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., AND RAY MAYNARD, *Petitioners*,
v.
MELISSA ZARDA AND WILLIAM MOORE, JR., CO-INDEPENDENT EXECUTORS OF THE ESTATE OF DONALD ZARDA, *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 STATUTORY INTERPRETATION AND EQUALITY LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF THE EMPLOYEES

KATIE EYER
PROFESSOR OF LAW
RUTGERS LAW SCHOOL
217 N. 5th St., E429
Camden, NJ 08102
(856) 225-6960
katie.eyer@rutgers.edu

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
ASHWIN P. PHATAK
DAYNA J. ZOLLE**
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18th St. NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amici Curiae

July 3, 2019

* Counsel of Record
** Not admitted in D.C.; supervised by principals of the firm

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES – cont'd

TABLE OF AUTHORITIES – cont'd

TABLE OF AUTHORITIES – cont'd

TABLE OF AUTHORITIES – cont'd

TABLE OF AUTHORITIES – cont'd

Page(s)

INTEREST OF *AMICI CURIAE*[1]

Amici are law professors who specialize in statutory interpretation and/or equality law issues. *Amici* are well versed in this Court's statutory interpretation and Title VII precedents and have written on these issues. Although *amici* have otherwise diverse views, they agree that a textualist analysis compels the conclusion that discrimination against individuals because of their sexual orientation or their transgender status is a form of discrimination "because of . . . sex" within the meaning of Title VII.

A full listing of *amici* appears in the Appendix.

INTRODUCTION AND SUMMARY OF ARGUMENT

The question presented in these cases is whether Title VII prohibits discrimination against individuals because of their sexual orientation or their transgender status. This Court's analysis of this question should begin and end with Title VII's text, which prohibits employers from taking adverse employment actions against an individual "because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). As this Court has repeatedly recognized, an employer has acted "because of . . . sex" where an individual's sex is a "but for" cause of the employer's actions. *See, e.g.*, *City of L.A.,*

---

[1] The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amici* state 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 to its preparation or submission.

Dep't of Water & Power v. Manhart, 435 U.S. 702, 711 (1978) (internal citation and quotation marks omitted). And at the time of Title VII's enactment, the word "sex" meant, at a minimum, "biological" sex.[2] *See infra* at 6. Given the meaning of these terms at the time of Title VII's enactment, every instance of sexual orientation or gender identity discrimination occurs "because of . . . sex"—that is, it would not have occurred but for the individual's "biological sex."

For example, a lesbian—a woman who is attracted to women—would not have been fired for her attraction to women if she were a man attracted to women. So too, a transgender woman (in the terms of the Employers, a "biological man") would not have been fired for identifying and presenting as a woman if she were a "biological woman." As such, the plain meaning of Title VII's terms—as those terms were defined at the time of the law's enactment—dictates the conclusion that employment discrimination based on an individual's sexual orientation or transgender status is discrimination "because of such individual's . . . sex."

It does not matter that enactment-era observers might have thought otherwise. Rather, under this Court's precedents, "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).

---

[2] All the Employers in these cases agree that "sex" in 1964 meant what has been referred to as "biologically male or female." Bostock Br. in Opp'n 18; Zarda Cert. Pet. 16; Harris Cert. Pet. 26. Because the meaning of "biologically male or female" is itself disputed in some contexts, *amici* clarify that they use the term herein in the way that they understand the Employers to be using it in their briefing—that is, to connote the sex an individual is assigned at birth, typically on the basis of their external reproductive anatomy. *See, e.g.*, Harris Pet. 26.

Thus, even unanticipated applications are nevertheless covered by a law if those applications come within the reach of the law's plain text. *See, e.g.*, *id.* at 79-80; *cf. Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074-75 (2018). This is true regardless of whether the observer who failed to anticipate a particular application is the public or Congress itself. *See, e.g.*, *Oncale*, 523 U.S. at 79.

Actions by subsequent legislatures also do not change the analysis. The Employers argue that the fact that Congress has used the terms "sexual orientation" and "gender identity" alongside "sex" in certain recent laws proves that "sex" does *not* mean the same thing as "sexual orientation" and "gender identity" for purposes of Title VII. *See* Bostock Br. in Opp'n 17; Zarda Cert. Pet. 11; Harris Cert. Pet. 19. But Title VII does not prohibit discrimination based on sexual orientation and gender identity because "sex" *means* "sexual orientation" or "gender identity." Rather, it does so because discrimination based on an employee's sexual orientation or gender identity is also necessarily "because of such individual's . . . sex." In any event, there are numerous examples of both state legislatures and Congress enacting civil rights legislation that includes overlapping protections—and such overlapping protections have never been understood as a basis for limiting the scope of each individual protection.

Nor do later failed legislative proposals tell us anything about the meaning of the phrase "because of . . . sex" at the time of Title VII's passage. As this Court has repeatedly reiterated, "failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute." *Lockhart v. United States*, 546 U.S. 142, 147 (2005) (quoting *United States v. Craft*, 535 U.S. 274, 287 (2002)). Here,

such proposals tell us at most that some legislators in subsequent Congresses did not believe that Title VII *securely* protected individuals from discrimination based on sexual orientation and transgender status. And the failure to pass such legislative proposals can arise from anything from "inability to agree upon how to alter the status quo" to "indifference to the status quo." *See Johnson v. Transp. Agency*, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting).

In short, the views of legislators that passed Title VII—and the views of legislators in the years after it passed—cannot trump what the plain text says. Title VII prohibits employment discrimination "because of [an] individual's . . . sex." And each instance of discrimination based on an individual's sexual orientation or transgender status is also necessarily "because of such individual's . . . sex." For purposes of statutory interpretation, that is the end of the matter.

ARGUMENT

I. THE TEXT OF TITLE VII PLAINLY PROHIBITS EMPLOYMENT DISCRIMINATION BASED ON AN INDIVIDUAL'S SEXUAL ORIENTATION OR TRANSGENDER STATUS.

1. "In statutory construction, we begin 'with the language of the statute.'" *Kingdomware Techs. v. United States*, 136 S. Ct. 1969, 1976 (2016) (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002)). "And where the statutory language provides a clear answer, [we] end[] there as well." *Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 254 (2000) (quoting *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999)). In this case, this Court's analysis should begin and end with the text of Title VII.

Title VII's text provides that "[i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's . . . sex*." 42 U.S.C. § 2000e-2(a)(1) (emphasis added). As set out below, each and every instance of discrimination based on sexual orientation or transgender status would not have occurred but for an individual's sex. It thus is necessarily "because of . . . sex" within the meaning of Title VII.

"Because of" means "by reason of; on account of." *Webster's New World Dictionary of the Am. Language* 131 (C. ed. 1960); *see Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009) (same definition in other contemporaneous dictionaries). As this Court has long recognized, an action is "because of" sex where it would not have occurred "but for that person's sex." *Manhart*, 435 U.S. at 711 (internal citation and quotation marks omitted); *see Gross*, 557 U.S. at 176; *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 350-52 (2013).[3] Thus, where an employer takes an adverse

---

[3] Although there has been variation in the extent to which this Court has understood "because of" to *require* but-for causation, it has consistently held that such causation is *sufficient* to satisfy the "because of" requirement. *See, e.g.*, *Manhart*, 435 U.S. at 711; *Gross*, 557 U.S. at 176-77; *cf. Price Waterhouse v. Hopkins*, 490 U.S. 228, 240-41 (1989) (plurality opinion) (suggesting in dicta that "because of" does not require but-for causation, though ultimately adopting a "mixed motives" burden-shifting framework that did require but-for causation for liability).

In 1991, Congress amended Title VII to codify (and partially modify) the mixed motives burden-shifting framework recognized in *Price Waterhouse*. *See* 42 U.S.C. § 2000e-2(m); *see also Desert Palace v. Costa*, 539 U.S. 90, 94 (2003) (describing the

employment action against an individual that it would not have taken "but for" that individual's sex, Title VII has been violated.

As the Employers in these cases all agree, in 1964, the term "sex" was commonly defined to mean, at a minimum, "biological sex," *i.e.*, an individual's classification as male or female at birth. *See* Bostock Br. in Opp'n 18 (arguing that "sex" in 1964 meant "biologically male or female"); Zarda Cert. Pet. 16 (same); Harris Cert. Pet. 26 (same); *see also Webster's New World Dictionary of the Am. Language* 1335 (C. ed. 1960) (defining "sex" as "either of the two divisions of organisms distinguished as male or female" or "the character of being male or female"). *See generally Wis. Cent.*, 138 S. Ct. at 2074 ("words generally should be interpreted as taking their ordinary, contemporary, common meaning . . . at the time Congress enacted the statute" (internal citation and quotation marks omitted)).

Applying these contemporaneous definitions, discrimination based on sexual orientation or transgender status is discrimination "because of . . . sex." For instance, when an employer fires a woman because of her sexual orientation, the employer fires her because she is a *woman* who is attracted to other women. If she were a *man* who was attracted to women, she would not have been fired. Thus, the fact that she is a woman and not a man is a "but for" cause of her firing.

"alternative" mixed motives paradigm codified by § 2000e-2(m)). When a Title VII plaintiff relies on § 2000e-2(m), a lower "motivating factor" standard of causation applies. *See* 42 U.S.C. § 2000e-2(m). Because sexual orientation and gender identity discrimination satisfy even the higher but-for standard of causation, this brief does not address the alternative framework provided for in § 2000e-2(m).

Similarly, when an employer fires a transgender woman because she is transgender, the employer fires her because of her sex. Each characteristic that defines the employee as transgender—her identification as a woman, her self-description as a woman, her appearance as a woman—is one that her employer would find unobjectionable in a "biological" woman. Thus, the termination would not have happened "but for" the fact that she is a "biological" male, as the Employers in these cases have defined the term.

Importantly, this conclusion does not, as the Employers in these cases suggest, require the Court to hold that the word "sex" *means* "sexual orientation" or "gender identity." *See* Bostock Br. in Opp'n 20; Zarda Cert. Pet. 16-17; Harris Cert. Pet. 26. Rather, individuals who are fired because they are gay or transgender are treated differently because of their *sex*, as the Employers all acknowledge that term was commonly defined at the time of Title VII's enactment. That is, they are treated differently because of their status as a "biological" man or woman, and the discrimination therefore would not have occurred "but for that person's sex." *Manhart*, 435 U.S. at 711 (internal citation and quotation marks omitted). In other words, the discrimination is "because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1).

2. Some lower court judges have suggested that an employer who engages in discrimination based on sexual orientation or transgender status cannot have engaged in discrimination "because of . . . sex" because the employer presumably would discriminate equally against both men *and* women who are gay or transgender. *See, e.g.*, *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 365-67 (7th Cir. 2017) (Sykes, J., dissenting). But this reasoning ignores the fact that Title VII's "focus on the individual is unambiguous."

Manhart, 435 U.S. at 708. After all, the statute prohibits employment discrimination "against any *individual* . . . because of such *individual's* . . . sex." 42 U.S.C. § 2000e-2(a)(1) (emphasis added).

As both this Court and lower courts have recognized, this individually-focused language means that Title VII does more than simply protect a broad group (for example, all women or all men) against discrimination; rather, it protects *individuals* from being discriminated against on the basis of specified characteristics. Thus, in the context most analogous to that at issue here, lower courts have recognized that discrimination against an individual because of that individual's interracial relationship is "'because of such individual's race'" (even if the employer may discriminate against African Americans and whites alike) because "the employee [in the interracial relationship] suffers discrimination because of the employee's *own* race." *Holcomb v. Iona Coll.*, 521 F.3d 130, 137, 139 (2d Cir. 2008) (quoting 42 U.S.C. § 2000e-2(a)(1)); *see Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 891-92 (11th Cir. 1986) (same). In the same vein, sex is a "but for" cause of discrimination based on sexual orientation or transgender status, even if the employer discriminates against both gay men and lesbians or against both transgender men and women, because the individual is treated differently on the basis of his or her *own* sex.

This Court also has recognized that policies that are facially symmetrical are nevertheless "because of . . . sex," where—as to particular individuals—the outcome would be different "but for" their sex. Thus, for example, in *Dothard v. Rawlinson*, 433 U.S. 321 (1977), this Court concluded that a policy barring prison guards from "contact" positions with prisoners of the other sex was facially discriminatory as to

women denied such positions—even though it could also bar men from contact positions in women's prisons. *Id.* at 332 n.16. Thus, this Court found that the policy was defensible only as a bona fide occupational qualification (BFOQ), despite the fact that it also applied to men. *Id.* at 332-34.[4]

Moreover, the fact that society might consider "sexual orientation" and "gender identity" as their own categories does not make discrimination on these bases any less "because of . . . sex"—even where such discrimination affects men and women alike. For example, as noted above, courts have recognized that employment discrimination against individuals in interracial relationships is "because of such individual's race" for purposes of Title VII, even where the employer might discriminate symmetrically against both African Americans and whites in such relationships. This is because an individual's *own* race is a but-for cause of that discrimination, regardless of whether African Americans and whites are affected equally as a group. Notably, this conclusion would remain the same even if society designated a social category for those in interracial relationships ("interracial-sexuals"), as it has for those in same-sex relationships ("gay men" and "lesbians"), and an employer contended that it acted based on that category. The individual's race would still be a but-for cause of the adverse employment action, and thus that action would still be "because of such individual's race." Likewise, the

[4] Under Title VII, an employer may defend against a disparate treatment lawsuit by showing that sex "is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e). The Court in *Dothard* ultimately held that, as applied to Alabama's maximum-security male prisons, sex was a BFOQ. *See Dothard*, 433 U.S. at 334.

existence of social categories like "gay" and "transgender" does not change the fact that when an employer takes an adverse employment action on the basis of sexual orientation or transgender status, an individual's "sex" is necessarily a but-for cause of that differential treatment—and the employer's conduct is thus prohibited by the express terms of the statute.

In short, "Title VII requires employers to treat their employees as *individuals*." *Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 1083 (1983) (per curiam). And thus each individual is entitled to be free from "treatment . . . which but for that person's sex would be different." *Manhart*, 435 U.S. at 711 (internal citation and quotation marks omitted). Under Title VII, "fairness to the class"—or, as here, unfairness to both classes—"[can]not justify unfairness to [an] individual." *Connecticut v. Teal*, 457 U.S. 440, 455 (1982).

3. Title VII's proscription on discrimination "because of . . . [protected characteristics]" also is not limited only to those actions arising from racism, sexism, or other malign group-based motives. Rather, this Court has consistently recognized that adverse employment actions that would not have occurred but for an individual's protected characteristic fall within Title VII's proscription on discrimination "because of . . . [protected characteristics]," regardless of whether the actions arise from such invidious motives.

Thus, for example, even where an employer's motive is to *avoid* discrimination against African Americans (not to discriminate against whites), this Court has held that an employer's race-based actions are "because of . . . race"—and thus, absent rare exceptions, proscribed. *See, e.g.*, *Ricci v. DeStefano*, 557 U.S. 557, 579-80 (2009) (employer actions taken to avoid a racial

disparate impact were racial disparate treatment); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 278-85 (1976) (reverse discrimination claims actionable where an African American employee was given preferential treatment); *see also* Resp't Br. 16, *McDonald*, 427 U.S. 273 (No. 75-260) (arguing that the better-treated African American employee was simply being given a "break," and that this was not invidious and thus not actionable). So too, benign motives, such as the desire to protect fetuses, or to ensure that men and women as groups receive equal benefits, have been found by this Court to be irrelevant to the basic question of whether an employer engaged in the "treatment of a person in a manner which but for that person's sex would be different." *Manhart*, 435 U.S. at 711 (internal citation and quotation marks omitted); *see Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls*, 499 U.S. 187, 197-200 (1991).

Rather, to the extent that this Court has understood "because of" to connote an intent requirement (that might be conceived of as distinct from causation), it is not one of malign intent—but rather simply that protected characteristics "play[] a role in [the decision-making] process." *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 141 (2000) (quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)) (stating that the plaintiff's protected characteristic "must have 'actually played a role in [the employer's decision-making] process and had a determinative influence on the outcome'").

And this requirement is unquestionably satisfied in all cases in which discrimination based on sexual orientation or transgender status takes place. When an employer engages in discrimination based on sexual orientation or transgender status, the individual's sex,

of necessity, "play[s] a role in [the decision-making] process," *id.* at 141 (quoting *Hazen*, 507 U.S. at 610), because "sexual orientation" and "transgender status" are unintelligible without considering the individual's sex.

* * *

For all of these reasons, the text of Title VII unambiguously prohibits employment discrimination because of an individual's sexual orientation or transgender status. Such discrimination is "because of such individual's . . . sex," within the meaning of those terms at the time of Title VII's passage. As this Court has repeatedly reiterated, where the text of a statute is unambiguous, that is the end of the matter, and this Court must adhere to the words that Congress passed. As the next Section makes clear, the plain text controls even when that text sweeps more broadly than what contemporaneous legislators or observers might have anticipated.

II. THE CONTEMPORANEOUS EXPECTATIONS OF LEGISLATORS OR THE PUBLIC AT THE TIME TITLE VII WAS PASSED CANNOT OVERRIDE ITS PLAIN TEXT.

As described above, the plain text of Title VII prohibits employers from discriminating against individuals based on their sexual orientation or transgender status because such discrimination is necessarily "because of such individual's . . . sex." That is sufficient to end the case. *See Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 632 (2018) (where "plain language . . . is 'unambiguous,' 'our inquiry begins with the statutory text, and ends there as well'" (quoting *BedRoc Limited, LLC v. United States*, 541 U.S. 176, 183 (2004) (plurality opinion))).

Nevertheless, some have suggested that this textualist analysis should be rejected because, in their view, no one at the time Title VII was enacted would have thought that it covered discrimination based on sexual orientation or transgender status. *See Wittmer v. Phillips 66 Co.*, 915 F.3d 328, 334 (5th Cir. 2019) (Ho, J., concurring) ("No one seriously contends that, at the time of enactment, the public . . . understanding of Title VII included sexual orientation or transgender discrimination."); *Hively*, 853 F.3d at 362 (Sykes, J., dissenting) ("Is 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? The answer is no, of course not.").

As an initial matter, it bears emphasis that such an argument—while often framed in terms of the meaning of "sex" at the time of Title VII's passage—is not in fact a textualist argument at all. As described above, even applying the most narrow meaning of the term "sex" at the time of Title VII's passage, discrimination based on sexual orientation or transgender status constitutes discrimination "because of . . . sex." *See* Part I, *supra*. Thus, this argument is not about the original meaning of the statute's words. Rather it is an invitation to limit the scope of those words to only those applications that enactment-era observers would have expected them to reach.

This approach is thus fundamentally inconsistent with textualism—and this Court has consistently rejected it for this reason. As this Court has recognized, "[i]t is not our function 'to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have' intended." *Wis. Cent.*, 138 S. Ct. at 2073 (quoting *Henson v. Santander*

Consumer USA Inc., 137 S. Ct. 1718, 1725 (2017)). Similarly, this Court has rejected arguments that the expectations of the original public can constrain otherwise broad and inclusive text. *See, e.g.*, *id.* at 2074-75 (observing that the "original public meaning" of statutory terms is not limited to those applications that existed at the time); *see also* Katie Eyer, *Statutory Originalism and LGBT Rights*, 54 Wake Forest L. Rev. 63, 89-92 (2019) (discussing *Wisconsin Central*).

In *Oncale v. Sundowner Offshore Servs., Inc.*, for example, this Court held that Title VII's prohibition on discrimination "because of . . . sex" includes same-sex workplace sexual harassment where that harassment is "because of . . . sex." 523 U.S. at 79-80. The Court acknowledged that "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII." *Id.* at 79. Nonetheless, "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Id.*

Analogously, in *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998), this Court held that Title II of the Americans with Disabilities Act (ADA), which prohibits a "public entity" from discriminating against a "qualified individual with a disability" on account of that disability, 42 U.S.C. § 12132, covers state prisoners because "the statute's language unmistakably includes State prisons and prisoners within its coverage." 524 U.S. at 209. Although the petitioners argued that "Congress did not envisio[n] that the ADA would be applied to state prisoners," *id.* at 212 (internal citation and quotation marks omitted), the Court insisted that "in the context of an unambiguous statutory text that is irrelevant," *id.* Indeed, "the

fact that a statute can be 'applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'" *Id.* (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985)).

Thus, as *Oncale* and *Yeskey* hold, a refusal to apply broad text simply because certain applications were not anticipated at the time of enactment is inconsistent with a proper textualist analysis. Where the broad language of a statute literally includes particular applications, it is a fundamental derogation from textualist principles to exclude them based on contrary expectations. Indeed, *Holy Trinity Church v. United States*, 143 U.S. 457 (1892)—often held up as the antithesis of this Court's modern textualist approach—did exactly that, rejecting an application of a criminal law precisely because the Court believed that Congress neither anticipated nor desired the prosecution of a church for importation of a foreign minister. *Id.* at 472. That approach has been rejected by this Court for at least two decades. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 11-13 (2012); John F. Manning, *The New Purposivism*, 2011 Sup. Ct. Rev. 113, 125.

Finally, this argument is equally without merit regardless of whether the relevant enactment-era audience is conceived of as Congress or the "original public." *Cf. Wittmer*, 915 F.3d at 334, 335 n.1 (Ho, J., concurring) (suggesting that looking to the expectations of the "original public" is somehow more acceptable than the Congress-focused arguments rejected in *Oncale*). Indeed, in *Oncale*, one could have argued that the "original public" would not have thought Title VII would cover same-sex sexual harassment in the workplace, but the Court nevertheless applied Title VII's plain text and held that it covered such conduct. *See*

Oncale, 523 U.S. at 79-80. So too, in *Yeskey*, the "original public"—just like Congress—no doubt would not have anticipated that prisoners would be beneficiaries of the ADA, and yet the Court held that prisoners are equally entitled to the ADA's broad textual protections. *See Yeskey*, 524 U.S. at 209, 212; *see also* Eyer, *supra*, at 97-99. In short, using the public's or Congress's expectations to limit text is fundamentally inconsistent with this Court's approach to statutory interpretation. *Cf. Wis. Cent.*, 138 S. Ct. at 2074-75 (conducting a textualist analysis and concluding that electronic transfers of paychecks "would qualify today as 'money renumeration' under the [Railroad Retirement Tax Act]'s original public meaning," even though they "weren't common in 1937").

Of course, it *is* consistent with this Court's precedents to look at how the public would have understood the terms "because of" and "sex" in 1964. "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) (quoting *INS v. Chadha*, 462 U.S. 919, 951 (1983)). For that reason, courts use historical definitions and other historical etymological context to understand the meaning of the words of a statute at the time of enactment.[5]

[5] Even originally expected applications may in some circumstances provide relevant etymological context. But there is a profound distinction between looking to the original expectations about the application of a statute to discern the semantic meaning of the words of a statute—which may be legitimate—and relying on original expectations to *depart* from the semantic meaning of a statute—which plainly is not. Here, as already noted, discrimination based on sexual orientation or transgender status is "because of . . . sex" even using the narrowest meaning of those

But as already explained above, *supra* at 6-7, even considering the narrowest definition of "sex" in 1964—"biological" status as male or female—discrimination based on sexual orientation or transgender status would not happen but for an individual's "biological" sex. Under this Court's statutory interpretation precedents, that is the end of the matter.

* * *

In short, it simply makes no difference that the public or Congress might not have expected the words of Title VII to apply to discrimination on the basis of sexual orientation or transgender status in 1964. Whatever they might have thought, the plain meaning of the words "because of such individual's . . . sex," as they were defined at the time of Title VII's passage, encompasses discrimination based on sexual orientation or transgender status. As the next Section explains, actions by *subsequent* legislatures—which did not amend Title VII itself—also cannot alter the plain meaning of Title VII.

III. THE ACTIONS OF SUBSEQUENT LEGISLATURES CANNOT TRUMP THE PLAIN MEANING OF TITLE VII'S TEXT.

Refusing to accept that the plain meaning of Title VII controls this case, the Employers at the certiorari stage offered two additional arguments that certain

---

words. *See* Part I, *supra*. As such, the use of originally expected applications in this context is simply an invitation to depart from the words of the statute, rather than an effort to ascertain their meaning. This distinction is important because there may be many reasons—unrelated to the semantic meaning of the text—why an enacting Congress or public may not anticipate a particular application. *See, e.g.*, *Wis. Cent.*, 138 S. Ct. at 2074-75 (technological advances); Eyer, *supra*, at 97-99 (disfavored rights-holders).

actions by *subsequent* legislatures can override this plain meaning. First, they argued that Congress's inclusion of the terms "sexual orientation" and "gender identity" alongside "sex" in statutes passed decades after Title VII became law suggests that the phrase "because of . . . sex" in Title VII does not encompass discrimination based on an employee's sexual orientation or transgender status. Second, they argued that Congress's failure to pass bills in subsequent years that would have explicitly included "sexual orientation" and "gender identity" as protected groups under Title VII means that the phrase "because of . . . sex" cannot encompass discrimination based on an employee's sexual orientation or transgender status. Neither argument is persuasive.

1. First, the Employers argued that Title VII's prohibition on discrimination "because of . . . sex" cannot encompass discrimination on the basis of sexual orientation or transgender status because, elsewhere in the U.S. Code, Congress has used the terms "sexual orientation" and "gender identity" alongside "sex" or "gender," suggesting (in the Employers' view) that those terms are mutually exclusive. *See* Bostock Br. in Opp'n 17; Zarda Cert. Pet. 11; Harris Cert. Pet. 19. In other words, the Employers contended that the fact that Congress sometimes uses those terms together in other statutes necessarily means that "sex" does *not* mean the same thing as "sexual orientation" or "gender identity" for purposes of Title VII.

But this is a red herring: no one argues that "sex" means the same thing as "sexual orientation" or "gender identity." Rather, as explained above, Title VII covers employment discrimination against gay and transgender individuals *not* because "sex" literally means "sexual orientation" or "gender identity," but because such discrimination is also necessarily

"because of such individual's . . . sex" per that phrase's meaning at the time Title VII was passed. The fact that Congress has explicitly prohibited discrimination because of "sexual orientation" or "gender identity" in some other parts of the U.S. Code does not alter the plain meaning of the existing Title VII prohibition.

In addition, the provisions that the Employers cited—funding for programs and activities under the Violence Against Women Act, and laws and programs regarding crimes motivated by a victim's sexual orientation or gender identity, Bostock Br. in Opp'n 17; Zarda Cert. Pet. 11; Harris Cert. Pet. 8 n.4—were all passed nearly half a century after Title VII became law. *See* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54; Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, Div. E, 123 Stat. 2190 (2009). It strains credulity to suggest that what Congress did in these statutes decades later could shed light on the meaning of the phrase "because of . . . sex" in the Civil Rights Act of 1964.

Moreover, overlapping protections under civil rights laws are common and are not a basis for inferring limitations on the scope of such protections. For example, Title VII prohibits "race," "color," *and* "national origin" discrimination, categories that plainly overlap. *See* 42 U.S.C. § 2000e-2(a)(1); *see also Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 614 (1987) (Brennan, J., concurring) ("[I]n the Title VII context, the terms [race and national origin] overlap as a legal matter." (citing 29 C.F.R. § 1606.1)); *Reyes v. Pharma Chemie, Inc.*, 890 F. Supp. 2d 1147, 1158 (D. Neb. 2012) ("The line dividing the concepts of 'race' and 'national origin' is fuzzy at best, and in some contexts, national origin discrimination is so closely related to racial discrimination as to be indistinguishable."); EEOC

Compliance Manual 15-IV (Apr. 2006), https://www.eeoc.gov/policy/docs/race-color.html (noting that, "for example, a discrimination complaint by an 'Asian Indian' can implicate race, color, and national origin, as can, for example, a complaint by a Black person from an African nation, or by a dark-skinned Latino" (footnote omitted)).

Indeed, the supposed redundancy to which the Employers pointed exists in the laws of several States that added specific statutory protections for LGBT employees—even after their courts held that discrimination against LGBT employees was within the scope of existing sex discrimination provisions. *See, e.g.*, *Enriquez v. W. Jersey Health Sys.*, 777 A.2d 365, 373 (N.J. Super. Ct. App. Div.) (holding that gender identity discrimination is sex discrimination), *cert. denied*, 785 A.2d 439 (Table) (N.J. 2001); 2006 N.J. Sess. Law Serv. Ch. 100 (West) (adding gender identity alongside sex); S.B. 2437, 211th Leg. (N.J. 2006) (explaining that the 2006 amendment was intended to "codify the court's reasoning in the *Enriquez* decision"); *Maffei v. Kolaeton Indus., Inc.*, 626 N.Y.S.2d 391, 396 (Sup. Ct. 1995) (harassment against a transgender employee is "discrimination based on sex"); *Buffong v. Castle on Hudson*, 824 N.Y.S.2d 752 (Sup. Ct. 2005) ("the word 'sex' in the statute covers transsexuals"); S.B. 1047 & Assemb. B. 747, 2019-20 Reg. Sess. (N.Y. 2019) (adding gender identity alongside sex, while recognizing that "court decisions [already] properly held [that] New York's sex discrimination laws prohibit discrimination . . . because an individual has transitioned or intends to transition from one gender to another").

Thus, no inference can be drawn from the fact that Congress—decades later, in different laws—proscribed sex discrimination alongside sexual orientation and gender identity discrimination. Congress's

inclusion of "sexual orientation" and "gender identity" alongside "sex" in recent laws does not (and cannot) change the fact that the preexisting prohibition on discrimination "because of . . . sex" in Title VII encompasses discrimination based on transgender status and sexual orientation.

2. Finally, the Employers argued that Title VII cannot cover discrimination based on an individual's sexual orientation or transgender status because Congress has considered and failed to pass bills in subsequent years that would have explicitly included "sexual orientation" and "gender identity" as prohibited bases for action under Title VII. *See* Bostock Br. in Opp'n 20-22 n.4; Zarda Cert. Pet. 20 n.6; Harris Cert. Pet. 7-8 n.3. But this Court has repeatedly explained that "failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute." *Lockhart*, 546 U.S. at 147 (quoting *Craft*, 535 U.S. at 287); *see United States v. Price*, 361 U.S. 304, 313 (1960) ("the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one" (quoting *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990))).

That is because "several equally tenable inferences may be drawn from such inaction." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994). Here, for instance, proposed legislation might simply tell us that some legislators did not think that gay and transgender employees were *securely* protected, given the way in which lower courts were interpreting early sex discrimination claims by gay and transgender employees. *See, e.g.*, *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 329-30 (9th Cir. 1979); *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084-85 (7th Cir. 1984). And the failure to pass such legislation could represent anything from "inability to

agree upon how to alter the status quo" to "indifference to the status quo." *See Johnson*, 480 U.S. at 672 (Scalia, J., dissenting); *cf. Pension Benefit Guar. Corp.*, 496 U.S. at 650 ("Congressional inaction lacks 'persuasive significance' because 'several equally tenable inferences' may be drawn from such inaction, 'including the inference that the existing legislation already incorporated the offered change.'" (quoting *United States v. Wise*, 370 U.S. 405, 411 (1962))).

In any event, the existence of failed legislative proposals years *after* Title VII's passage would only be arguably relevant if the text of Title VII were ambiguous. As described above, however, Title VII is anything but ambiguous.[6] Title VII's text plainly prohibits discrimination based on sexual orientation and transgender status because such discrimination is necessarily "because of [an] individual's . . . sex." As such, that plain text controls. It cannot be overridden by the views of subsequent legislators, any more than by the views of contemporaneous legislators or observers.

[6] As this Court properly recognized in *Yeskey*, "the fact that a statute can be 'applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'" *Yeskey*, 524 U.S. at 212 (quoting *Sedima*, 473 U.S. at 499).

CONCLUSION

For the foregoing reasons, the judgments of the Second and Sixth Circuits in *Altitude Express v. Zarda* and *R.G. & G.R. Harris Funeral Homes v. EEOC* should be affirmed, and the judgment of the Eleventh Circuit in *Bostock v. Clayton County, Georgia* should be reversed.

Respectfully submitted,

KATIE EYER
PROFESSOR OF LAW
RUTGERS LAW SCHOOL
217 N. 5th St., E429
Camden, NJ 08102
(856) 225-6960
katie.eyer@rutgers.edu

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
ASHWIN P. PHATAK
DAYNA J. ZOLLE**
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th St. NW, Ste 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amici Curiae

July 3, 2019

* Counsel of Record
** Not admitted in D.C.; supervised by principals of the firm

APPENDIX: LIST OF *AMICI*

Carlos A. Ball, Distinguished Professor of Law, Rutgers Law School

Maxine Eichner, Graham Kenan Distinguished Professor of Law, University of North Carolina School of Law

Katie Eyer, Professor of Law, Rutgers Law School

Anita S. Krishnakumar, Mary C. Daly Professor of Law, Associate Dean for Faculty Scholarship, St. John's University School of Law

Holning Lau, Willie P. Mangum Distinguished Professor of Law, University of North Carolina School of Law

Richard Primus, Theodore J. St. Antoine Collegiate Professor of Law, University of Michigan Law School

David A. Strauss, Gerald Ratner Distinguished Service Professor of Law, Faculty Director of the Jenner & Block Supreme Court and Appellate Clinic, University of Chicago Law School

Tobias Barrington Wolff, Jefferson Barnes Fordham Professor of Law; Deputy Dean, Alumni Engagement and Inclusion, University of Pennsylvania Law School