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

# In the Supreme Court of the United States

GERALD LYNN BOSTOCK, *Petitioner*,
V.
CLAYTON COUNTY, GEORGIA, *Respondent*.

ALTITUDE EXPRESS, INC., *et al.*, *Petitioners*,
V.
MELISSA ZARDA, *et al.*, *Respondents*.

R.G. & G.R. HARRIS FUNERAL HOMES, INC., *Petitioner*,
V.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND AIMEE STEPHENS, *Respondents*.

*On Writs of Certiorari to the United States Courts of Appeals for The Eleventh, Second, and Sixth Circuits*

## BRIEF OF *AMICI CURIAE* BUSINESS ORGANIZATIONS IN SUPPORT OF THE EMPLOYERS

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## INTEREST OF *AMICI CURIAE*[1]

The C12 Group ("C12") is the largest network of Christian CEOs, business owners, and executives in the United States. Its members include more than 2,350 CEOs, presidents, business owners, and executives representing nearly 1,600 businesses. Collectively, these businesses span all industry sectors, employ hundreds of thousands of employees, and represent billions of dollars of revenues. C12 members share deeply held religious beliefs, view their business and vocation as expressions of their faith, and embrace a faith-based duty to bring goodness and transformation to the communities in which they operate.

Fellowship of Companies for Christ International ("FCCI") was formed in 1978 to encourage and equip Christian business leaders and business owners. Over its 40-year history, FCCI's membership has included thousands of CEOs, business owners, and executive leaders in virtually every state and an expansive variety of industries. Through a number of means, FCCI helps its members to operate their businesses and conduct their personal lives in accordance with Christian principles.

*Amici* submit this brief to bring to the Court's attention the destabilizing effects on businesses of interpreting the Title VII's prohibition on

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[1] No party or counsel for a party authored this brief in whole or in part. No one other than Amici or their counsel made a monetary contribution to preparing or submitting this brief. Each of the parties has consented to the filing of this amicus brief.

discrimination because of "sex" to mean discrimination because of "gender identity" or "sexual orientation."

## SUMMARY OF ARGUMENT

For decades, the courts, employment law practitioners, rights advocates, academics, and employers all understood that the term "because of … sex" in Title VII does not mean because of "gender identity" or because of "sexual orientation." Indeed, a candid assessment of the ordinary meaning of the statutory term "sex" at the time of the passage of Title VII shows that Congress could not have intended it to encompass gender identity and sexual orientation; the concept of including such traits in an antidiscrimination law was unheard of in 1964.

Given this consensus, whether Title VII should be amended to include gender identity and sexual orientation as protected traits has been the subject of legislative debate for decades. Numerous alternatives have been considered by Congress, including proposed standalone statutes focused on gender identity and sexual orientation issues in the employment context. During this decades-long debate, employers and other interested parties have raised significant issues and concerns implicated by the inclusion of these traits in a federal antidiscrimination statute, such as impacts on privacy interests and the effects of disparate impact claims. Indeed, the various legislative proposals have reflected attempts to address these concerns, but none has passed.

The decisions of the Second and Sixth Circuits below, however, ignore the ordinary meaning of the statutory terms, thereby bypassing the political process, shutting down debate, preventing any accommodation of divergent views, and precluding any compromise. By interpreting "sex" in Title VII to encompass gender identity and sexual orientation, the lower courts have effectively amended the statute by judicial fiat. These decisions should be reversed.

## ARGUMENT

### I. The statutory interpretations of the Second and Sixth Circuits undermine the political process and fail to consider employer concerns.

#### A. Our constitutional system and the businesses operating within it depend on courts interpreting statutes according to their ordinary meaning at the time of enactment.

It is a fundamental rule that courts must interpret the words of a statute as taking their "ordinary meaning ... at the time Congress enacted the statute." *Perrin v. United States*, 444 U.S. 37, 42 (1979); *see also Summit Valley Indus. v. United Bhd. of Carpenters & Joiners*, 456 U.S. 717, 722 (1982) (given rule of construction, "petitioner's claim can succeed only if an examination of the relevant legislative history demonstrates that Congress intended to give a broader than normal scope to the [statutory] term").

This rule is vital to maintain our constitutional order. "After all, if judges could freely invest old statutory terms with new meanings, we would risk amending legislation outside the 'single, finely wrought and exhaustively considered, procedure' the Constitution commands." *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019).

The judicial foreclosure of the political process is of especial concern to businesses. In promulgating statutes governing business, Congress must often balance conflicting considerations. Judicial injection of new meaning to statutory terms precludes businesses from effectively presenting facts and concerns for consideration; Congress "has the capacity to investigate and analyze facts beyond anything the Judiciary could match." *GMC v. Tracy*, 519 U.S. 278, 309 (1997); *see also Bush v. Lucas*, 462 U.S. 367, 389 (1983) (Congress "may inform itself through factfinding procedures such as hearings that are not available to the courts").

### B. Interpreting "because of … sex" to mean because of "gender identity" or because of "sexual orientation" would ignore the ordinary meaning of the statutory language and short-circuit the political process.

The holdings of the Second and Sixth Circuits below violate the rule that words in a statute must be interpreted according to their ordinary meaning *at the time* the statute was enacted. For decades since its enactment, the universal consensus has been that "sex" in Title VII does not embrace gender identity or

sexual orientation. Indeed, a recent treatise on LGBTQ employment discrimination law candidly explains that the gender identity and sexual orientation could not have been encompassed by the statutory language because those concepts were barely nascent when Title VII was passed in 1964:

> Title VII does not expressly extend protections on the basis of either sexual orientation or gender identity to LGBTQ workers in the United States. Indeed, there is no legislative history supporting the inclusion of protections for LGBTQ workers under Title VII's framework since the concepts of sexual orientation, gender identity and gender expression were only just coming into society's collective consciousness during the civil rights era of the 1960s, and sexual minorities (frequently referred to in popular culture at the time as sexual deviants, perverts, and sissies, among other slang and derogatory terms) had virtually no political clout at that time in American history.[2]

The courts too had this understanding. As the Ninth Circuit put it in rejecting a claim that Title VII prohibited discrimination based on "transsexuality":

> Giving the statute its plain meaning, this court concludes that Congress had only the traditional notions of "sex" in mind….

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[2] Davis & Lichtfield, 1 LGBTQ Employment Law Practice Guide § 1.03 (2018).

> Congress has not shown any intent other than to restrict the term "sex" to its traditional meaning. Therefore, this court will not expand Title VII's application in the absence of Congressional mandate. The manifest purpose of Title VII's prohibition against sex discrimination in employment is to ensure that men and women are treated equally, absent a bona fide relationship between the qualifications for the job and the person's sex.

*Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662-63 (9th Cir. 1977). The other circuit courts came to the same conclusion.[3]

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[3] *See Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999) ("[W]e regard it as settled law that ... Title VII does not proscribe harassment simply because of sexual orientation."); *Simonton v. Runyon*, 232 F.3d 33, 35 (2nd Cir. 2000) ("The law is well-settled in this circuit and in all others to have reached the question that ... Title VII does not prohibit harassment or discrimination because of sexual orientation."); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3rd Cir. 2001) ("It is clear ... that Title VII does not prohibit discrimination based on sexual orientation."); *Wrightson v. Pizza Hut of Am.*, 99 F.3d 138, 143 (4th Cir. 1996) ("Title VII does not afford a cause of action for discrimination based upon sexual orientation."); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979) ("Discharge for homosexuality is not prohibited by Title VII."); *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006) ("[S]exual orientation is not a prohibited basis for discriminatory acts under Title VII."); *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984) ("While we recognize distinctions among homosexuals, transvestites, and transsexuals, we believe that the same reasons for holding that the first two groups do not enjoy Title VII coverage apply with

This understanding was shared by practicing lawyers,[4] rights advocates,[5] and academics.[6]

The Second and Sixth Circuits break with this decades-long consensus without ever explaining how their interpretations are consistent with the ordinary meaning of the statutory terms at the time Title VII was enacted. *See Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227, 229 (2014) (considering "[d]ictionaries

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equal force to deny protection for transsexuals."); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) ("Title VII does not prohibit discrimination against homosexuals."); *Sommers v. Budget Mktg, Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) ("[D]iscrimination based on one's transsexualism does not fall within the protective purview of [Title VII]."); *De Santis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 329-30 (9th Cir. 1979) ("we conclude that Title VII's prohibition of 'sex' discrimination … should not be judicially extended to include sexual preference such as homosexuality"); *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005) ("Title VII's protections ... do not extend to harassment due to a person's sexuality.").

[4] *See, e.g.*, Thomas H. Barnard & Timothy J. Downing, *Emerging Law on Sexual Orientation and Employment*, 29 U. MEM. L. REV. 555, 565 (1999) ("there is currently no federal law on the books on the topic of employment discrimination on the basis of sexual orientation").

[5] Tracy Davis & Sarah Oppenheim, *Legislative Focus: Extending Non-Discrimination in Employment to Gays and Lesbians*, 7 HUM. RTS. BR. 32, 32 (2000) ("Transgendered people are not included in current non-discrimination laws, including Title VII …").

[6] Brian S. Barnett, et al., *The Transgender Bathroom Debate at the Intersection of Politics, Law, Ethics, and Science*, 46 J. OF THE AM. ACADEMY OF PSYCHIATRY AND THE LAW 232 (2018) ("Although activists have been advocating for national nondiscrimination laws for lesbian, gay, bisexual, transgender, and queer (LGBTQ) individuals for over 30 years, none has been passed.").

from the era of [the statute's] enactment" and the "historical context surrounding [the statute's] passage"). The Judiciary, however, does not have "*carte blanche*" to deviate from ordinary meaning of statutory terms. *Bilski v. Kappos*, 561 U.S. 593, 603 (2010).

### C. Decades of legislative efforts also demonstrate that "sex" does not embrace gender identity and sexual orientation.

Congress has also demonstrated that the term "sex" in Title VII does not encompass gender identity or sexual orientation. Since the mid-1970s, there have been numerous efforts to amend Title VII or pass separate legislation to prohibit employment discrimination based on gender identity and sexual orientation. All have failed.

- In 1975, Congress considered legislation to add "affectional or sexual preference" to Title VII. Civil Rights Amendments, H.R. 166, 94th Cong., 1st Sess. (1975). It did not pass.

- Over the subsequent 30 years, there were dozens of legislative efforts to add sexual orientation to Title VII. *See Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 154 & n.23 (2d Cir. 2018) (Lynch, J., dissenting). None passed.

- In 1994, Congress considered the Employment Non-Discrimination Act ("ENDA"), which would prohibit employment discrimination on the basis of sexual orientation. Employment Non-

Discrimination Act, H.R. 4636, 103d Cong. (1994). The proposed legislation did not pass.

- Versions of ENDA were proposed almost every year. ENDA spurred significant legislative debate.[7] For instance, rights advocates engaged in an intense debate on whether to include gender identity in ENDA, resulting in two versions of the bill.[8] No version of ENDA has passed.

- In 2015, Congress again considered amending Title VII to prohibit discrimination on the basis of sexual orientation and gender identity. *See* Equality Act of 2015, S. 1858, 114th Cong. (2015). It too failed to pass.

- Congress is currently considering similar proposed legislation. Equality Act, H.R. 5, 116th Cong. (2019).

Other legislation also demonstrates that the statutory term "sex" does not include gender identity or sexual orientation. Congress specifically included "gender identity" and "sexual orientation" alongside "sex" in the Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54, 118–26, and alongside "gender" in the Matthew Shepard and

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[7] *See* William B. Rubenstein, *Do Gay Rights Laws Matter?: An Empirical Assessment*, 75 S. CAL. L. REV. 65, 69 (2001).

[8] Paisley Currah, *Expecting Bodies: The Pregnant Man and Transgender Exclusion from the Employment Non-Discrimination Act*, 36 WSQ: WOMEN'S STUDIES Q. 330, 332-335 (2008).

James Byrd, Jr., Hate Crimes Prevention Act of 2009, 18 U.S.C. § 249 (2012).

## II. Inserting "gender identity" and "sexual orientation" for "sex" in Title VII raises a host of issues for businesses that the Court is not equipped to address.

As the history of efforts to amend Title VII and to pass ENDA and the Equality Act demonstrate, including gender identify and sexual orientation in a federal employment antidiscrimination statute would raise a multitude of issues to be debated, weighed, and considered.

As demonstrated below, interpreting "sex" in Title VII to encompass gender identity and sexual orientation would similarly raise a host of issues for employers. Contrary to the blithe assertions of other *amici*, compliance would not be simple. Indeed, one of the largest rights advocacy groups has issued an 85-page "toolkit" to educate employers on means to avoid discrimination based on gender identity.[9] An association of city officials released a 53-page guide for municipalities to assist with antidiscrimination policies focused on gender identity.[10] The glossary included in another compliance toolkit spans four pages and is filled with terms that did not exist ten

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[9] *See* Human Rights Campaign, *Transgender in the Workplace: A Toolkit for Employers* (Oct. 2016), [hereinafter *HRC Toolkit*], https://tinyurl.com/ y48fm58j.

[10] *See* League of California Cities, *Transgender in the Workplace, A Guide for Municipalities* (Sept. 2017) [hereinafter *Guide for Municipalities*], https://tinyurl.com/yyt7zus8.

years ago.[11] When considered in the context of Title VII compliance, these and other guidelines illustrate the difficulties employers would face.

### A. Safety and privacy issues.

The courts have long recognized that sex may be a bona fide occupational qualification (BFOQ) under Title VII in certain occupations. Interpreting "sex" to include gender identity would create significant compliance problems with regard to these occupations.

For instance, as this Court explained, "a woman's relative ability to maintain order in a male, maximum-security, unclassified penitentiary … could be directly reduced by her womanhood." *Dothard v. Rawlinson*, 433 U.S. 321, 335-36 (1977). The Court's use of "womanhood" was unmistakably a reference to the biological difference between men and women. One of the concerns was that "sex offenders who have criminally assaulted women in the past would be moved to do so again if access to women were established within the prison." *Id.*

Courts have also held that sex-based distinctions may also be permissible to preserve privacy interests. For instance, the "privacy rights of mental health patients or residents in mental health facilities can justify a BFOQ to provide for same-sex personal hygiene care." *Local 567 Am. Fed'n of State, etc. v.*

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[11] *See* E.R. Green, & L.M. Maurer, The Teaching Transgender Toolkit: A Facilitator's Guide to Increasing Knowledge, Decreasing Prejudice & Building Skills 53-56 (2015).

*Mich. Council 25*, 635 F. Supp. 1010, 1013 (E.D. Mich. 1986); *cf. EEOC v. Sedita*, 816 F. Supp. 1291, 1296 (N.D. Ill. 1993) (holding a women's health club's refusal to employ men in managerial positions did not violate Title VII because the positions involved substantial intimate contact with members); *Norwood v. Dale Maint. Sys.*, 590 F. Supp. 1410 (D. Ill. 1984) (holding employer's requirement that janitors be men permissible to protect privacy of customers using men's bathrooms).

But interpreting "sex" in Title VII to encompass gender identity would be contrary to these holdings. Legal compliance guidelines insist that sex-segregated job assignments must be issued according to gender identity, not sex. For instance, the guide for municipalities states, "For sex-segregated job assignments, transgender employees will be classified and assigned in a manner consistent with their gender identity, not their sex assigned at birth."[12] Similarly, guidance from the Office of Personnel Management states that once an employee identifies as a particular gender, "agencies should treat the employee as that gender for purposes of all job assignments and duties."[13] Under these guidelines, a

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[12] *Guide for Municipalities*, *supra* note 10, at 16

[13] Office of Personnel Management, *Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace* (Jan. 18, 2017) [hereinafter *OPM Guidelines*], https://tinyurl.com/ yy7sch3l. These Guidelines have since been removed.

woman prison guard with an "internal sense of being male," *id.*, must be assigned to a male prison.

Complicating the issue, the legal guidelines insist that the transgender status of an employee is a private matter that an employer may not disclose.[14] Indeed, inquiry into a transgender person's physiology is considered a "[d]enial of personal body privacy" and a "microagression."[15]

Interpreting Title VII to encompass gender identity would thus put employers in an untenable situation. They would be required to assign employees in a manner that would directly violate the privacy interests of their clients. For instance, despite prior case law,[16] a medical center would be required to

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[14] *See, e.g.*, City of West Hollywood, *Workplace Gender Transition Guidelines*, March 21, 2016, in *Guide for Municipalities*, *supra* note 10, at 24 ("Transgender employees have the right to discuss their gender identity or expression openly, or to keep that information private. The transgender employee gets to decide when, with whom, and how much to share their private information."); Transgender Law Center, *Model Transgender Employment Policy* at 5, (same) [hereinafter *Model Transgender Employment Policy*], https://tinyurl.com/y5qdgsj6; *see also How to manage gender identity in the workplace*, Personnel Today (warning to "avoid non-consensual disclosure" and inadvertent "outing" of transgender employees), *available at* www.personneltoday.com.

[15] Kevin L. Nadal, et al., *Emotional, Behavioral, and Cognitive Reactions to Microaggressions: Transgender Perspectives*, 1 PSYCHOLOGY OF SEXUAL ORIENTATION AND GENDER DIVERSITY 72, 73-74 (2014).

[16] *See Backus v. Baptist Medical Center*, 510 F. Supp. 1191 (E.D. Ark. 1981), *vacated as moot*, 671 F.2d 1100 (8th Cir. 1982); *see also Automobile Workers v. Johnson Controls, Inc.*, 499 U.S.

permit a male who has an internal sense of being female to serve as obstetrics nurses, regardless of the patient's serious privacy interests. Moreover, the employer would not be permitted to inform the patient that a male would be engaged in the most intimate and sensitive intrusion into her bodily privacy.

Interpreting Title VII in this manner would also undermine employers who work with vulnerable children. Sex has been held to be a BFOQ for employees who "treat emotionally disturbed and sexually abused adolescents and children" because "children who have been sexually abused will disclose their problems more easily to a member of a certain sex." *Healey v. Southwood Psychiatric Hosp.*, 78 F.3d 128, 132-33 (3d Cir. 1996). But if "sex" is interpreted to include gender identity, an employer would be required to assign male counselors to sexually abused girls based solely on the counselor's internal sense of being female. And the employer would not be allowed to tell the girl or her parents that it was doing so.

Further complicating employer compliance is that gender identity may be both male and female or

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187, 206 n.4 (1991) (recognizing that sex might "constitute a BFOQ when privacy interests are implicated," such as an obstetrics nurse who "provide[s] sensitive care for patient's intimate" concerns); *id.* at 219 n.8 (White, J., concurring) ("The lower federal courts … have consistently recognized that privacy interests may justify sex-based requirements for certain jobs"—such as a restroom attendant—and Title VII's legislative history recognized some examples, including "a female nurse hired to care for an elderly woman" and "a masseur").

neither male nor female.[17] Indeed, there are apparently multiple variations of such "non-binary" gender identity.[18] Moreover, gender identity is apparently fluid—for some, it can change back and forth, further complicating compliance.[19] Employees with such gender identities would confound the BFOQ analysis if "sex" is interpreted to include gender identity.[20]

Even for those occupations for which sex is not a BFOQ, employers still confront privacy issues for their employees and customers in common restroom, locker room, and shower facilities.[21] Employers, who

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[17] *Guide for Municipalities*, *supra* note 10, at 8; *OPM Guidelines*, *supra* note 13, at 2; *Model Transgender Employment Policy*, *supra* note 14, at 3 (defining gender identity as a "person's internal, deeply-felt sense of being male, female, or something other or in-between").

[18] Skylar Davidson, *Gender inequality: Nonbinary transgender people in the workplace*, COGENT SOCIAL SCIENCES (2016), 2: 1236511 ("Some gender identities that fall under the umbrella term 'nonbinary gender' are genderqueer, agender, androgynous, Two-Spirit, gender nonconforming, gender variant, third gender, genderfluid, and bigender."), https://tinyurl.com/ y3femnsg.

[19] *See* Green, & Maurer, *supra* note 11, at 54 (defining "genderfluid" to include a "person whose gender identity or expression shifts between masculine and feminine").

[20] *Cf.* Barnett, et al., *supra* note 6 ("Psychiatrists, not unlike the general public, have struggled to conceptualize transgender individuals.").

[21] *See, e.g.*, *Guidelines for Municipalities*, *supra* note 10, at 10 (defining discrimination to include denying "an employee access to locker rooms and/or restrooms that correspond to their gender identity or gender expression"); *OPM Guidelines*, *supra* note 13 ("agencies should allow access to restrooms and (if

would be bound to keep an employee's sex confidential, could not inform employees and customers of the situation.

These types of privacy issues were discussed and debated during the consideration of ENDA, leading to the two competing versions of the proposed legislation. The debate led a sponsor of one of the versions, Congressman Barney Frank, to state, "Transgendered people want a law that mandates a person with a penis be allowed to shower with women. They can't get that in ENDA."[22]

One might argue that sex-based safety and privacy concerns would remain legitimate grounds for a BFOQ because they do not involve sex-based stereotypes. But gender identity advocates argue vociferously that "there is no objective, socially agreed upon test for determining who is male and who is female. Hence, there is no way of ever enforcing sex-classification policies in a 'rational,' i.e., consistent

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provided to other employees) locker room facilities consistent with the employee's gender identity"); *Model Transgender Employment Policy*, *supra* note 14, at 6 ("All employees have the right to use the locker room that corresponds to their gender identity.").

[22] *Currah*, *supra* note 8, at 333. *See also* Employment Non-Discrimination Act, H.R. 3017, 111th Cong. (2009) ("Nothing in this Act shall be construed to establish an unlawful employment practice based on actual or perceived gender identity due to the denial of access to shared shower or dressing facilities in which being seen unclothed is unavoidable …").

way."[23] Indeed, such advocates want to use "gender-identity antidiscrimination law to abolish sex-segregated imprisonment."[24] And they insist that cases basing a BFOQ on privacy interests "overvalue traditional notions of female modesty," "sanction stereotypes," and are "shot through with discriminatory attitudes."[25]

But any debate about such issues would be foreclosed by interpreting "sex" to mean "gender identity." The decades-long legislative discussion would be immediately terminated, and the outcome determined by the choice made by this Court, without any balancing of employer concerns or compromise on these issues.

### B. Disparate Impact Issues.

The question of whether disparate impact claims may be brought for alleged employment discrimination based on gender identity or sexual orientation has also been the subject of intense debate. Early versions of ENDA, for instance, explicitly disclaimed such claims, differentiating the proposed statute from Title VII.[26] Later versions have

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[23] Heath Fogg Davis, *Sex-Classification Policies as Transgender Discrimination: An Intersectional Critique*, 12 PERSPECTIVES ON POLITICS 45, 46 (2014).

[24] *Id.* at 54.

[25] Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 975-76 (2019).

[26] *See, e.g.*, Employment Non-Discrimination Act, S. 2238, 103d Cong. § 5 (1994) ("The fact that an employment practice has a disparate impact, as the term 'disparate impact' is used in

stated, "Disparate Impact—Only disparate treatment claims may be brought under this Act."[27]

Under the Second and Sixth Circuit interpretations, however, there would be no debate. Plaintiffs could bring class-action disparate impact claims based on gender identity and sexual orientation under Title VII.

The possibility of such claims would raise significant compliance issues for employers. Disparate impact claims require no showing of discriminatory motive. Rather, the nub of such claims is statistical evidence that a facially neutral employment policy disproportionately affects a protected class of employees. *See Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 646 (1989); *Davis v. District of Columbia*, 925 F.3d 1240, 1249 (D.C. Cir. 2019). Employers seeking to comply with Title VII often "apply the statistical analyses used by the courts to their own workplaces."[28] These analyses require employers to classify employees and applicants according to protected traits.

As scholars have recognized, however, gender identity and sexual orientation are not necessarily

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section 703(k) of the Civil Rights Act of 1964, on the basis of sexual orientation does not establish a prima facie violation of this Act.").

[27] *See, e.g.*, Employment Non-Discrimination Act, S. 815, 113th Cong. § 4(g) (2013).

[28] G. Roger King & Jeffrey D. Winchester, *Building an Internal Defense Against Class Action Lawsuits and Disparate Impact Claims*, 16 THE LABOR LAW. 371, 382 (2001).

obvious, may be kept private, and are not immutable.[29] Indeed, one of the sponsors of ENDA insisted that allowing disparate impact claims would require employees to disclose their sexual orientation, violating privacy rights.[30] Employers seeking to avoid Title VII liability would therefore need to make assumptions regarding employee and applicant gender identity and sexual orientation or be faced with potential non-compliance.

### C. Medical insurance issues.

Employer coverage of certain medical procedures has been a significant issue under Title VII. Following the Court's decision in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), which held that discrimination based on pregnancy is not discrimination based on sex, Congress amended Title VII to state that "the 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." 42 U.S.C.S. § 2000e.

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[29] *See, e.g.*, Hazel Oliver, *Sexual Orientation Discrimination: Perceptions, Definitions And Genuine Occupational Requirements*, 33 INDUSTRIAL L.J. 1 (2004) ("Sexual orientation is unique in being a 'hidden' characteristic, which is not generally obvious to an outside observer."); Steven E. Mock & Richard P. Eibach, *Stability and Change in Sexual Orientation Identity Over a 10-Year Period in Adulthood*, ARCHIVE OF SEXUAL BEHAVIOR (2012), DOI 10.1007/s10508-011-9761-1.

[30] H.R. Subcomm. on Health, Empl., Lab. & Pensions of the Comm. on H. Educ. & Lab., The Employment Non-Discrimination Act of 2007: Hearing on H.R. 2015, 110th Cong. (Sept. 5, 2007) (Statement by Congressman Barney Frank).

To accommodate the concerns of employers and others, however, Congress made explicit that Title VII "shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion." *Id.*

Interpreting Title VII to encompass gender identity would raise similar concerns. Employees could bring actions alleging the failure to provide insurance covering gender reassignment surgery is unlawful. *See, e.g.*, *Mario v. P & C Food Mkts.*, 313 F.3d 758, 761 (2d Cir. 2002). And, unlike in the legislative process, employers would be precluded from effectively raising certain concerns about mandating such coverage.

**D. Language issues.**

According to the EEOC, which has interpreted "sex" to include gender identity, the use of a pronoun inconsistent with an employee's internal sense of being male or female may create a hostile working environment in violation of Title VII. *See Jameson v. Donahoe*, 2013 EEOPUB LEXIS 1437, *4 (E.E.O.C. May 21, 2013). The legal guidelines frame this as a right: "An employee has the right to be addressed by the name and pronoun that correspond to the employee's gender identity, upon request."[31]

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[31] *Guide for Municipalities*, *supra* note 10, at 8.

This presents a far more difficult compliance issue than the EEOC or guidelines suggest. "Multiple pronouns have been introduced to be used to properly describe a transgender or genderqueer individual."[32] For instance, "Ne/nem/nir/nirs/nemself was introduced to avoid gender-neutral pronouns that are derived from gendered pronouns."[33] Other pronouns that have been use include "ve/ ver/vis/vis/verself" and "ey/em/eir/eirs/eirself."[34] A common system is "ze/zir/zir/zirs/zirself."[35] But some use "xe/xem/ xyr/xyrs/xemself to avoid the feminine association with ze."[36]

Under threat of legal liability, employers must not only ensure that managers use whatever pronouns are preferred by the transgender employee, employers must ensure that co-workers use them as well.[37] Interpreting "sex" to include gender identity

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[32] Brandon Darr & Tyler Kibbey, *Pronouns and Thoughts on Neutrality: Gender Concerns in Modern Grammar*, Pursuit – J. OF UNDERGRADUATE RESEARCH AT THE U. OF TENN., Vol. 7: Iss. 1, Article 10 (2016).

[33] *Id.* at 75.

[34] *Id.*

[35] *Id.*

[36] *Id.*; *see also Guidelines for Municipalities*, *supra* note 10, at 12 ("In addition to the traditional pronouns (he/him, she/her, they), some people use gender-neutral pronouns, such as they/them/theirs, ne, ve, ze/zie and xe.").

[37] *See OPM Guidelines*, *supra* note 13 ("For everyday interactions and usage, managers, supervisors, and coworkers should use the name and pronouns appropriate to the gender identity of the employee, as expressed by the employee.").

would thus require employers to make certain that all their employees adopt the new language.

Indeed, it is not at all apparent that changing pronounces would be sufficient. Employers are urged to "focus on comprehensive language, information, and techniques that encourage real understanding, acceptance, and inclusion," to teach "employees about the use of inclusive language at work," and to ensure "all language in programming, training, or instructional materials is gender inclusive."[38] While doing so, however, employers must keep up with a constantly changing vocabulary because what "was permissible—even embraced—terminology 15 years ago may be considered inaccurate and even offensive today."[39]

The EEOC and legal guidelines, however, are strikingly Anglocentric. For employers whose businesses routinely use foreign languages, such as Spanish or French, this requirement would present an even more difficult, if not impossible task.[40]

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[38] Joshua C. Collins, et al., *The Problem of Transgender Marginalization and Exclusion: Critical Actions for Human Resource Development*, HUMAN RESOURCE DEVELOPMENT REV., June 2015, at 13, 17.

[39] Transgender and Nonbinary Gender Policy in the Public Sector, Oxford Research Encyclopedia of Politics (May 2019).

[40] *See, e.g.*, Natasha Salmon, *Gender neutral version of French sparks backlash*, INDEPENDENT (Oct. 7, 2017), https://tinyurl.com/y2nrxbyp; *No more middots: French PM clamps down on gender-neutral language*, THE GUARDIAN (Nov. 21, 2017), https://tinyurl.com/y2xkay7h.

## CONCLUSION

An interpretation of "on the basis of … sex" to mean on the basis of gender identity or sexual orientation would raise numerous, complex issues for U.S. employers. Rather than vetting these issues through legislative debate—a debate that has been ongoing for decades—such an interpretation would bypass the opportunity for discussion and compromise. Weighing and appraising a "host of considerations," however, "is more appropriately for those who write the laws, rather than for those who interpret them." *Bush*, 462 U.S. at 380 (quoting *United States v. Gilman*, 347 U.S. 507 (1954)). The Court should therefore reject the invitation to short circuit the political process.

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