persuasively refuted not in a dissent, but in one of the concurring opinions. Referring to the statement by the majority, that it had relied on "'the

most natural reading of Title VII,'" Judge Dennis Jacobs responds clearly and candidly:

> Not really. "**Sex**," which is used in series with "race" and "religion," is one of the words **least likely to fluctuate in meaning**. I do not think I am breaking new ground in saying that the word "sex" as a personal characteristic **refers to the male and female** of the species. Nor can there be doubt that, **when Title VII was drafted in 1964**, "sex" drew the distinction between men and women. "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning [citation omitted]."
>
> In the opinion of the Court, the word "sex" undergoes modification and expansion.... It is undeniable that sexual orientation is a "function of sex" in the (unhelpful) sense that it cannot be defined or understood without reference to sex. But surely that is because it has to do with sex — as so many things do. ***Everything*** **that cannot be understood without reference to sex does not amount to sex itself** as a term in Title VII. So it seems to me that all of these arguments are circular as well as unnecessary. [Zarda at 134

(Dennis Jacobs, J., concurring) (emphasis added).][12]

Nevertheless, Zarda now urges this Court to adopt the Second Circuit's approach. In the Introduction to his Opening Brief on the merits, Respondent Zarda boldly declares that "Title VII protects American workers from discrimination because of their sex. It strikes at the **entire spectrum** of sex-based disparate treatment." Zarda Opening Brief ("Zarda Br.") at 2 (emphasis added). To that end, Zarda contends that "Title VII forbids an employer from denying a person equal employment opportunities because of the employer's view of how persons of that sex should act." *Id.* Thus, Zarda concludes that he — a "gay ... man attracted to other men" — was subjected to unlawful sex-based discrimination on the ground that "he was fired because he did not conform to the sex stereotype that men should be attracted only to women." *Id.* at 3. Then, in his Summary of the Argument, Zarda asserts that "Title VII's commitment to providing workers with equal employment opportunities without regard to their sex requires protecting people against discrimination for being lesbian, gay, or bisexual." *Id.* at 10. Such discrimination, he maintains, "is a form of prohibited sex stereotyping ... that men should be attracted only to women and that women should be attracted only to men[, which] has nothing to do with a worker's capacity to do the job." *Id.* at 11. Zarda's view of Title VII is that it created a broad range of

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[12] Judge Dennis Jacobs concurred in the result because he agreed with the portion of the opinion dealing with associational discrimination.

protections first for homosexuals, but really for all manner of persons engaged in different sexual practices. The Second Circuit's theory that any employment decision "motivated, as least in part, by sex and is thus a subset of sex discrimination" (Zarda at 112) is both wholly unsupported by Title VII and untethered to reality.

B. Zarda's View of Title VII Opens the Door to Protections for All.

Following the Second Circuit's line of reasoning, Title VII would, for example, protect persons from adverse actions if they fit into any one of the following sex-based categories:

- men attracted to female prostitutes, and women attracted to male prostitutes;
- men attracted to women not their wives, and women attracted to men, not their husbands; and
- men attracted to under age girls, and women attracted to under age boys.

After all, Zarda would argue that none of the sexual stereotypes violated by such persons, like homosexuality, have anything to do with job performance:

> [the] sex-based stereotype that men should be attracted only to women and vice versa is particularly unjustifiable as the basis for an adverse employment action as it is so utterly

> unrelated to performance on the job. [*Id.* at 25-26.]

But there is more at stake here than job competence. Even Zarda has acknowledged that "'moral beliefs' and 'sex-based stereotypes' are not mutually exclusive categories." *Id.* at 26. In other words, he admits that there can be a clash between sex-based stereotypes and moral beliefs that adversely affects "equal ... opportunity" in the workplace. *See id.* at 26-27. Zarda attempts a Houdini-like escape from this clash by his assertion that "Title VII ... does not forbid such moral beliefs, but it does prohibit using them to deny equal employment opportunities to individual workers." *Id.* at 27.

However, when in doubt, "equality wins out" — first for gay, lesbian, and bisexual workers, and then domino-like, for the unnamed persons not living up to an employer's sex-based stereotypes — the sexual purchaser, the serial adulterer, and the pedophile, as well as a host of others of varying sexual proclivities. Take, for example, recently exposed men in high office who have been "outed" for sexual harassment to gain sexual advantage over younger women seeking to advance their business or professional career. Under Zarda's expansive "spectrum of sex-based disparate treatment" (Zarda Br. at 2) — if one is dismissed from his employment on the ground of such sexual misbehavior, all that he need do is assert that he was dismissed because of "sex," namely for his "being" a member of the sexual stereotype that married men should be attracted only to their wives. Analogizing from the first paragraph of Zarda's Summary of the

Argument, which elevates the interests of "lesbian, gay, or bisexual" persons over all others, the answer must be in the affirmative. Zarda asserts:

> Title VII's commitment to providing workers with equal employment opportunities without regard to their sex requires **protecting people** against discrimination for being lesbian, gay, or bisexual. [*Id.* at 10 (emphasis added).]

Would it not follow, *a fortiori*, that members of other sex-based stereotypes — such as adulterers, predators, pedophiles, and the like — could make the same argument that their sex requires that they be protected against discrimination for violating sex stereotypes that persons should behave otherwise? Indeed, in summation, that is exactly what Zarda contends:

> Title VII rejects using sex-based generalizations to make employment decisions, whether those generalizations rest on **beliefs about** the capacity ... of men to do a job at all or on normative beliefs about **how a person** of a particular sex **should behave**. [*Id.* at 11 (emphasis added; italics original).]

In reality, Zarda's view would weaponize Title VII, arming the Harvey Weinsteins of the world with a sex discrimination claim with which to counter the #MeToo movement against sexual predators in the workplace. Under Zarda's view of the law, no employer decisions may have a moral foundation:

> Employers, like all other Americans, retain the right to their moral views about how individuals of a particular sex should lead their lives. But Title VII prevents an employer from using those views to limit individuals' employment opportunities. [Zarda Br. at 17.]

CONCLUSION

For the reasons set forth above, the Second Circuit's decision in Zarda should be reversed, and the Eleventh Circuit's decision in Bostock should be affirmed.

Respectfully submitted,

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