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* MEMBERS OF CONGRESS IN SUPPORT OF EMPLOYERS

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INTEREST OF *AMICI CURIAE*[1]

Amici are United Stated Senators and Members of the United States House of Representatives ("Members of Congress").[2]

As members of Congress, *amici* have a profound interest in listening to and carrying out the will of our constituents—the American people. In pursuit of this interest, *amici* keenly desire that the laws enacted by Congress be faithfully and appropriately interpreted. As elected legislative officials, *amici* are uniquely able to speak to the importance of leaving legislative action, such as modifying the language of Title VII, to the Congress of the United States. This is, after all, what Article I of our Constitution requires. *Amici* are also uniquely situated to understand the views of the American people on this issue, both through the electoral process and through continuing feedback from our constituents.

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[1] Pursuant to Supreme Court Rule 37.3(a), *amici* certify that Petitioners Altitude Express, Inc., *et al.*, and R.G. & G.R. Harris Funeral Homes, Inc., as well as Respondents Equal Employment Opportunity Commission and Clayton County, Georgia, have given blanket consent to the filing of *amicus* briefs. Pursuant to Supreme Court Rule 37.6, counsel for *amici* certifies that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] A complete list of *amici* appears in the appendix to this brief.

SUMMARY OF ARGUMENT

Title VII prohibits employers from discriminating against any individual with respect to the terms and conditions of employment "because of such individual's race, color, religion, sex, or national origin . . . ." 42 U.S.C. § 2000e-2(a). Title VII does not expressly include sexual orientation and gender identity as protected classes. The text and legislative history do not support the view that Title VII was intended to protect them. Thus, a modification of Title VII to include sexual orientation and gender identity should be sought through the legislative process.

The Constitution vests all federal legislative powers in Congress. U.S. Const. Art. 1 § 1. The fundamental principle of separation of powers assures Americans the ability to participate in the process of lawmaking through the legislature, which is accountable to the people.

Mindful of this vitally important responsibility delegated to the legislature, the Constitution specifically prescribes the process through which legislation is accomplished. Every bill must pass both Houses of Congress and be presented to the President. U.S. Const. Art. 1 § 7. Additionally, the Constitution protects congressional deliberations through the Speech and Debate Clause. Each House of Congress is governed by rules and traditions of its own making that likewise protect representative lawmaking. These procedural safeguards combine to ensure engagement of the American people from a national, state, and local perspective.

The President cannot change a single word in a bill presented to him for consideration. The President can merely sign the bill into law or veto it. Once a bill has run the gauntlet of bicameralism and presentment, duly enacted legislation becomes the supreme law of the land. U.S. Const. Art. VI ¶ 2. Accordingly, statutes deserve the deepest respect by the Judicial Branch. Courts should interpret statutes as enacted.

In recognition of the legislature's prerogative, courts interpret statutes according to their text. The principle of *stare decisis* assures stability and serves the constitutional ideal of the rule of law. When interpreting a statute, adherence to *stare decisis* is particularly important because correction can be had through the legislature. *U.S. v. Lane*, 474 U.S. 438, 460 n.1 (1986) (Brennan, J., concurring).

The legislature has the ability to modify Title VII. If Congress intended to include sexual orientation and gender identity among the protected classes in Title VII, it could have done so. In fact, Congress has expressly included sexual orientation as a protected class when, for example, it found evidence of hate crimes motivated by bias against sexual orientation. *See U.S. v. Jenkins*, 909 F. Supp. 2d 758, 776 (E.D. Ky 2012). Title VII has not been judicially interpreted to include sexual orientation and gender identity until recently, and legislative attempts to modify Title VII to include them are ongoing. Consequently, this Court should refrain from judicially circumventing the legislative process.

The legislative history of Title VII does not support the view that Congress intended to include sexual

orientation and gender identity as protected classes under Title VII. While the legislative history of the sex amendment is not extensive, it is sufficient to establish that Congress intended the amendment to protect women's rights.

The text of Title VII does not apply to sexual orientation and gender identity. The statute prohibits discrimination because of sex. Sexual orientation and gender identity, despite their connection to sex, are not "sex," *per se*. Title VII does not prohibit discrimination based upon "things that cannot be defined or understood without reference to sex" or "things that are directly connected to sex." Moreover, sex stereotyping is not a separate protected class, but rather a means of proving sex discrimination. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 251, 109 S. Ct. 1775, 1791 (1989).

After Congress originally enacted Title VII—and long after Title VII was judicially construed to exclude sexual orientation and gender identity as protected classes—numerous attempts have been made to broaden Title VII to include them. It would be incongruous to hold that 50 attempts to pass legislation to include these things failed if all that was at stake was a mere "belt and suspenders" effort to clarify existing law.

Although remedial statutes are generally broadly interpreted to accomplish their legislative purpose, statutes should not be so broadly construed as to substantively modify their terms. Courts have long recognized that including sexual orientation and gender identity as protected classes under Title VII

through judicial interpretation would violate the separation of powers.

Under our Constitution, contentious policy disputes are resolved by the people, through their elected representatives in Congress. The extension of Title VII to protect sexual orientation and gender identity raises a complex set of concerns and potentially far-reaching consequences. These issues merit thoughtful consideration and the deliberative participation of the people. Accordingly, modification of the statute should be referred to the legislature.

The facts of the cases on appeal demonstrate the necessity for a careful weighing of competing considerations. Some of the potential effects include collateral impacts on businesses and imposition on matters of conscience. The rights of those who claim protections for sexual orientation and gender identity must be weighed against First Amendment protections of religious freedom. Additionally, judicially broadening Title VII will likely affect the way other statutes, such as Title IX and the Affordable Care Act, are interpreted. Evidence exists that interpretations of "sex" to include sexual orientation and gender identity are adversely affecting the undisputed purpose of the sex amendment—the protection of women's rights. All of these considerations support the view that resolution should be sought through the legislative process.

The ruling sought by the Charging Parties in this case is a substantive, fundamental extension of Title VII. The number of *amicus* briefs filed in this case alone demonstrates the recognition that the issues in this case are of major significance to the public. If the

government is to be "of the people, by the people, for the people," such a momentous change should be made by the legislature.

ARGUMENT

The Charging Parties are three individuals who allege they suffered adverse employment actions because of their sexual orientation or gender identity. In each case, the plaintiffs have advanced arguments urging the Court to adopt a flawed interpretation of Title VII that would amount to a judicial revision of the statute.

Donald Zarda worked as a sky-diving instructor for Altitude Express, Inc. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 108 (2d Cir. 2018). He was fired in response to a complaint by a client. A female client to whom Zarda was strapped for a tandem skydive told her boyfriend that Zarda inappropriately touched her and disclosed his sexual orientation to excuse his behavior. The female client's boyfriend complained to Altitude Express, who terminated Zarda's employment. *Id.* Zarda had the opportunity to present his case to a jury under New York's Human Rights Law. The jury decided in favor of Altitude Express. *Id.* at 167 n.2 (Livingston, J., dissenting). Nevertheless, Zarda brought suit alleging he was fired solely because of his reference to his sexual orientation. *Id.* at 109.

Aimee Stephens was born male and employed by R.G. & G.R. Harris Funeral Homes, Inc. under the name William Anthony Beasley Stephens. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 567 (6th Cir. 2018). While working as a funeral

director, Stephens informed the funeral home that he intended to transition from male to female and that he would dress as a woman at work. *Id.* at 566. The funeral home is a closely held corporation whose principal is a Christian. *Id.* at 567-68. Citing religious objections and concern for the interests of funeral attendees, the funeral home terminated Stephens' employment. *Id.* at 569. Stephens then filed a charge of discrimination based upon gender identity with the EEOC. *Id.*

Gerald Lynn Bostock worked as a Child Welfare Services Coordinator for Clayton County, Georgia. *Bostock v. Clayton County*, Civ. Action No. 1:16-CV-1460-ODE, 2017 WL 4456898 at *1 (N.D. Ga. filed July 21, 2017). The County terminated Bostock's employment for "conduct unbecoming to one of its employees." *Id.* However, Bostock alleged he was discriminated against because he is gay. *Id.*

The Charging Parties asked this Court to interpret Title VII's prohibition of sex discrimination to encompass discrimination based upon sexual orientation and gender identity. Their requests should be denied for the following reasons.

I. Modification of Title VII is a quintessentially legislative function.

A. Separation of powers is a fundamental principle of America's constitutional order.

Article I, section 1 of the Constitution provides that "All legislative powers herein granted shall be vested in a Congress of the United States." U.S. Const. Art. I

§ 1. By these words, the Constitution ensures that, among the three branches of government, it is the "legislature… [that] prescribes the rules by which the duties and rights of every citizen are to be regulated." THE FEDERALIST No. 78, p. 465 (C. Rossiter ed.1961). And because the legislature is accountable to the People through biennial elections, the Constitution "promise[s] Americans more direct democratic participation in ordaining their supreme law than anyone had ever seen on a continental scale" before its ratification. Akhil Reed Amar, *America's Constitution: A Biography* 65.

Article I goes on to provide that "Every bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a law, be presented to the President of the United States." U.S. Const. Art. I § 7. These procedural safeguards and limitations combine to ensure engagement from a national (presidential), state (senatorial) and local (congressional) perspective, with all three tiers of engagement electorally accountable to the American people. As this Court has explained, the Founders clearly wrote the Constitution with "a determination that legislation by the national Congress be a step-by-step, deliberate and deliberative process." *I.N.S. v. Chadha*, 462 U.S. 919, 959 (1983). The House and Senate must agree on the precise language for the bill to merit transmission to the White House for the president's consideration and action. For his part, the president cannot change a jot or tittle of what is presented to him. The best the president can seek to do is to issue a "signing statement" setting forth his understanding or interpretation of the measure—

anything more would betray the "finely wrought procedure that the Framers designed." *Clinton v. City of New York*, 524 U.S. 417, 440 (1998). "With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution." *I.N.S. v. Chadha*, 462 U.S. 919, 959 (1983).

Each House, in turn, is governed by rules of its own making and traditions formed out of more than two centuries of cumulative experience. Those rules and traditions likewise assure an elaborate and collaborative process of law-making. No member of either House can, for example, vote absentee. No matter how exigent the circumstances may be, including debilitating illness, each of our 100 senators and 435 members of Congress must be physically present within the Chamber, in timely manner, to cast a vote on proposed legislation. Senate Rule XII.1, House Rule III.1.

Similarly, the Constitution protects congressional deliberations through the Speech and Debate Clause. *See Gravel v. United States*, 408 U.S. 606, 616 (1972) ("The Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch. It thus protects Members against prosecutions that directly impinge upon or threaten the legislative process.").

To ensure that the voice of We the People is honored, the Constitution also places pro-democratic

limits on the ability of the House to limit or expel its duly-elected Members. *Powell v. McCormack,* 395 U.S. 486, 522 (1969) ("…the Constitution leaves the House without authority to *exclude* any person, duly elected by his constituents, who meets all the requirements for membership expressly prescribed in the Constitution.") (emphasis added).

All this points to an overriding fact: *Amici* take our roles as duly-elected lawmakers with the utmost seriousness. And so too, we respectfully suggest that the courts should likewise show the comity and deference that, at its best, characterizes our system of separated powers. Duly enacted legislation, once it has run the daunting three-step gauntlet of bicameralism and presentment, deserves the deepest respect by the Article III branch when it is called upon to review the work product of *both* political branches.

The president cannot change a single word in a bill presented to him for consideration and possible approval–his choice is a binary one, he may approve or not. It follows *a fortiori* that the judicial branch, which has no role in the lawmaking process, must interpret the laws as they were enacted, and not on the basis of the preferences of any jurist. The legislature makes the laws–the judiciary has "neither force nor will, but merely judgment." THE FEDERALIST No. 78, p. 465 (C. Rossiter ed.1961).

B. *Stare decisis* assures stability and predictability in matters of statutory interpretation.

This Court has frequently pointed to the power of *stare decisis*: "Its greatest purpose is to serve a constitutional ideal—the rule of law." *Citizens United v. FEC*, 558 U.S. 310, 378 (2010) (Roberts, C.J., concurring). That overarching value is best served by fidelity to the long and uninterrupted march of the caselaw. This is particularly true on issues of statutory interpretation where the authoritative influence of judicial precedent is at its zenith. As Justice Brandeis wrote:

> "*Stare decisis* is usually the wise policy, because, in most matters, it is more important that the applicable rule of law be settled than that it be settled right… This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this court has often overruled its earlier decisions."

Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406-07 (1932) (Brandeis, J., dissenting).

For the half-century after its passage, Title VII was understood to protect against discrimination "because of…sex," without enumerated protections for gender identity or sexual orientation. *See Higgins v. New Balance Athletic Shoe, Inc.,* 194 F.3d 252, 259 (1st Cir. 1999); *Dawson v. Bumble & Bumble,* 398 F.3d 211, 217-

18 (2d Cir. 2005); *Bibby v. Phila. Coca Cola Bottling Co.,* 260 F.3d 257, 261 (3d Cir. 2001); *Wrightson v. Pizza Hut of Am., Inc.,* 99 F.3d 138, 143 (4th Cir. 1996); *Blum v. Gulf Oil Corp.,* 597 F.2d 936, 938 (5th Cir. 1979); *Kalich v. AT & T Mobility, LLC,* 679 F.3d 464, 471 (6th Cir. 2012); *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.,* 224 F.3d 701, 708 (7th Cir. 2000); *Williamson v. A.G. Edwards & Sons, Inc.,* 876 F.2d 69,70 (8th Cir. 1989); *DeSantis v. Pac. Telephone and Telegraph Co., Inc.*, 608 F.2d 327, 329-30 (9th Cir. 1979); *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. 2017). Until very recently, this caselaw was clear and unequivocal.

The proposed eleventh-hour shift in interpretation would amount to nothing more than a judicial revision–an attempted rewrite of the law, not to mention an attempt to circumvent the Constitution–that until recent years was neither advanced nor embraced in the cauldron of litigation. The foundational importance of the ordinary public meaning of statutory language, as of the time of its enactment, is enshrined in well-settled principles of *stare decisis.* This is *stare decisis* on steroids.

In this current controversy, it is undisputed that "correction can be had by legislation." Therefore, the burden on the parties seeking to overturn established precedent has "special force." *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73, 109 S.Ct. 2363 (1989) (superseded by statute on other grounds). If Congress had originally understood "sex" in Title VII to include gender identity and sexual orientation, then it

would have had no problem including that language. But problems abound. As discussed below, Congress has on numerous occasions attempted—and failed—to revise Title VII's language. Overturning the will of the people, embodied in the considered actions of their elected representatives, would run directly counter to *stare decisis* principles.

This Court has frequently taught a fundamental lesson about the domain of precedent: "*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). The highly-prized values of evenhandedness, predictability, consistency, and stability all point in favor of the traditional, longstanding interpretation. These well-established judicial ideals can only be achieved when courts embrace the original public meaning of Title VII's pivotal terms. As discussed below, Congress included neither the concept of gender identity nor sexual orientation in the term "sex."

C. The history of Title VII reflects the will of the American people as expressed through a landmark piece of bipartisan legislation.

Although the inclusion of "sex" as a protected category under Title VII was not the focus when the statute was enacted, the legislative history clearly establishes that Congress acted to protect women's rights. Detailed chronologies of the efforts to include

sex discrimination in the bill have been elaborately described in other submissions in this litigation. *See*, *e.g.* Robert C. Bird, *More than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 Wm. & Mary J. Women & Law 137 (Spring 1997); Jo Freeman, *How Sex Got into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 Law & Ineq. 163 (1991). "Congressional behavior towards the sex amendment, when viewed in its entirety, clearly points to the conclusion that Congress passed the sex amendment because of strong political forces seeking to further the cause of equality for women." Bird, *supra*, at 158.

The fact that Title VII protects against sex discrimination is attributed to longstanding efforts of the National Woman's Party (NWP). Bird, *supra*, at 147, Freeman, *supra*, at 165. Due to effective lobbying from women's groups, President John F. Kennedy established the President's Commission on the Status of Women. *Zarda*, 883 F.3d at 138 (Lynch, J., dissenting). The NWP worked tirelessly to have the term "sex" added to federal legislation. Freeman, *supra*, at 172. In the wake of President Kennedy's tragic assassination, Martin Luther King, Jr.'s iconic "I Have a Dream" speech, and the horrific bombing of an African-American church in Birmingham, Alabama, passage of the Civil Rights Act became an urgent Congressional priority. Freeman, *supra*, at 173-74. Opponents of the proposed legislation subjected the bill to ten days of intense debate in January 1964. *Id.* at 174. During those hearings, Rep. Howard H. Smith (D. Va.) moved to add "sex" to the language of Title VII. *Id.* at 174. Smith made the proposal "to prevent

discrimination against . . . women." Freeman, supra, at 163.

Subsequent debates over inclusion of "sex" as a protected class demonstrate that the addition represented a considered product of the deliberative process. Bird, *supra*, at 150-160; Freeman, supra, at 174-183. The effect of the sex amendment upon other laws protecting women were considered during the debates. Bird, *supra*, at 154. Specific concerns included military service and alimony. *Id.*

However, there was no indication whatever that sexual orientation and gender identity were to be included within the meaning of the term "sex." *Zarda*, 883 F.3d at 142 (Lynch, J., dissenting). In an early case, the Seventh Circuit recognized that if Congress intended to include sexual orientation and gender identity as protected classes under Title VII, the legislative history would reflect the resulting debates. *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984). The public attention these cases have received tends to support this inference. It bears emphasis that, at the time Title VII was enacted, the common public meaning of the term "sex" did not include references to sexual orientation and gender identity. *Hively v. Ivy Tech Cmty. College of Indiana*, 853 F.3d 339, 362-63 (7th Cir. 2017) (Sykes, J., dissenting). "No one seriously contends that, at the time of enactment, the public meaning and understanding of Title VII included sexual orientation and transgender discrimination." *Wittmer v. Phillips 66 Company*, 915 F.3d 328, 334 (5th Cir. 2019) (Ho, J., concurring).

For decades, this public meaning—as Congress, the President, and the nation understood it in 1964—was faithfully adhered to by the EEOC. Only a few short years ago did the EEOC abruptly reverse course. *See Macy v. Holder*, EEOC Doc. 0120120821, 2012 WL 1435995 (Apr. 20, 2012) (interpreting Title VII to prohibit gender identity discrimination); *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641 (July 15, 2015) (interpreting Title VII to prohibit sex orientation discrimination). Several courts thereafter followed the Commission's lead, resulting in the issue now pending before this Court. *See Wittmer*, 915 F.3d at 336 (Ho, J., concurring).

Had Congress intended to include sexual orientation and gender identity among the protections of Title VII, it could have expressly done so. Congress and various state legislatures have expressly prohibited discrimination based upon sexual orientation and/or gender identity in other statutes. *Wittmer*, 915 F.3d at 338 n.3 (Ho, J., concurring). Congress has expressly included sexual orientation and gender identity as protected classes in other statutes such as the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, 18 U.S.C. § 249(a)(2)(A) & (c)(4), and the Violence Against Women Act, 34 U.S.C. § 12291(b)(13)(A). This was no accident. Congress expressly found that the incidence of violence motivated by bias against a victim's "race, color, religion, national origin, gender, sexual orientation, gender identity, or disability" is "a serious national problem." 34 U.S.C. § 30501(1). Congress found that the FBI documented more than 1,265 incidents of hate crimes motivated by bias based upon sexual

orientation. *U.S. v. Jenkins*, 909 F. Supp. 2d 758, 776 (E.D. Ky 2012). Congress made no such findings when it enacted Title VII.

The legislative history of the sex amendment, while not extensive, is sufficient to demonstrate that Congress' intent was limited to protecting women. "It is . . . generally recognized that the major thrust of the 'sex' amendment was towards providing equal opportunities for women." *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748, 750 (8th Cir. 1982). Likewise, courts have long recognized that there is no evidence of legislative intent to protect sexual orientation and gender identity. "It would defy common sense to imagine that lawmakers labored to assemble a majority coalition to eradicate sexual orientation and transgender discrimination from the workplace—only to select the most oblique formulation they could think of ('because of sex') and then hope for the best that courts would understand what they meant." *Wittmer*, 915 F.3d at 334 (Ho, J., concurring).

In our view, this latter-day modification effects a substantive change in statutory law—an about-face entrusted to the Article I and II branches. "Under our Constitution, contentious policy disputes are resolved by the people, through their elected representatives in Congress." *Wittmer*, 915 F.3d at 341 (Ho, J., concurring). Legislation requires the people to reach a consensus based upon a common language. *Id.* "That confidence is lost if the people undertake to debate difficult issues, accept the daunting task of forging compromise, and then reduce that compromise to legislation—only to have courts surprise the people

with rulings that bear no resemblance to the common language." *Id.*

II. Sexual Orientation and Gender Identity are not "sex."

Title VII makes it unlawful for an employer to take adverse employment actions "or otherwise to discriminate against any individual" with respect to the terms and conditions of employment "because of such individual's race, color, religion, sex, or national origin . . . ." 42 U.S.C. § 2000e-2(a). "Because of sex" is a defined term in the statute. Title VII defines "because of sex" or "on the basis of sex" to include, but not be limited to:

> because of or on the basis of pregnancy, childbirth, or related medical conditions . . . . This subsection 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 . . . .

42 U.S.C. § 2000e(k). The term "sex" as used in the statute is not synonymous with "sexual preference." *Ulane*, 742 F.2d 1084.

The Charging Parties argue that sexual orientation "cannot be defined or understood without reference to sex." *See Baldwin v. Foxx*, EEOC Decision No. 0120133080, 2015 WL 4397641 at *5 (July 15, 2015). The answer to this argument is straightforward: Title VII does not prohibit discrimination based upon "things

that cannot be defined or understood without reference to sex;" it prohibits discrimination based upon "sex."

Similarly, supporters of the Charging Parties argue that gender identity is a "sex-based consideration" because it is "directly connected to one's sex." *See* Br. of Members of Congress as *Amici Curiae* in Support of the Employees, p.8 (filed July 3, 2019); *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221 (10th Cir. 2007); *Harris Funeral Homes*, 884 F.3d at 575. Again, Title VII's prohibition is not against discrimination based upon "things that are directly connected to sex," but rather "because of [an] individual's . . . sex."

The issue is not whether sexual orientation and gender identity can be defined or understood without reference to sex, or whether and/or how they are connected to "sex," but whether these things *are*, as a matter of law, "sex."

What the statute actually prohibits is discrimination "because of [an] individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). The enumerated terms are nouns, not verbs. They refer to an individual's characteristics, not a person's activities or inclinations. This Court has held that federal protections for women exist because "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth." *Frontiero v. Richardson*, 411 U.S. 677, 686, 93 S. Ct. 1764, 36 L. Ed. 2d 583 (1973). The debate in the public arena concerns, in part, whether sexual orientation and gender identity are properly considered statuses or characteristics. Title VII's sex discrimination provision prohibits discrimination

because of an individual's sex; it does not prohibit discrimination because of an individual's actions, behaviors, or inclinations.

The Charging Parties argue that Title VII has been extended to protect against discrimination because of sex stereotypes. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 239, 109 S. Ct. 1775 (1989). The *Price Waterhouse* court was not primarily concerned with whether sex stereotyping constitutes sex discrimination, but rather with procedural matters. The court did not hold that sex stereotyping violates Title VII *per se*. The court held that "stereotyped remarks can certainly be *evidence* that gender played a part." 490 U.S. at 251, 109 S. Ct. at 1791. Moreover, it is one thing to prohibit employers from discriminating based upon failure to conform to stereotyped notions of how a person of that sex should act; it is another to require employers to accept an employee's characterization of their gender identity. Thus, *Price Waterhouse* should not be read to expand the statutory terms.

The view that the sex discrimination provision protects women, but not sexual orientation and gender identity, is buttressed by the numerous unsuccessful efforts to expand Title VII's coverage.[3] Since its

[3] The argument that subsequent legislative history is not dispositive of Congressional intent is disingenuous. The subsequent legislative attempts are not used for the purpose of altering the plain meaning of Title VII. *See Bruesewitz v. Wyeth*, 562 U.S. 223, 242, 131 S. Ct. 1068, 1082, 179 L.Ed. 2d 1 (2011) ("Permitting the legislative history of subsequent . . . legislation to alter the meaning of a statute would set a dangerous precedent."); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps*

passage in 1964, over fifty legislative attempts have been made to expand Title VII expressly to include sexual orientation and/or gender identity discrimination. *See Zarda*, 863 F.3d at 153 n.23 (listing the bills). The first such attempt came in 1975, just over a decade after the Act was passed. Repeated attempts to add these new protections have failed year after year. In its first proposed reform, Congress implicitly acknowledged that protections for gender identity and sexual orientation were not included in "sex." [4] Nor are they today. Until 2016, courts were

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of Engineers, 531 U.S. 159, 169-70, 121 S.Ct. 675, 148 L.Ed. 576 (2001) (holding that failed legislative proposals cannot overcome the plain text of a statute); *Patterson*, 491 U.S. at 175 n.1, 109 S. Ct. at 2371 n.1 (1989) ("Congressional inaction cannot amend a duly enacted statute."). Although subsequent legislative history lacks controlling weight, "it should not be ignored when it is clearly relevant." *Walt Disney Prods. v. U.S.*, 480 F.2d 66, 68 (9th Cir. 1973). Subsequent legislative history has been considered when it is consistent with the text and purpose of the statute. *Johnson v. Transp. Agency, Santa Clara County, Cal.*, 480 U.S. 616, 629 n.7, 107 S.Ct. 1442, 1450 n.7 (1987); *Fribourg Nav. Co. v. C.I.R.*, 383 U.S. 272, 283-84, 86 S.Ct. 862, 869, 15 L. Ed. 2d 751 (1966). Here, the plain meaning of the statute, legislative history, and case law until the EEOC's *Macy* and *Foxx* decision were all in agreement. The failure of efforts in Congress to *add* protections for sexual orientation and gender identity is significant as to the question whether judicial intervention interferes with the prerogatives of the legislature.

[4] Congress amended Title VII in 1991, well after judicial decisions established that sexual orientation and gender identity were not protected under Title VII. To the extent congressional acquiescence has significance, it cuts against the Charging Parties' interpretation of the statute. *Johnson*, 480 U.S. at 629 n.7, 107 S. Ct. at 1450 n.7.

unanimous in holding that Title VII's protections did not extend so far. *Id.*

III. The broad remedial purpose of Title VII must be weighed against the danger of creating new forms of discrimination.

The Charging Parties rally around the familiar adage that "remedial statutes should be broadly interpreted." This argument is not new. For decades, courts recognized that using this maxim to extend the protections of Title VII to sexual orientation and gender identity violates the principle of separation of powers. *Ulane*, 742 F.2d at 1086 ("Although the maxim that remedial statutes should be liberally construed is well recognized, that concept has reasonable bounds beyond which a court cannot go without transgressing the prerogatives of Congress."). But the fact remains that law is law. Laws, no matter how beneficent the animating purposes may be, are to be interpreted in accordance with their terms. It is the text that counts, and where the text is plain the Court need not resort to canons of interpretation.

In any event, their invitation to perform a judicial form of corrective surgery masks an enormously complex set of issues that merit thoughtful consideration. Take, for example, the factual circumstances in *R.G. & G.R. Harris Funeral Homes*, 884 F.3d at 566-69. In this case, Thomas Rost, the owner of the funeral home, was placed in an extraordinarily difficult position by his employee, Mr. Stephens. After six years of employment, Stephens informed the owner that he was leaving for a two-week vacation, but when he returned, he would present

himself as a woman. It is undisputed that the employee's actions would violate the dress code that Mr. Rost had carefully crafted in order to respect the needs of his grieving clients. It is also undisputed that Mr. Stephens had agreed to the dress code policy.

Not only was the situation potentially awkward for grieving families, Mr. Rost was also concerned about the sensitivities of the funeral home's women employees, who had worked for years side-by-side with Mr. Stephens and who would have to use the same restroom. To allow Stephens to violate the funeral home's dress code would, Mr. Rost feared, potentially put his business at risk. Equally troubling, to accede to his employee's demand would violate Mr. Rost's faith-shaped conscience.

This set of circumstances reminds us that, as John Adams famously said, "facts are stubborn things." The undisputed facts point ineluctably to the enormous sensitivity of the employment situation. From the funeral home's perspective, the employee's request raised workplace issues of exquisite vulnerability. In this particular setting, the funeral home's image and reputation are based in large measure on the conduct of the employees connecting with grieving families and loved ones in a time of sorrow.

Other workplaces will have their own concerns, including matters of conscience and belief. *See, e.g.*, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 201 L. Ed. 2d 35 (2018). *Amici* applaud this Court's super-majority ruling in *Masterpiece Cakeshop* that government officials may not evince hostility to religious belief and

practice. Indeed, to accept the invitation to engage in judicial legerdemain may under certain circumstances conflict with constitutionally-protected freedom of conscience.

We are also aware of—and applaud—this Court's recognition that corporate entities may have purposes and values in which matters of belief and conscience may weigh heavily. *See*, *Burwell v. Hobby Lobby Stores,* 573 U.S. 682 (2014). For example, some religious employers have argued that the EEOC's interpretation unfairly prejudices their religious rights because the "ministerial exemption" is too narrow. Amended Complaint, *U.S. Pastor Council, et al. v. Equal Employment Opportunity Comm'n et al.*, Case No. 4:18-cv-00824-O (N.D. Tex. filed Mar. 29, 2019). The Executive Branch has responded to these concerns.

In that suit, the Department of Justice argued that Title VII does *not* reach discrimination based on sexual orientation and gender identity. Br. in Supp. of Defs.' Mot. to Dismiss at 2-6, *U.S. Pastor Council v. EEOC*, No. 4:18-cv-00824-O (N.D. Tex. Dec. 17, 2018) (ECF 8); Def's. Mem. in Resp. to Pl's. Mot. for Summ. J. at 6, *Franciscan Alliance, Inc., et al. v. Azar*, No. 7:16-cv-00108-O (N.D. Tex. Apr. 5, 2019) (ECF 154) ("Since the Rule was issued, the United States has returned to its longstanding position that the term 'sex' in Title VII does not refer to gender identity . . . ."). A Department of Justice Memorandum promulgated by the Attorney General on October 4, 2017 confirms the position that Title VII does not prohibit discrimination based upon gender identity. *Id.* at 6. On May 4, 2017, the President issued Executive Order 13798, which

reaffirms the Executive Branch's commitment to "vigorously enforce Federal law's robust protections for religious freedom." *Promoting Free Speech and Religious Liberty*, Exec. Order 13798 at § 1, 82 FR 21675 (May 4, 2017). This Executive Order called for the Attorney General to "issue guidance interpreting religious liberty protections in Federal law." *Id.* at § 4. Pursuant to the Executive Order, the Attorney General issued a memorandum to guide all administrative agencies and executive departments in the execution of federal law. *Federal Law Protections of Religious Liberty*, Attorney General's Memorandum, 82 FR 49668-01, 2017 WL 4805663 (Oct. 6, 2017). This memorandum, among other things, recognizes that the Free Exercise Clause protects both persons and private associations and businesses. *Id.* at 49668 ¶ 4. "Organizations do not give up their religious-liberty protections by . . . seeking to earn or earning a living; by employing others to do the same." *Id.*

Not only that, but the law of unintended consequences is undoubtedly at work. "The manifest purpose of Title VII's prohibition against sex discrimination in employment is to ensure that men and women are treated equally . . . ." *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 663 (9th Cir. 1977). Yet broadening the Title VII definition of "sex" will likely undermine this purpose.

The definition of "sex" in Title VII has implications that reach far beyond the immediate context of discrimination in the workplace.

> "Because Title IX adopts the substantive and legal standards of Title VII, a holding by the

> U.S. Supreme Court on the definition of 'sex' under Title VII will likely have ramifications for the definition of 'sex' under Title IX, and for the cases raising sexual orientation or gender identity claims under Section 1557 [of the Patient Protection and Affordable Care Act (ACA)] and Title IX which are still pending in district courts."

Nondiscrimination in Health and Health Educ. Programs or Activities, 84 Fed. Reg. 115 (proposed June 14, 2019) (to be codified at 42 C.F.R. pts. 438, 440, and 460). A regulation enacted by the United States Department of Health and Human Services interpreted the ACA's prohibition of discrimination based on "sex" to reach "gender identity" and "termination of pregnancy." *Franciscan Alliance, Inc. v. Burwell*, 227 F. Supp. 3d 660, 669-70 (N.D. Tex. 2016). A federal court enjoined enforcement of this regulation upon a finding that, among other things, the regulation likely violated religious liberty. *Id.* at 670, 691-93. The court recognized that the interpretation of "sex" in the ACA could affect Title IX because Section 1557 of the ACA incorporates Title IX's prohibition of sex discrimination. *Id.* at 686.

Recently, feminists have argued that the extension of the term "sex" to include sexual orientation and gender identity adversely affects the protected rights of women.[5] These concerns are not merely speculative.

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[5] Editorial, The Guardian view on the Gender Recognition Act: where rights collide, The Guardian (Oct. 17, 2018), https://www.theguardian.com/commentisfree/2018/oct/17/the-guardian-view-on-the-gender-recognition-act-where-rights-collide.

Several women recently sued a women's homeless shelter because, based upon the shelter's understanding of federal law, it admitted a purported transgender male and allowed him to, among other things, take showers with the vulnerable women. Complaint, *McGee, et al. v. Poverello House, et al.*, Case No. 1:18-cv-00768-LJO-SAB (E.D. Cal. Filed June 5, 2018). Transgender individuals have demanded the right to use school locker rooms intended for the gender with which they identify, regardless of the impact on the privacy rights of others using those locker rooms. *See e.g.*, *Johnston v. University of Pittsburgh of Commonwealth System of Higher Educ.*, 97 F. Supp. 3d 657, 668-70 (W.D. Pa. 2015). Transgender individuals have begun dominating women's sports.[6] Because Title IX, like Title VII, prohibits discrimination based upon sex, courts interpreting Title IX often look to case law interpreting Title VII. *Johnston*, 97 F. Supp. 3d at 674-76. Some females have complained that not only have they lost opportunities in sports and career advancement, they have been subjected to suppression of their First Amendment free speech rights due to political pressure. Bolar, *infra*. These adverse effects

[6] Fred Dreier, Commentary: The complicated case of transgender cyclist Dr. Rachel McKinnon, www.velonews.com (Oct. 18, 2018), https://www.velonews.com/2018/10/news/commentary-the-complicated-case-of-transgender-cyclist-dr-rachel-mckinnon_480285; Victor Morton, Transgender hurdler easily wins NCAA women's national championship, The Washington Times (June 3, 2019), https://www.washingtontimes.com/news/2019/jun/3/cece-telfer-franklin-pierce-transgender-hurdler-wi/; Kelsey Bolar, 8th Place: A High School Girl's Life After Transgender Students Join Her Sport, The Daily Signal (May 6, 2019), https://www.dailysignal.com/2019/05/06/8th-place-high-school-girls-speak-out-on-getting-beat-by-biological-boys/.

upon women's rights represent nothing less than an undermining of the undisputed purpose of the inclusion of "sex" among the protections of Title VII. We also note that some medical professionals have opined that broadening the traditional understanding of sex to include sexual orientation and gender identity harms children.[7]

These sensitive cultural issues should be the subject of thoughtful and considerate deliberation in the highest traditions of a representative democracy that cherishes human dignity. *See Johnston*, 97 F. Supp. 3d at 676-77 ("It is within the province of Congress—and not this Court—to identify those classifications that are statutorily prohibited.").

* * * *

"The government proceeds directly from the people; is 'ordained and established,' in the name of the people... [and] is emphatically and truly, a government of the people. In form, and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit." *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 403-05 (1819). Our Constitution preserves self-government by vesting all federal legislative power in a bicameral Congress. Art. I, Sec. 1. As this Court explained long ago: "The difference between the departments undoubtedly is, that the legislature makes, the

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[7] Position Statement, American College of Pediatricians, "Gender Ideology Harms Children (updated Sept. 2017), https://www.acpeds.org/the-college-speaks/position-statements/gender-ideology-harms-children.

executive executes, and the judiciary construes the law." *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 46 (1825). The debate over whether to extend Title VII is a quintessentially legislative task. That debate should continue in the halls of Congress.

CONCLUSION

As Members of Congress, *amici* are concerned that what this Court is being asked to do is to exercise authority rightly conferred upon the Article I Branch. The Court should reject the invitation to do so.

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APPENDIX

APPENDIX

COMPLETE LIST OF *AMICI CURIAE*

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Roy Blunt
Mike Braun
John Cornyn
Kevin Cramer
James M. Inhofe
James Lankford
Mike Lee

Members of the United States House of Representatives

Robert B. Aderholt (AL-04)
Rick W. Allen (GA-12)
Brian Babin, DDS (TX-36)
Jim Banks (IN-03)
Andy Biggs (AZ-05)
Ted Budd (NC-13)
Michael C. Burgess, M.D. (TX-26)
Doug Collins (GA-09)
Warren Davidson (OH-08)
Jeff Duncan (SC-03)
Bill Flores (TX-17)
Russ Fulcher (ID-01)
Louie Gohmert (TX-01)
Paul A. Gosar, DDS (AZ-04)
Glenn Grothman (WI-06)

Michael Guest (MS-03)
Andy Harris (MD-01)
Vicky Hartzler (MO-04)
Jody Hice (GA-10)
George Holding (NC-02)
Richard Hudson (NC-08)
Jim Jordan (OH-04)
Steve King (IA-04)
Doug LaMalfa (CA-01)
Doug Lamborn (CO-05)
Debbie Lesko (AZ-08)
Thomas Massie (KY-04)
Mark Meadows (NC-11)
Alex X. Mooney (WV-02)
Ralph Norman (SC-05)
Pete Olson (TX-22)
Gary Palmer (AL-06)
John Ratcliffe (TX-04)
David Rouzer (NC-07)
Van Taylor (TX-03)
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