No. 18-107

IN THE
Supreme Court of the United States

R.G. & G.R. HARRIS FUNERAL HOMES, INC.,
Petitioner,
v.
EQUAL OPPORTUNITY EMPLOYMENT COMMISSION,
Respondent,
and
AIMEE STEPHENS,
Respondent-Intervenor.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* JUDICIAL WATCH, INC.

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INTERESTS OF THE *AMICUS CURIAE*[1]

Judicial Watch, Inc. ("Judicial Watch") is a non-partisan, public interest organization headquartered in Washington, D.C. Founded in 1994, Judicial Watch seeks to promote accountability, transparency and integrity in government, and fidelity to the rule of law. Judicial Watch regularly files *amicus curiae* briefs and lawsuits related to these goals.

Judicial Watch has an interest in this lawsuit as it is a classic example of parties asking a court to impose a legislative outcome that was not obtained by appeals to Congress. Judicial Watch believes that this approach is contrary to the true rule of law.

SUMMARY OF ARGUMENT

In general, Congress' failure to pass a particular bill has questionable value in establishing Congress' intent with respect to the laws it *has* passed. The Court's precedents provide an exception to this rule, however, where evidence derived from persistent, failed attempts to amend legislation is "overwhelming." The last case before the Court to effectively invoke this exception involved 13 failed bills submitted over the course of 12 years.

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[1] Judicial Watch states that no counsel for a party to this case authored this brief in whole or in part; and no person or entity, other than *amicus* and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Judicial Watch sought and obtained the consent of all parties to the filing of this *amicus* brief.

The instant case is far more compelling. Seventy-one bills seeking to amend Title VII to include sexual orientation and gender-related categories have been submitted to Congress, and have failed, over the course of the past 45 years. These bills, and related House and Senate Reports, and floor statements by the bills' sponsors, show that it was commonly understood that Title VII did not refer to sexual orientation. In these circumstances, this decades-long pattern of failed legislation shows that what all of these bills proposed is not a part of existing law. It is, therefore, wrong to argue that Title VII applies to sexual orientation.

ARGUMENT

The Fact That 71 Bills to Amend Title VII to Include Sexual Orientation and Gender-Related Categories Have Failed in the Past 45 Years Confirms That Those Categories Are Not Included in Current Law.

Before the Court is one of the exceptional cases where it is appropriate to conclude that Congress' persistent failure to enact a particular amendment means that existing law does not include what is in that amendment.

In general, the Court has cautioned against drawing inferences from failed attempts to pass legislation. Thus, in *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) the Court noted that "subsequent legislative history" is "a particularly

dangerous ground on which to rest an interpretation of a prior statute when it concerns . . . a proposal that does not become law." (citations omitted). "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.'" *Id.* at 650 (citation omitted); *see Solid Waste Agency v. United States Army Corps of Eng'rs,* 531 U.S. 159, 170 (2001) ("A bill can be proposed for any number of reasons, and it can be rejected for just as many others.").

Notwithstanding this general rule, the Court has on occasion drawn inferences from the failure to enact a bill where the sheer number of legislative attempts to pass it and the clarity of the issue presented make such inferences reasonable. *Bob Jones University v. United States*, 461 U.S. 574 (1982) concerned an IRS interpretation of a provision of the tax code that Congress had chosen not to amend. The Court observed that "[o]rdinarily, and quite appropriately, courts are slow to attribute significance to the failure of Congress to act on particular legislation." *Id.* at 600. (citation omitted). Yet the Court also noted that "Congress was, by its own studies and by public discourse, constantly reminded" of the controversial interpretation. *Id.* at 599. Further, while "[n]onaction by Congress is not often a useful guide . . . the nonaction here is significant. During the past 12 years there have been no fewer than 13 bills introduced to overturn" the IRS' interpretation. *Id.* at 600. It was "hardly conceivable that Congress . . . was not abundantly aware of what was going on." *Id.* at

600-01. The Court concluded that "Congress' failure to act" provided "added support for concluding that Congress acquiesced in the IRS rulings." *Id.* at 601 (citations omitted); *see Heckler v. Day*, 467 U.S. 104, 113 (1984) (finding it statutorily significant that, although a particular amendment had "been proposed almost annually since 1975, and congressional concern over the [] problem has remained high," Congress had refused to act).

The decision in *Solid Waste Agency* is often cited for the fact that, in the case before it, the Court rejected inferences from legislative inaction. 531 U.S. at 169-70. However, that same decision acknowledged that legislative inaction might be appropriately used to show legislative intent in the right circumstances. In particular, the Court approved the approach taken in *Bob Jones University*, citing the "overwhelming evidence of [Congress'] acquiescence" to the IRS' ruling in that case, including Congress' acute awareness of the key issue and the 13 bills that had been proposed to alter the statute. *Id.* at 169 n.5. The principle in *Bob Jones University* and *Heckler*, that legislative inaction can be an appropriate aid to discerning legislative intent in the right circumstances, has never been overruled.[2]

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[2] In *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011), the Court made the sweeping statement that "Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation." (citations omitted). Yet the "post-enactment" history cited in that case consisted only of the contents of two House committee reports. *Id.* This is a far cry from the abundant evidence of failed legislative efforts discussed below. Subsequently, in *Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S*, 566 U.S. 399, 422 (2012), the Court again had to

In the instant case, the number of congressional attempts to amend Title VII to include sexual orientation eclipses anything seen in *Bob Jones University* or in any other case of which *amicus* is aware. The first such bills were submitted in the 93rd Congress in 1974. Bills to amend Title VII to include homosexuality, bisexuality, sexual orientation, or "affectional or sexual preference" have been submitted in each of the 24 sessions of Congress since then. In all, 71 such bills have been submitted—and have failed to pass Congress—over a span of 45 years.[3] At least 14 of these bills sought to amend Title

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consider the argument that the failure to pass legislation—in that case, one bill—shed light on the meaning of current law. The Court did not treat the point as an illegitimate argument, but established instead that the proposed interpretation of that failed bill was not persuasive. *Id.*

[3] H.R. 14752, 93rd Cong. (1974); H.R. 15692, 93rd Cong. (1974); H.R. 16200, 93rd Cong. (1974); H.R. 166, 94th Cong. (1975); H.R. 5452, 94th Cong. (1975); H.R. 10389, 94th Cong. (1975); H.R. 2667, 94th Cong. (1975); H.R. 13019, 94th Cong. (1976); H.R. 13928, 94th Cong. (1976); H.R. 451, 95th Cong. (1977); H.R. 2298, 95th Cong. (1977); H.R. 4794, 95th Cong. (1977); H.R. 5239, 95th Cong. (1977); H.R. 7775, 95th Cong. (1977); H.R. 8268, 95th Cong. (1977); H.R. 8269, 95th Cong. (1977); H.R. 10575, 95th Cong. (1978); H.R. 12149, 95th Cong. (1977); H.R. 2074, 96th Cong. (1979); S. 2081, 96th Cong. (1979); H.R. 1454, 97th Cong. (1981); H.R. 3371, 97th Cong. (1981); S. 1708, 97th Cong. (1981); H.R. 427, 98th Cong. (1983); S. 430, 98th Cong. (1983); H.R. 2624, 98th Cong. (1983); H.R. 230, 99th Cong. (1985); S. 1432, 99th Cong. (1985); H.R. 709, 100th Cong. (1987); S. 464, 100th Cong. (1987); S. 2109, 100th Cong. (1988); H.R. 655, 101st Cong. (1989); S. 47, 101st Cong. (1989); H.R. 1430, 102nd Cong. (1991); S. 574, 102nd Cong. (1991); H.R. 423, 103rd Cong. (1993); H.R. 431, 103rd Cong. (1993); H.R. 4636, 103rd Cong. (1994); S. 2238, 103rd Cong. (1994); H.R. 382, 104th Cong. (1995); H.R. 1863, 104th Cong. (1995); S. 932, 104th Cong.

VII to include gender identity, appearances, mannerisms, or characteristics.[4]

These 71 bills amount to more than *five times* the number of failed bills that persuaded the Court in *Bob Jones University* and that the Court in *Solid Waste Agency,* 531 U.S. at 169 n.5, described as "overwhelming evidence." All of this activity concerning this one issue, moreover, has guaranteed that Congress is "abundantly aware of what [is] going on." *Bob Jones University* 461 U.S. at 600-01.

(1995); S. 2056, 104th Cong. (1996); H.R. 365, 105th Cong. (1997); H.R. 1858, 105th Cong. (1997); S. 869, 105th Cong. (1997); H.R. 311, 106th Cong. (1999); H.R. 2355, 106th Cong. (1999); S. 1276, 106th Cong. (1999); H.R. 217, 107th Cong. (2001); H.R. 2692, 107th Cong. (2001); S. 1284, 107th Cong. (2001); H.R. 214, 108th Cong. (2003); H.R. 3285, 108th Cong. (2003); S. 1705, 108th Cong. (2003); H.R. 288, 109th Cong. (2005); H.R. 3685, 110th Cong. (2007); H.R. 2015, 110th Cong. (2007); H.R. 3017, 111th Cong. (2009); H.R. 2981, 111th Cong. (2009); S. 1584, 111th Cong. (2009); H.R. 1397, 112th Cong. (2011); S. 811, 112th Cong. (2011); H.R. 1755, 113th Cong. (2013); S. 815, 113th Cong. (2013); H.R. 3185, 114th Cong. (2015); S. 1858, 114th Cong. (2015); H.R. 2282, 115th Cong. (2017); S. 1006, 115th Cong. (2017); H.R. 5, 116th Cong. (2019); S. 788, 116th Cong. (2019). *Amicus* notes that it cannot verify that this is a complete list.

[4] H.R. 2015, 110th Cong. (2007); H.R. 3017, 111th Cong. (2009); H.R. 2981, 111th Cong. (2009); S. 1584, 111th Cong. (2009); H.R. 1397, 12th Cong. (2011); S. 811, 112th Cong. (2011); H.R. 1755, 113th Cong. (2013); S. 815, 113th Cong. (2013); H.R. 3185, 114th Cong. (2015); S. 1858, 114th Cong. (2015); H.R. 2282, 115th Cong. (2017); S. 1006, 115th Cong. (2017); H.R. 5, 116th Cong. (2019); S. 788, 116th Cong. (2019). *Amicus* cannot represent that this list is exhaustive.

House and Senate reports accompanying these bills demonstrate that it was commonly understood that Title VII's definition of sex does not encompass sexual orientation. The House Report accompanying the Civil Rights Amendments Act of 1979 explained that it would, if enacted, "add homosexuals to the protected classes under various civil rights laws, including Title VII of the 1964 Civil Rights Act." H.R. Rep. No. 96-1546, at 41 (1980). The House Report on the Employment Non-Discrimination Act (ENDA) of 2007 stated that "[d]espite a growing awareness that anti-discrimination law should include protections based on sexual orientation, Title VII did not extend such protection to GLB [gay, lesbian, and bisexual] workers." H.R. Rep. No. 110-406 at 12 (2007); *see id.* at 11 ("under Title VII, discrimination based on sexual orientation is currently an unprotected class"). The 2001 Senate Report on ENDA observed that "Title VII prohibits discrimination based on race, color, religion, sex, and national origin—but not sexual orientation." S. Rep. No. 107-341, at 13 (2002).

The sponsors of each bill that made it to a chamber floor admitted that sexual orientation or gender identity is not a protected class under Title VII. In his opening remarks on the ENDA of 1996, Senator Edward Kennedy stated that in the case of sexual orientation "the law offers no protection or recourse." 142 Cong. Rec. 9986 (1996). Representative Barney Frank, the sponsor of the ENDA of 2007, lamented the fact that there is no federal protection on the basis of sexual orientation. 153 Cong. Rec. 13230 (2007). Senator Patrick Leahy, a co-sponsor of the ENDA in 2013, explained that

"there are no Federal protections from discrimination on the basis of sexual orientation or gender identity." 159 Cong. Rec. 78945 (2013). Representative David Cicilline, sponsor of the Equality Act of 2019, stated on the House floor that the bill "adds sexual orientation and gender identity as protected classes through existing civil rights law." 165 Cong. Rec. 3935 (2019).

In sum, Congress' repeated, failed attempts over half a century to amend Title VII to include sexual orientation or gender-related classifications reveals Congress' understanding that existing law does not include those categories. This understanding was further confirmed in the reports and speeches accompanying the many failed bills. In an ordinary case, as the Court has emphasized, Congress' motive in not adopting legislation is ambiguous, and trying to draw inferences from this inaction is risky. But this is not an ordinary case. Indeed, *amicus* respectfully submits that this is the most compelling example the Court has seen of the special circumstances, described in *Bob Jones University* and *Heckler*, which justify relying on legislative inaction to derive legislative intent.

Where 71 bills over the course of 45 years attempted to include sexual orientation or gender identity in Title VII's definition of sex, it is singularly unpersuasive, after all those bills have failed, to argue that these categories were "in there all along." Any such statute should be passed by Congress, not ordered by the Court.

CONCLUSION

For the foregoing reasons, *amicus* Judicial Watch respectfully requests that the Court reverse the judgment of the District Court.

Respectfully submitted,

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