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

IN THE

Supreme Court of the United States

GERALD LYNN BOSTOCK,

v.

CLAYTON COUNTY, GEORGIA,

ALTITUDE EXPRESS, INC., AND RAY MAYNARD,

v.

MELISSA ZARDA AND WILLIAM MOORE, JR., CO-INDEPENDENT EXECUTORS OF THE ESTATE OF DONALD ZARDA

R.G. & G.R. HARRIS FUNERAL HOMES, INC.,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMM'N AND AIMEE STEPHENS

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

BRIEF OF *AMICI CURIAE* WISCONSIN ADVOCACY ORGANIZATIONS IN SUPPORT OF THE EMPLOYEES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and Other Authorities:

INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae include a wide array of Wisconsin-based advocacy organizations committed to the well-being of LGBT+ individuals. Although their unique approaches differ, the organizations all unite in a common mission of uplifting a community whose constituents seek only to exist in peace and to be treated equally under the law—in the workplace, and everywhere.

The **LGBT Bar Association of Wisconsin** is an organization dedicated to promoting the professional development and advancement of LGBT legal professionals.

Community Shares of Wisconsin is a member-driven federation of nonprofits working together to address social, economic, and environmental problems through grassroots activities, advocacy, research, and public education.

Cream City Foundation mobilizes philanthropic resources to advance the human rights and respond to the human needs of LGBT people in Southeastern Wisconsin.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

Diverse & Resilient works to achieve health equity and to improve the safety and well-being of LGBT people and communities in Wisconsin.

Fair Wisconsin works to protect and secure LGBT civil rights through lobbying, legislative advocacy, grassroots organizing, coalition building, and electoral involvement.

Legal Action of Wisconsin provides free legal services to low-income people, including many LGBT individuals, who would otherwise be denied equal access to justice.

Legal Aid Society of Milwaukee was founded in 1916 to do all things necessary for the prevention of injustice, which includes providing legal representation for members of the LGBT community.

Out Professional Engagement Network (OPEN) provides educational and informational resources regarding issues of gender and sexual diversity of professional concern to LGBT individuals.

Trans Law Help Wisconsin is a legal aid clinic staffed completely by volunteer attorneys who provide needed assistance to the transgender community.

The **Wisconsin LGBT Chamber of Commerce** works to create a fully inclusive state by promoting economic growth and opportunities among LGBT owned and allied businesses, corporations, and professionals in Wisconsin.

SUMMARY OF THE ARGUMENT

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination "because of . . . sex." 42 U.S.C. § 2000e-2(a)(1). In these cases, Bostock, Zarda, and Stephens (collectively, the "Plaintiffs") contend that Title VII's protections extend to discrimination based on sexual orientation and transgender status. *Amici* agree.

Statutory text alone compels a holding that Title VII prohibits sexual-orientation and transgender-status discrimination. To reach this conclusion, the Court can assume that "sex" in Title VII means what lay dictionaries said it meant in 1964. Starting from this interpretive premise, the only semantically and logically coherent reading of Title VII supports a ruling in Plaintiffs' favor. To show how, this brief follows an argument to the contrary—that Title VII's text *does not* prohibit sexual-orientation and transgender-status discrimination—to its logical conclusion. This argument, as shown below, succumbs to logical flaws and lacks any textual foothold.

Indeed, the only way for opponents to succeed is by departing from the text and original meaning of Title VII and instead resorting to Congress's or the 1964 public's *expected application* of the Civil Rights Act. But such a method of statutory interpretation has been thoroughly discredited. Just last term this Court reaffirmed that while "every statute's *meaning* is fixed at the time of enactment," it is also the case that "new *applications* may arise in light of changes in the world." *Wis. Central Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018). Even more pointedly, the Court has

eschewed reliance on expected application in Title VII sex-discrimination cases. *See, e.g.*, *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998). Despite ostensibly following a textualist and originalist approach, the dissenters in *Zarda* actually conflate original meaning with expected application, leading to an atextual conclusion. This Court should avoid the same result.

Looking beyond Title VII's text, a ruling in Plaintiffs' favor would also preserve and enhance the Court's institutional legitimacy. First, such a ruling would harmonize the Court's dual roles as (a) a constitutionally-charged protector of individual rights against majoritarian excess, and (b) a core part of a democratic government responsive to public opinion. Title VII exists to protect the rights of *individuals* against discriminatory employment practices. Running parallel, the American public overwhelmingly believes that employers should not be allowed to discriminate against individuals based on their sexual orientation or transgender status. *See* Andrew R. Flores, *National Trends in Public Opinion on LGBT Rights in the United States*, The Williams Institute 25, 27 (2014), https://tinyurl.com/yd43w2dg. A ruling in Plaintiffs' favor therefore presents no countermajoritarian tension.

Second, a ruling in Plaintiffs' favor comports with the Court's existing Title VII jurisprudence. Viewed together, this Court's decisions prohibiting same-sex sexual harassment, gender-stereotype discrimination, and associational discrimination—along with the reasoning embedded in those decisions—plot a

jurisprudential trajectory that necessarily embraces the legal rule for which Plaintiffs advocate.

Third and finally, a ruling in Plaintiffs' favor would address widespread discrimination and allay its well-documented negative effects. The ruling would positively affect society as a whole and its individual members psychologically, socially, and economically. In sum, the benefits flowing from such a ruling would certainly preserve and enhance the Court's institutional legitimacy.

ARGUMENT

I. Statutory text compels a holding that Title VII prohibits discrimination because of sexual orientation and transgender status.

Title VII of the Civil Rights Act of 1964 makes it unlawful 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). For the sake of argument, this section assumes that both in 1964 and today, the word "sex" in Title VII means "either of the two divisions of organisms distinguished as male or female." "Sex," *Webster's New World Dictionary of the American Language* (1960); *see* "Sex," *The American Heritage Dictionary of the English Language* (5th ed. 2019) (defining "sex" as "[e]ither of the two divisions, designated female and male, by which most organisms are classified on the basis of their reproductive organs and functions"); *see also Zarda v. Altitude Express, Inc.*,

883 F.3d 100, 145 (2d Cir. 2018) (en banc) (Lynch, J., dissenting); *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 362–63 (7th Cir. 2017) (en banc) (Sykes, J., dissenting). Even using this definition of "sex," however, the text of Title VII still compels the result advocated by Plaintiffs: employers may not discriminate because of an individual's sexual orientation or status as transgender.

"Sexual orientation"—often expressed colloquially using labels like straight, gay, lesbian, and bisexual—means "[t]he direction of a person's sexual interest, as toward people of a different sex, toward people of the same sex, or without regard to sex." "Sexual orientation," *American Heritage Dictionary of the English Language* (5th ed. 2019). An "immutable" characteristic, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015), sexual orientation depends on two variables: an individual's own sex and the sex to which that individual is attracted.

Whether an individual is "transgender" also depends on two variables: the individual's sex assigned at birth and the individual's gender identity. "Gender identity," in turn, refers to an individual's inner sense of being male, female, both, or neither. *See* "Gender identity," *American Heritage Dictionary of the English Language* (5th ed. 2019); *see also* Eli Coleman et al., *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People*, World Professional Association for Transgender Health 96 (2012), https://tinyurl.com/y39yvaa9. The term "transgender" describes individuals whose sex assigned at birth differ from their gender identity. *See*

"Transgender," *American Heritage Dictionary of the English Language* (5th ed. 2019).[2]

A. It is semantically and logically incoherent to argue that Title VII does not prohibit sexual-orientation or transgender-status discrimination.

1. In sexual-orientation discrimination cases under Title VII, employers often argue—and judges sometimes have agreed—that there is a substantive difference between discriminating "because of sex" and "because of sexual orientation." Although the former clearly violates Title VII, the argument goes, the latter does not. In short, employment discrimination "because of sexual orientation" is not prohibited by Title VII—and hence, no employee who was discriminated against because of sexual orientation can state a claim under Title VII. Although at first blush this argument may sound plausible, it actually suffers from semantic shortcomings and internal logical flaws.

Consider three hypothetical individuals named Tom, Jane, and Bob:

[2] The term "cisgender" refers to individuals whose sex assigned at birth matches their gender identity.

	Tom	Jane	Bob
Sex	Male	Female	Male
To Which Sex Attracted	Male	Male	Female
Sexual Orientation	Gay[3]	Straight	Straight

Other than the characteristics represented in the chart, all three individuals are similarly situated.

Tom and Jane apply for a manager's position at ABC Company. ABC Company hires Jane but not Tom, stating that it "refuses to hire individuals attracted to the same sex, whether homosexual or bisexual." When one compares Tom and Jane, one notices that the sex to which both are attracted is the same (male) and that the *only* difference between them is their sex: Tom is male, and Jane is female. On this basis, Tom argues that ABC Company violated Title VII by "refus[ing] to hire" him "because of" his "sex." 42 U.S.C. § 2000e-2(a)(1).

Later, suppose Tom and Bob apply for an assistant's position at ABC Company. ABC Company hires Bob but not Tom, again stating that it "refuses to hire homosexual and bisexual individuals." When one

[3] *Amici* acknowledge that individuals like Tom may prefer other descriptors for their sexual orientation, such as "homosexual," "bisexual," "pansexual," or "queer," depending on the circumstances. None of these potential variations affects the argument.

compares Tom and Bob, one notices that they are both the same sex (male) and that the difference between them—unlike the difference between Tom and Jane—is the sex to which they are attracted. On this basis, ABC Company argues: "We only refuse to hire homosexual and bisexual individuals, not men or women per se. We didn't hire Tom for either the manager's position or the assistant's position because he is gay. It has nothing to do with whether he's a man or a woman." It argues that it is not discriminating "because of . . . sex" but rather because of sexual orientation.

Still, though, ABC Company must concede that it refuses to hire *certain* males—namely, those males who are attracted to males.[4] What is that refusal to hire because of? There are two possibilities: ABC Company refuses to hire either because of (a) the sex of those males, or (b) the sex to which those males are attracted.

ABC Company cannot argue option (a). To do so would concede that it "refuses to hire . . . because of . . . sex" in violation of Title VII. 42 U.S.C. § 2000e-2(a)(1). So ABC Company proceeds with option (b). For that option to make logical sense, however, ABC Company must argue that it refuses to hire either *all* individuals who are attracted to males or *all* individuals who are attracted to females. Otherwise (b) would blur into (a). To illustrate, suppose ABC Company says it refuses to

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[4] And, consistent with its statement that it "refuses to hire homosexual and bisexual individuals," ABC Company must also concede that it refuses to hire *certain* females—namely, those females who are attracted to females.

hire *certain* individuals who are attracted to males—namely, those individuals who are themselves male. Such refusal to hire would be at least partially "because of" the sex of the individual, which is option (a).[5]

Continuing on, ABC Company argues that it refuses to hire all individuals who are attracted to males. This, in turn, raises two insurmountable obstacles. First and most fundamentally, ABC Company has now argued *both* that it refuses to hire homosexual individuals *and* that it refuses to hire all individuals who are attracted to males; in doing so, it has logically limited itself to hiring *only* males (that are heterosexual). But a practice of hiring only males—and, hence, *never* hiring females—is textbook "refus[al] to hire" "because of . . . sex." 42 U.S.C. § 2000e-2(a)(1); *see Hively*, 853 F.3d at 359 n.2 (Flaum, J., concurring) (quoting *Manhart*, 435 U.S. at 708). Second, ABC Company *did not* actually refuse to hire all individuals who are attracted to males: it hired Jane, an individual attracted to males.

These logical quagmires necessarily ensue because "sexual orientation" depends on two variables: an individual's sex and the sex to which that individual is attracted. *See supra* p. 6. The moment an employer argues that it only discriminates against individuals who are attracted to members of the "same sex" (homosexual, or even bisexual), it necessarily raises the subsidiary question of what the attracted-to sex is the "same" as. The answer, of course, is the sex of the

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[5] "Partially" is enough. *See City of L.A., Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978).

individual—an impermissible factor for an employer to consider under Title VII. *See Hively*, 853 F. 3d at 358–59 (Flaum, J., concurring).

As the foregoing shows, an employer that asserts it discriminates *only* because of sexual orientation must really be arguing one of two things: it either discriminates because of (a) the sex of the individual (Jane/Tom), or (b) the sex to which the individual is attracted (Bob/Tom). Option (a) violates Title VII on its face. Option (b) is logically flawed, because it still ultimately relies on the sex of an individual like Tom, unless all women were also discriminated against (a practice which itself would violate Title VII). Thus, if an employer refuses to hire because of sexual orientation, it *necessarily*—as a matter of text and logic—"refuses to hire . . . because of . . . sex." 42 U.S.C. § 2000e-2(a)(1).

2. Like in sexual-orientation cases, employers in transgender-status cases under Title VII often argue that there is a difference between discriminating "because of . . . sex" and "because of . . . transgender status." This argument also fails.

Consider three hypothetical individuals named Devon, Mary, and Jack:

	Devon	Mary	Jack
Sex Assigned at Birth	Male	Female	Male
Gender Identity	Female	Female	Male
Transgender or Cisgender	Trans-gender	Cisgender	Cisgender

Other than the characteristics represented in the chart, all three individuals are similarly situated.

Devon and Mary apply for a manager's position at ABC Company. ABC Company hires Mary but not Devon, stating that it "refuses to hire transgender individuals." When one compares Devon and Mary, one notices that their gender identities are the same and that the *only* difference between them is the sex they were assigned at birth. On this basis, Devon argues that ABC Company violated Title VII by "refus[ing] to hire" "because of . . . sex." 42 U.S.C. § 2000e-2(a)(1).

Later, suppose Devon and Jack apply for an assistant's position at ABC Company. ABC Company hires Jack but not Devon, again stating that it "refuses to hire transgender individuals." Because Devon and Jack share the same sex assigned at birth but differ in gender identity, ABC Company argues that it is not discriminating "because of . . . sex" but rather because of transgender status.

Even still, ABC Company must concede that it refuses to hire *certain* individuals assigned male at birth: those whose gender identity is female. This

refusal must either be because of (a) those individuals' sex assigned at birth, or (b) those individuals' gender identity. Since (a) is a clear violation of Title VII, ABC Company proceeds with option (b).

For option (b) to make logical sense, however, ABC Company must argue that it refuses to hire either *all* individuals whose gender identity is male or *all* individuals whose gender identity is female. Otherwise (b) would blur into (a). *See supra* pp. 9-10. ABC Company thus argues that it refuses to hire all individuals whose gender identity is male. But ABC Company has now argued *both* that it refuses to hire transgender individuals *and* that it refuses to hire all individuals whose gender identity is male—which means that it hires *only* individuals assigned the female sex at birth. But a practice of hiring only females—and, hence, *never* hiring males—is "refus[al] to hire" "because of . . . sex." 42 U.S.C. § 2000e-2(a)(1).

In the end, an employer that asserts it discriminates *only* because of transgender status must really be arguing that it either discriminates because of (a) the individual's sex assigned at birth (Mary/Devon), or (b) the individual's gender identity (Jack/Devon). Option (a) violates Title VII on its face. As explained above, option (b) is logically incoherent. Ultimately, if an employer refuses to hire because of transgender status, it *necessarily*—as a matter of text and logic—"refuses to hire . . . because of . . . sex." 42 U.S.C. § 2000e-2(a)(1); *see EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 578 (6th Cir. 2018) ("Because an employer cannot discriminate against an employee for being transgender without considering that employee's biological sex, discrimination on the

basis of transgender status necessarily entails discrimination on the basis of sex—no matter what sex the employee was born or wishes to be.").

B. Textualism and originalism support a holding that Title VII prohibits sexual-orientation and transgender-status discrimination.

Textualism and originalism both support a holding that Title VII prohibits discrimination based on an individual's sexual orientation or transgender status. Indeed, the arguments above draw from and adhere to the "fair meaning of the text" of Title VII, Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 356 (2012), as guided by the "original public meaning" of its terms, *Wis. Central*, 138 S. Ct. at 2070–72.

1. The concept of "original public meaning"—also phrased "ordinary contemporary common meaning"—embodies the cornerstone principle, trumpeted time and again by this Court, that the words of a statute must be interpreted "consistent with their ordinary meaning . . . at the time Congress enacted" them. *Wis. Central*, 138 S. Ct. at 2070 (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)); *see, e.g.*, *id.* at 2070–72; *Artis v. District of Columbia*, 138 S. Ct. 594, 601–03, 614 n.8 (2018); *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 553–54 (2014); *Amoco Prods. Co. v. S. Ute Indian Tribe*, 526 U.S. 865, 873–75 (1999); *Diamond v. Chakrabarty*, 447 U.S. 303, 308–10, 315–16 (1980).

"Original public meaning" instructs both that "every statute's *meaning* is fixed at the time of enactment" and that "new *applications* may arise in light of changes in the world." *Wis. Central*, 138 S. Ct. at 2074. It enables the Court to interpret the "meaning of a particular statutory term," Katie R. Eyer, *Statutory Originalism and LGBT Rights*, 54 Wake Forest L. Rev. 63, 93 (2019), but it has nothing to do with how that term *applied* at the time of enactment, *see, e.g.*, Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 92 (2012); Randy E. Barnett, *The Gravitational Force of Originalism*, 82 Fordham L. Rev. 411 (2013). By contrast, methods of interpretation based on the public's (or Congress's) *expected application* of a statute are anathema to textualism and originalism and have been discredited. *See, e.g.*, *Hively*, 853 F.3d at 345 ("[T]he fact that the enacting Congress may not have anticipated a particular application of the law cannot stand in the way of the provisions of the law that are on the books."); Scalia & Garner, *supra*, at 101 (rejecting view that courts should "infer exceptions" to a statute's plain meaning "for situations that the drafters never contemplated"); Eyer, *supra*, at 66–67, 72–80, 93; Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 Harv. L. Rev. 1298, 1327 (2018); Anton Metlitsky, *The Roberts Court and the New Textualism*, 38 Cardozo L. Rev. 671, 688–89 (2016).

An embrace of original meaning—and a rejection of expected application—has permeated the Court's jurisprudence. Recently in *Wisconsin Central*, when asked to interpret the meaning of the phrase "money

remuneration" in a 1937 federal statute benefitting railroad employees, the Court turned to original public meaning. 128 S. Ct. at 2070, 2074–75. Because "money" meant a "medium of exchange" in 1937, "'money,' as used in [the] statute, must always mean a 'medium of exchange.'" *Id.* at 2074. But that did not mean railroad employees were "trapped in a monetary time warp, forever limited to those forms of money commonly used in the 1930's." *Id.* While the statute's *meaning* is fixed, "what *qualifies* as a 'medium of exchange' may depend on the facts of the day." *Id.*

The approach taken in *Wisconsin Central* mirrors the Court's approach in an earlier case involving Title VII's ban on discrimination "because of . . . sex." *Oncale*, 523 U.S. at 75.[6] *Oncale* involved workplace sexual harassment between members of the same sex. The Court, speaking through Justice Scalia, held that "nothing in Title VII necessarily bars a claim of discrimination 'because of . . . sex' merely because the plaintiff and the defendant . . . are of the same sex." *Id.* at 79. "[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and

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[6] *See also, e.g.*, *Penn. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 211–12 (1998) (per Scalia, J.) (holding that the Americans with Disabilities Act's ban on discrimination against "qualified individual[s] with a disability" applied to inmates in state prisons). The *Slaughter-House Cases* provides an early example of the Court's members discussing differences between original meaning and expected application. 83 U.S. (16 Wall.) 36 (1872). In that case, the Court rejected the view that the Reconstruction Amendments applied only to African Americans, even though a primary purpose of those amendments was to protect freed slaves. *Compare id.* at 67–68, 72 *with id.* at 123 (Bradley, J., dissenting).

it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Id.*

For the sake of argument, assume that the original public meaning of the word "sex" in Title VII is "either of the two divisions of organisms distinguished as male or female." "Sex," *Webster's New World Dictionary of the American Language* (1960). With that definition in tow, the "fair meaning of the text" of Title VII, Scalia & Garner, *supra*, at 356, properly applied "in light of changes in the world," *Wis. Central*, 138 S. Ct. at 2074, reveals that Title VII prohibits sexual-orientation and transgender-status discrimination. *See supra* pp. 5-14.

2. The dissenters in *Zarda* and *Hively* invoke the concept of "original public meaning"—and misapply it. *Zarda*, 883 F.3d at 143 (Lynch, J., dissenting); *Hively*, 853 F.3d at 363 (Sykes, J., dissenting). To be sure, they properly *interpret* the term "sex" in Title VII to mean what it ordinarily meant in 1964. *Hively*, 853 F.3d at 362–63 (Sykes, J., dissenting). But then they go awry.

Although the dissenters pay lip service to the distinction between original meaning and expected application, *see Zarda*, 883 F.3d at 144 (Lynch, J., dissenting); *Hively*, 853 F.3d at 361–62 (Sykes, J., dissenting), they confuse that distinction in practice. The dissenters betray their confusion, for example, by asking:

> 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?

Hively, 853 F.3d at 362 (quoted in *Zarda*, 883 F.3d at 149–50 (Lynch, J., dissenting)) (emphases added). This question has nothing to do with the original public meaning or the "ordinary contemporary common meaning" of any statutory term or phrase; it has everything to do with what discriminatory actions a reasonable person in 1964 would have *expected* Title VII to *apply* to.[7] What Title VII "banned" in 1964 (or bans now) is an issue of application, not meaning.

The *Hively* dissenters also contend that "the ordinary meaning of the word 'sex' does not fairly include the concept of 'sexual orientation,'" and that "[t]he two terms are never used interchangeably." *Hively*, 853 F.3d at 363. That "sex" and "sexual orientation" are not synonyms is undoubtedly true—and undoubtedly irrelevant for answering the question presented here. Although "sex" does not *mean* "sexual orientation," this difference does not decide one way or the other whether Title VII's ban on discrimination

[7] Just because the dissenters focus on the *public's* expected application (instead of Congress's) does not mean they avoid the expected-applications approach.

"because of . . . sex" *applies* to discrimination based on an individual's sexual orientation. *See supra* pp. 14-17.

The *Zarda* dissenters, for their part, assert that Title VII "remains a law aimed at *gender* inequality, and not at other forms of discrimination that were understood at the time, and continue to be understood, as a different kind of prejudice . . . ." *Zarda*, 883 F.3d at 100 (Lynch, J., dissenting). Again, this assertion fails to engage with the original meaning of any of Title VII's text. It focuses solely on how the public "understood" (read: expected) Title VII would apply.

These examples show how the *Zarda* and *Hively* dissenters—despite protestations to the contrary—fail to reason as principled textualists or originalists. Textualism and originalism teach that "[i]t is the meaning of the words that is fixed, rather than their particular application." Eyer, *supra*, at 90 (citing *Wis. Central*, 138 S. Ct. at 2074–75). But the dissenters' arguments "depend precisely on the opposite notion—that only those applications that the imagined historical public would have thought included are actionable—regardless of the meaning of the words 'because of . . . sex.'" *Id.* at 90–91. Contrary to this Court's approach in *Oncale*, the dissenters atextually privilege "the principal concerns of our legislators" over "the provisions of our laws." 523 U.S. at 79. And contrary to the Court's approach in *Wisconsin Central*, the dissenters atextually "trap[]" Plaintiffs "in a . . . time warp," subjecting them to a version of Title VII interpreted according to the 1964 public's expected application. 138 S. Ct. at 2074. The dissenters, in sum, embrace the discredited expected-applications approach to statutory construction, basing their

reasoning on what they thought Congress or the public "would have anticipated or desired." Eyer, *supra*, at 66–67.

Just like how the public's expected application does not help decide whether Title VII prohibits sexual-orientation discrimination, neither does it help decide whether Title VII prohibits discrimination against transgender employees. The Sixth Circuit correctly reasoned below that "the drafters' failure to anticipate that Title VII would cover transgender status is of little interpretive value . . . ." *R.G. &. G.R. Harris*, 884 F.3d at 577.

The true textualist and originalist approach eschews any reliance on Congress's or the public's expected application. It instead accepts the *meaning* of statutory text at the time of enactment, while recognizing that "new *applications* may arise in light of changes in the world." *Wis. Central*, 138 S. Ct. at 2074. As shown above, the "fair meaning of the text," Scalia & Garner, *supra*, at 356, as guided by its "original public meaning," *Wis. Central*, 138 S. Ct. at 2070–72, permits—and, indeed, compels—a holding that Title VII prohibits sexual-orientation and transgender-status discrimination.

C. To decide whether Title VII encompasses the claims in *Bostock* and *Zarda*, it is unnecessary to focus on the term "sexual orientation."

Plaintiffs in *Bostock* and *Zarda* have framed the question presented using the term "sexual orientation." Zarda, for example, asks "[w]hether the prohibition in

Title VII . . . against employment discrimination 'because of . . . sex' encompasses discrimination based on an individual's *sexual orientation*." Pet. for Writ of Cert. i (*Zarda*) (emphasis added). As mentioned, an individual's sexual orientation depends on two variables: the individual's own sex and the sex to which that individual is attracted. Although helpful in communication, the term "sexual orientation" is fundamentally just a shorthand way to express these multiple variables. Failing to appreciate how the term is shorthand has the potential to mislead.

In these cases and many others, litigants have pleaded Title VII claims for "sexual orientation" discrimination. To illustrate, suppose a plaintiff pleads the following general facts:

1. I am a male.

2. My sexual orientation is gay.

3. I was discharged by my former employer.

4. My former employer discharged me because of my sexual orientation.

Some courts have held that these facts state a claim under Title VII; some have held the opposite. *Compare, e.g.*, *Bostock v. Clayton Cty. Bd. of Comm'rs,* 723 F. App'x 964 (11th Cir. 2018) *with Zarda*, 883 F.3d 100. Jurists who have held, or who would have held, that these facts do not state a claim have reached that conclusion by reasoning that "the word 'sex' . . . does not also refer to 'sexual orientation.'" *Zarda*, 888 F.3d at 145 (Lynch, J., dissenting) (quoting *Hively*, 853 F.3d

at 363 (Sykes, J., dissenting)). The terms "sex" and "sexual orientation" are not synonyms, the argument goes, nor was "sexual orientation" even present in 1960s-era dictionaries. *Hively*, 853 F.3d at 363 n.3 (Sykes, J., dissenting).

Now, suppose the same plaintiff pleads as follows:

1. I am a male.

2. I am attracted to males.

3. I was discharged by my former employer.

4. My former employer discharged me because I am a male who is attracted to males.

This second pleading does not substantively depart from the first. Indeed, it pleads the exact same facts, differentiated only by the particular words used: whereas the former invokes the shorthand term "sexual orientation," the latter does not.

A court reviewing the second pleading *could not* dismiss the claim on the statutory-interpretation ground that "the word 'sex' . . . does not also refer to 'sexual orientation.'" *Hively*, 853 F.3d at 363 (Sykes, J., dissenting). How could it, when the pleading does not even use the term "sexual orientation"? The argument that "sex" does not mean "sexual orientation" becomes a strawman, and the question of whether "sex" means "sexual orientation" becomes a red herring.

By pleading claims of "sexual orientation" discrimination, litigants have invited courts to "interpret" whether the word "sex" means, or

encompasses, the term "sexual orientation." But recourse to that term—whether in pleadings or court opinions—is unnecessary, and it beclouds the real question here: do Bostock, Zarda, and other similar litigants have a claim under Title VII? The answer to that question becomes much clearer when the term "sexual orientation" is dispensed with, which can be done without sacrificing substance.

II. A ruling in Plaintiffs' favor would preserve and enhance the Court's institutional legitimacy.

The Constitution vests each branch of the federal government with distinct powers. *Compare* U.S. Const. art. I *with id.* at art. II *and id.* at art. III. The Legislature "commands the purse" and "prescribes the rules by which the duties and rights of every citizen are to be regulated." *The Federalist No. 78*, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961). The Executive "dispenses the honors" and "holds the sword of the community." *Id.* The Judiciary, by contrast, "has no influence over either the sword or the purse[.]" *Id.* Vested "merely" with the power of judgment, *id.*, it can neither "buy support for its decisions by spending money" nor "independently coerce obedience to its decrees[,]" *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 865 (1992) (plurality op.).

Bereft of both "force" and "will," *The Federalist No. 78*, *supra*, at 465 (Alexander Hamilton), the Judiciary derives power from another source: its "legitimacy" as an institution, *Casey*, 505 U.S. at 865. This Court's institutional legitimacy is "a product of substance and perception that shows itself in the people's acceptance"

that it is "fit to determine what the Nation's law means and to declare what it demands." *Id.* "Like the character of an individual, the legitimacy of the Court must be earned over time," and when compromised, it can be restored "only slowly." *Id.* at 868. Ultimately, the Court must concern itself with its institutional legitimacy not for its own sake, "but for the sake of the Nation to which it is responsible." *Id.* at 868.

In these cases, a ruling in Plaintiffs' favor—and a holding that Title VII prohibits discrimination because of sexual orientation and transgender status—would preserve and enhance the Court's institutional legitimacy. This is so for multiple reasons.

1. A ruling in Plaintiffs' favor would create no tension between individual rights and prevailing public opinion. "The Court's constitutionally prescribed role is to vindicate the *individual rights* of the people appearing before it." *Gill v. Whitford*, 138 S. Ct. 1916, 1933 (2018) (emphasis added). By vindicating individual rights, the Court mitigates the "effects of occasional ill humors in the society," *The Federalist No. 78*, *supra*, at 469 (Alexander Hamilton), safeguards against the "tyranny of the majority," and acts as "a bulwark against public opinion," John E. Jones III, *Inexorably Toward Trial: Reflections on the Dover Case and the "Least Dangerous Branch"*, Humanist, Jan.-Feb. 2009, at 23.

Public opinion, at the same time, guides the actions of governmental institutions in a properly functioning representative democracy. To that end, the Court's existence as an institution within our democracy sometimes places it at odds with its constitutional

charge to protect individual rights. From time to time, the Court renders a decision that both vindicates individual rights and deviates from prevailing public opinion. The resulting tension, which reaches its apex when the Court strikes down a statute, has been aptly dubbed the "countermajoritarian difficulty." *See generally* Alexander M. Bickel, *The Least Dangerous Branch* (1962). It is not difficult to understand how issuing countermajoritarian rulings has the potential to undermine public confidence in the Court and to compromise its institutional legitimacy.

Here, ruling in Plaintiffs' favor would not implicate the tension between vindicating individual rights and deferring to public opinion: this is a case in which protecting individual rights *aligns with* public opinion.

First, the Court's constitutional charge to vindicate individual rights supports a ruling in Plaintiffs' favor. Title VII exists to protect the rights of individuals against discriminatory employment practices. Repeating the word "individual" no less than 26 times, the provision of Title VII at issue evinces a clear focus on individual rights. 42 U.S.C. § 2000e-2. Indeed, "[Title VII] makes it unlawful to discriminate against any *individual* . . . because of such *individual*'s . . . sex[.] The statute's focus on the individual is unambiguous." *See Hively*, 853 F.3d at 359 n.2 (Flaum, J., concurring) (quoting *Manhart*, 435 U.S. at 708) (emphases in original).

Second, public opinion supports a ruling in Plaintiffs' favor. *See generally* Flores, *supra*, https://tinyurl.com/yd43w2dg. On many LGBT rights issues, "public support has increased significantly over

the past three decades and today a stable majority supports each of them." *Id.* at 7; *see also Obergefell*, 135 S. Ct. at 2596. Since polling started in 1977, "[t]here has been a majority of the public supporting the sentiment that gay[men] and lesbians should not be discriminated against when it comes to the workplace." Flores, *supra*, at 25. Likewise, "a broad majority of the public supports non-discrimination laws that are inclusive of transgender people." *Id.* at 27. According to a 2019 poll, 92% of American voters believe that employers should not be allowed to fire someone based on their sexual orientation or transgender status. *U.S. Voters Still Say 2-1 Trump Committed Crime, Quinnipiac University National Poll Finds; But Voters Oppose Impeachment 2-1*, Quinnipiac University (May 2, 2019), https://tinyurl.com/y52pv84u.

In these cases, then, the Court's existence as part of a democratic government responsive to public opinion *and* its "constitutionally prescribed role . . . to vindicate . . . individual rights," *Gill*, 138 S. Ct. at 1933, *both* gravitate toward a holding that Title VII prohibits sexual-orientation and transgender-status discrimination. Because vindication of individual rights and public opinion align, a ruling in Plaintiffs' favor presents no countermajoritarian tension. Such a ruling, therefore, would not threaten the Court's institutional legitimacy.

2. Another reason that a ruling in Plaintiffs' favor would preserve and enhance the Court's institutional legitimacy is that such a ruling is more likely to stand the test of time. The specific questions presented in these cases are matters of first impression before this Court, meaning *stare decisis* concerns are not strictly

implicated. Yet still, the Court's existing Title VII precedent discloses a jurisprudential trajectory that encompasses a ruling in Plaintiffs' favor here.

To begin, the Court has held that Title VII's ban on discrimination "because of . . . sex" encompasses a claim for same-sex sexual harassment in the workplace. *Oncale*, 523 U.S. at 79–80. In so holding, the Court rejected the discredited interpretive method that looks to the expected application of Congress or the public. *See supra* pp. 14-17. Same-sex sexual harassment "was assuredly not the principal evil Congress was concerned with when it enacted Title VII," *Oncale*, 523 U.S. at 79–80, and "few people in 1964 would likely have understood [it] to be covered," *Zarda*, 883 F.3d at 115. But "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." *Oncale*, 523 U.S. at 79–80.

The Court has also explained that Title VII's ban on discrimination "because of . . . sex" also bans discrimination because of sex-dependent traits, *Manhart*, 435 U.S. at 704–05, 711, and because of non-conformity with gender stereotypes, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–52 (1989) (plurality op.); *see also id.* at 259 (White, J., concurring in the judgment); *id.* at 272–73 (O'Connor, J., concurring in the judgment). In *Manhart*, the Court held that the City of Los Angeles violated Title VII when it required female employees to make larger pension contributions than their male colleagues. 435 U.S. at 704–05, 711. The City had based its policy on the sex-dependent

ground that females generally live longer than males. *Id.* A few years later in *Price Waterhouse*, the Court held that Price Waterhouse violated Title VII when it discriminated against a female employee because she did not dress, talk, and walk in a feminine manner. 490 U.S. at 251. Together, *Manhart* and *Price Waterhouse* stand for the proposition that "employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females . . . ." *Manhart*, 435 U.S. at 707.

Relevant to the sexual-orientation discrimination cases, several federal appellate courts have concluded that Title VII bans "associational discrimination" against "individuals who . . . are victims of discriminatory animus toward protected third persons with whom the individuals associate." *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 512 (6th Cir. 2009); *accord, e.g.*, *Zarda*, 883 F.3d at 126; *Hively*, 853 F.3d at 347–49; *Holcomb v. Iona Coll.*, 521 F.3d 130, 139 (2d Cir. 2008); *McGinest v. GTE Serv. Corp.,* 360 F.3d 1103, 1118 (9th Cir. 2004); *Deffenbaugh–Williams v. Wal–Mart Stores, Inc.*, 156 F.3d 581, 589 (5th Cir. 1998), *vacated in part on other grounds by Williams v. Wal–Mart Stores, Inc.*, 182 F.3d 333 (5th Cir. 1999) (en banc); *Stacks v. Sw. Bell Yellow Pages, Inc.,* 27 F.3d 1316, 1327 n.6 (8th Cir. 1994); *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986). In *Holcomb*, for example, a white man alleged he was discharged because he was married to an African American woman. 521 F.3d at 131–32. The Second Circuit ruled the man had stated a claim, holding that "an employer may violate Title VII if it takes action against an employee because of the employee's association with a person of another race." *Id.* at 139.

Although this Court has not decided whether Title VII bans associational discrimination, it has held that the U.S. Constitution does. *See Loving v. Virginia*, 388 U.S. 1 (1967). The *Loving* Court invalidated Virginia's anti-miscegenation statute under the Equal Protection Clause. *Id.* at 10–11. Like other anti-miscegenation statutes at the time, the law made it illegal for a white individual to marry an African American individual (and, necessarily, vice versa). Although Virginia had argued the statute was constitutional because it "punish[ed] equally both the white and the [African American] participants in an interracial marriage," the Court held that "equal application" did not save the statute. *Id.*; *see also McLaughlin v. Florida*, 379 U.S. 184 (1964) (holding interracial cohabitation statute unconstitutional). Albeit constitutional cases, *Loving* and *McLaughlin* "provide helpful guidance in [the] statutory context" of Title VII. *Ricci v. DeStefano*, 557 U.S. 557, 582 (2009); *accord Zarda*, 883 F.3d at 126.

Read in conjunction, *Oncale*, *Manhart*, *Price Waterhouse*, and the associational-discrimination cases plot a trajectory of Title VII jurisprudence that necessarily embraces a ruling in Plaintiffs' favor and a legal principle prohibiting employment discrimination because of either sexual orientation or transgender status.[8] For one thing, "[a]pplying [*Oncale*'s] reasoning

[8] So too have many of the Court's non-Title VII cases trended toward an expanded understanding and recognition of individual rights as applied to LGBT individuals. *See, e.g.*, *Obergefell*, 135 S. Ct. 2584; *United States v. Windsor*, 570 U.S. 744 (2013); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996).

[here], the fact that Congress might not have contemplated that discrimination 'because of . . . sex' would encompass sexual orientation [or transgender-status] discrimination does not limit the reach of the statute." *Zarda*, 883 F.3d at 115. Rather, the text of Title VII, when properly interpreted, includes a claim for sexual-orientation discrimination and transgender-status discrimination. *See supra* pp. 5-23. For another thing, in the United States today, being attracted to members of the same sex "represents the ultimate case of failure to conform" to gender stereotypes—and hence, a quintessential violation of Title VII under *Price Waterhouse* and *Manhart*. *Hively*, 853 F.3d at 346. Likewise, "discrimination against transgender persons necessarily implicates Title VII's proscriptions against sex stereotyping." *R.G. & G.R. Harris*, 884 F.3d at 576; *see also id.* at 574, 576–77. Because "a transgender person is someone who fails to act and/or identify with his or her gender," *id.* at 576 (quoting *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004)), "an employer cannot discriminate on the basis of transgender status without imposing its stereotypical notions of how sexual organs and gender identity ought to align," *id.* Finally, analogous to *Loving*, *Holcomb*, and similar cases, Title VII precludes discrimination against an individual because of the sex with whom that individual associates or desires to associate.

All in all, existing precedent supports holding that Title VII prohibits sexual-orientation and transgender-status discrimination. To the extent the Court's institutional legitimacy depends on issuing rulings consistent with existing precedent, the clearest path forward is a ruling in Plaintiffs' favor. By contrast, a

ruling in the other direction—that Plaintiffs have no claim under Title VII—would deviate from the well-plotted jurisprudential trajectory. It would require the Court to explain away, or perhaps even overrule, long-standing precedent on which the public has come to rely, including *Oncale*, *Manhart*, *Price Waterhouse*, *Loving*, and *McLaughlin*. Ruling against Plaintiffs would, in short, jeopardize the Court's institutional legitimacy.

3. Finally, a ruling in Plaintiffs' favor would preserve and enhance the Court's institutional legitimacy because it would produce beneficial effects for all of society.

First, a ruling in Plaintiffs' favor would address widespread discrimination and allay its well-documented negative effects. A 2017 survey, for instance, found that 25% of LGBT individuals had experienced some type of discrimination within the past year. Sejal Singh & Laura E. Durso, *Widespread Discrimination Continues to Shape LGBT People's Lives in Both Subtle and Significant Ways*, Center for American Progress (May 2, 2017), https://tinyurl.com/ybxbzttt. Similar numbers report having been discriminated against in the workplace because of their sexual orientation. *See A Survey of LGBT Americans*, Pew Research Center (June 13, 2013), https://tinyurl.com/y4b5cgn2; M.V. Lee Badgett, Testimony on S.811, The Employment Non-Discrimination Act of 2011 (June 12, 2012), https://tinyurl.com/y4gbxdxt. Over one-quarter of transgender individuals report being victims of employment discrimination. *See* Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey*

National Center for Transgender Equality 12–13, 139–56 (2016), https://tinyurl.com/yaop2spp. And more than three-quarters of transgender individuals report having taken "steps to avoid mistreatment in the workplace, such as hiding or delaying their gender transition or quitting their job." *Id.* at 13.

Experiencing discrimination often harms one's psychological, emotional, and physical wellbeing. *See* Singh & Durso, *supra*. "Higher discrimination translates into less job satisfaction, higher rates of absenteeism and more frequent contemplation of quitting than employees who have not experienced discrimination." Michael Friedman, *The Psychological Impact of LGBT Discrimination*, Psychology Today (Feb. 11, 2014), https://tinyurl.com/y2kgp8zg. To the contrary, employees covered by LGBT-supportive employment policies are psychologically healthier than those who are not covered. *See, e.g.*, M.V. Lee Badgett et al., *The Business Impact of LGBT-Supportive Workplace Policies*, The Williams Institute 9–10 (May 2013), https://tinyurl.com/y5smbobk.

Employment discrimination also tends to exacerbate poverty among the LGBT community, a population which already experiences poverty at comparatively higher rates. *See* Taylor N.T. Brown et al., *Food Insecurity and SNAP Participation in the LGBT Community*, The Williams Institute 3 (July 2016), https://tinyurl.com/kh4p8od; M.V. Lee Badgett et al., *New Patterns of Poverty in the Lesbian, Gay, and Bisexual Community*, The Williams Institute 9 (June 2013), https://tinyurl.com/prc4pcb; *see also* James et al., *supra*, at 12 ("Nearly one-third (29%) [of transgender respondents] were living in poverty, more than twice

the rate in the U.S. population (14%).”). This poverty-exacerbating effect is compounded among LGBT people of color. Jamie H. Douglas et al., *The Sexual Orientation Wage Gap for Racial Minorities*, 54 Indus. Relations 59, 85–86, 96 (2015).

Second, a ruling in Plaintiffs’ favor would be beneficial to business and the economy. Discriminatory workplaces lead to “a less motivated, less entrepreneurial, and less committed workforce.” Crosby Burns et al., *Gay and Transgender Discrimination in the Public Sector*, Ctr. for Am. Progress & AFSCME 19 (Sept. 2012), https://tinyurl.com/y43kwh67. “Firms that implemented LGBT-friendly policies,” by contrast, “experienced increases in firm value, productivity, and profitability.” Emily V. Troiano, *Why Diversity Matters*, Catalyst Information Ctr. 6 (2013); *see also* Sylvia Ann Hewlett et al., *How Diversity Can Drive Innovation*, Harv. Bus. Rev. (Dec. 2013), https://tinyurl.com/j8nyu8k.

Workplace diversity, in turn, contributes to a prosperous society. *See, e.g.*, M.V. Lee Badgett et al., *The Relationship Between LGBT Inclusion and Economic Development: Macro-Level Evidence*, 120 World Development 1 (Aug. 2019). Indeed, LGBT-supportive policies and workplace climates are linked to both economic growth and business profitability at the macro level. *See generally* M.V. Lee Badgett et al., *The Business Impact of LGBT-Supportive Workplace Policies*, The Williams Institute (May 2013), https://tinyurl.com/y5smbobk.

In sum, a ruling in Plaintiffs' favor would address societal shortcomings while avoiding creating new ones. Although not a panacea, a holding that Title VII prohibits sexual-orientation and transgender-status discrimination would provide—to LGBT individuals and to society as a whole—a remedy against existing employment discrimination, a promise of lesser employment discrimination in the future, and a real counterweight to employment discrimination's negative psychological, emotional, physical, and economic effects. These beneficial outcomes would certainly safeguard and fortify the Court's institutional legitimacy.

CONCLUSION

The Court should affirm the judgments of the United States Courts of Appeals for the Second Circuit and the Sixth Circuit. The Court should reverse the judgment of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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