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 COMM'N
AND AIMEE STEPHENS, Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH, SECOND, AND SIXTH CIRCUITS

BRIEF OF DAVID A. ROBINSON AS *AMICUS CURIAE* IN SUPPORT OF THE EMPLOYERS

DAVID A. ROBINSON
Counsel of Record
P.O. Box 780
North Haven, CT 06473
Telephone: (203) 214-4078
davidr225@comcast.net

Questions Presented

1. Whether the prohibition in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(l), against employment discrimination "because of . . . sex" encompasses discrimination based on an individual's sexual orientation.

2. Whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

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Interest of Amicus Curiae

I am a 66-year-old lawyer who concentrates in employment discrimination law.[1] I practiced in Massachusetts from 1977 to 2008 and now practice in Connecticut. I have written books[2] and articles on the topic and argued many discrimination cases in courts and agencies. From 2005 to 2014, I taught business law, business ethics (Business & Society), and/or human resource management at the University of New Haven. I earned my J.D. in 1977 from Washington University in St. Louis. I am admitted to practice before the U.S. Supreme Court. I am the amicus, not just "counsel for" the amicus.

In addition to my professional interest, I have a personal interest in this case. I am a man whose sexual orientation mutated from homo to hetero. When I was 14 to 16 years old, I felt sexual urges when I looked at boys; not all boys, but some boys. At 16, I decided to date girls. I eventually married a woman and am very happy with her. I testified before the Connecticut General Assembly in 2017 in opposition to proposed legislation that would ban

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[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part. No counsel or party or anyone else made a monetary contribution intended to fund the preparation or submission of this brief. I wrote and paid for it entirely myself.

[2] https://www.amazon.com/David-A.-Robinson/e/B001K8HRGQ (last visited Aug. 12, 2019).

"conversion therapy" on minors. I'll discuss my testimony below.

Summary of Argument

The answer to both questions presented is no.

Sexual orientation is not immutable. The word "immutable" appears twice in *Obergefell* but *Obergefell* does not hold or find that sexual orientation is immutable. The plaintiffs in the present case are not arguing that sexual orientation is immutable. Even if, arguendo, sexual orientation is immutable in some people, that does not mean Title VII encompasses it.

Except for religion, the characteristics that Title VII protects are immutable. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) ("sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth"); *Garcia v. Gloor*, 618 F.2d 264, 269 (5th Cir. 1980). Even religion is immutable in this sense: One cannot change one's religious origin or background. *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 726 n.5 (2010) (Alito, J., dissenting). In 1972 Congress amended the definition of "religion" to include the person's current religious behavior. Congress has declined to amend the definition of "sex" to include sexual behavior except

behavior related to pregnancy, childbirth, or related medical conditions.

As a matter of law, the immutability of sex means no one is "transgender."

Argument

I. Sexual orientation is not immutable. The word "immutable" appears twice in *Obergefell v. Hodges*, but *Obergefell* does not find or hold that sexual orientation is immutable. The plaintiffs do not argue that sexual orientation is immutable.

The plaintiffs' June 2019 briefs in this Court do not argue that sexual orientation is immutable. Whether the plaintiffs previously argued it, I do not know. Only two of their 44 amicus briefs filed in this Court in June-July 2019 argue that sexual orientation is immutable: American Bar Association Brief at 26 argues it but cites no authority. Wisconsin Advocacy Organizations Brief at 6 argues it, citing only *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015). As I will explain, *Obergefell* does not hold or find that sexual orientation is immutable.

To my knowledge—it is possible I missed something—only one other amicus brief for plaintiffs even touches on the topic: American Psychological Association et al. Brief at 7 says sexual orientation is "enduring." "Enduring" is not "immutable."

"Immutable" appears twice in *Obergefell*. First is when the Court looks at the case from the standpoint of the petitioners and respondents. Petitioners were same-sex couples wanting to marry. Respondents were states—Kentucky, Michigan, Ohio, and Tennessee—that define marriage as the union of man and woman. *Obergefell* states:

> To [respondents], it would demean a timeless institution if the concept and lawful status of marriage were extended to two persons of the same sex. Marriage, in their view, is by its nature a gender-differentiated union of man and woman. This view long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world.
>
> The petitioners acknowledge this history but contend that these cases cannot end there. Were their intent to demean the revered idea and reality of marriage, the petitioners' claims would be of a different order. But that is neither their purpose nor their submission. To the contrary, it is the enduring importance of marriage that underlies the petitioners' contentions. This, they say, is their whole point. Far from seeking to devalue marriage, the petitioners seek it for themselves

> because of their respect—and need—for its privileges and responsibilities. *And their immutable nature dictates that same-sex marriage is their only real path to this profound commitment.*

135 S. Ct. at 2594 (emphasis supplied). The sentence "And their immutable nature dictates that same-sex marriage is their only real path to this profound commitment" is strange and unclear. What is "their immutable nature?" Who, or what, is "their?" Does "their" mean "petitioners?" If it does, the sentence reads: "And the petitioners' immutable nature dictates that same-sex marriage is their only real path to this profound commitment." What is "immutable nature?" Are homosexual urges immutable? Is homosexual behavior immutable? Does *Obergefell* hold that a 14-year-old boy who has homosexual urges will have homosexual urges when he's 44? Does *Obergefell* hold that this 14-year-old boy will never fall in love with a woman? Does *Obergefell* hold that a 25-year-old woman happily married to a man will never fall in love with a woman? The sentence is too strange and unclear to be precedent. *See* Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2, 4 n.2 (2015) (critiquing *Obergefell*'s discussion of "immutable"). What about the millions of people like myself who have or had homosexual urges ("orientation") for a few years but are happily married to people of the opposite sex? I'll discuss my own experience below.

As a matter of semantics, an employer who fires or refuses to hire an employee because the employee is gay is not doing it because of the employee's sexual *orientation*. The employer is doing it because of the employee's sexual *behavior*, real or perceived by the employer. "Orientation" means "thinking." Merriam-Webster defines "orientation" as "a usually general or lasting direction of thought, inclination, or interest." A person's sexual "orientation"—what the person thinks about or has an urge to do—can include adultery, pedophilia, rape, and incest. The plaintiffs define sexual orientation much more narrowly than that. They define it as homosexual, heterosexual, or bisexual. They argue that discrimination based on homo, as distinguished from hetero, sexual behavior violates Title VII. In at least two of these three cases, the employees were fired because of their workplace behavior—what they said at work about their sexuality—not their orientation.

Obergefell's second mention of "immutable":

> For much of the 20th century, moreover, homosexuality was treated as an illness. When the American Psychiatric Association published the first Diagnostic and Statistical Manual of Mental Disorders in 1952, homosexuality was classified as a mental disorder, a position adhered to until 1973. See Position Statement on

> Homosexuality and Civil Rights, 1973, in 131 Am. J. Psychiatry 497 (1974). Only in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and *immutable*. See Brief for American Psychological Association et al. as Amici Curiae 7-17.

135 S. Ct. at 2596 (emphasis supplied). Is that a finding of fact? Does *Obergefell* find that sexual orientation is immutable? No. *Obergefell* does not find that all, or even most, psychiatrists believe that sexual orientation is immutable. Some psychiatrists do, some don't. Some believe that sexual orientation is mutable in some people, immutable in other people. They don't lump everyone together. Pages 16-21 and 28 of this brief discuss in detail a psychiatrist who believes that homosexual orientation is mutable in people who want to "renounce homosexuality" (his words). In the 1970s he was the most famous psychiatrist in the world. He lives today, but most people under 40 have never heard of him. I'll explain why.

The source *Obergefell* cites, Brief for American Psychological Association et al. at 7-17 (hereinafter 2015 APA brief), does not say sexual orientation is immutable. It says, "Most gay men and lesbians do not experience their sexual orientation as a voluntary choice." *Id.* at 7. "Most" does not mean "all." It means

that some gay men and some lesbians experience their sexual orientation as a voluntary choice. It also does not mean that a man who has homosexual urges can achieve happiness only if he has sex with a man. I had homosexual urges as a teen but dated women and eventually married a woman. I am very happy with her. I chose to be heterosexual. It wasn't always easy. I'm not saying I made the "right" choice. I made a choice. When LGBT people say homosexuality "isn't a choice," are they saying my only choice was to date boys? Even if, arguendo, sexual "orientation" is immutable, sexual behavior is mutable. After turning 16, I behaved heterosexually.

The 2015 APA brief at 9 says "sexual orientation change efforts are unlikely to succeed and can be harmful." "Unlikely" does not mean "can't." "Can" does not mean "will."

Thus, the 2015 APA brief does not say what *Obergefell* says the 2015 APA brief says.

Furthermore, even if, arguendo, sexual orientation or sexual behavior is immutable, or immutable in some people, that does not mean Title VII protects it from discrimination. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 360 (1978) ("a classification is not *per se* invalid because it divides classes on the basis of an immutable characteristic") (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part) (emphasis in original).

Title VII was intended in 1964 to prohibit discrimination based on immutable characteristics that ordinarily do not affect job performance: race, color, religion (religion into which a person is born),[3] sex, and national origin. Thereafter Congress amended Title VII to include some related characteristics that are arguably mutable, such as religious practice, 42 U.S.C. § 2000e(j) (1972), and pregnancy, *id.* § 2000e(k) (1978). Congress also prohibited age discrimination (Age Discrimination in Employment Act of 1967) and disability discrimination (Americans With Disabilities Act of 1990). Age is immutable.

The ADA goes into great detail to take into account the mutability or immutability of disability. *E.g.,* 42 U.S.C. § 12102(4)(E). By contrast, "When Congress makes it unlawful for an employer to 'discriminate because of sex' without further explanation of its meaning, we should not readily infer that it meant something different from what the concept of discrimination has traditionally meant." *General Elec. Co. v. Gilbert*, 429 U.S. 125, 145 (1976) (internal ellipses omitted). In response to *General Elec.*, Congress amended Title VII to explain that discrimination because of pregnancy is "discrimination because of sex." Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k).

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[3] See *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 726 n.5 (2010) (Alito, J., dissenting) (distinguishing between a person's religion at birth and current religious belief).

Congress has repeatedly declined to define "because of sex" to encompass sexual orientation, transgender status, or transvestism.

II. The 2019 American Psychological Association amicus brief does not argue that sexual orientation is immutable. Only two of the plaintiffs' 44 amicus briefs argue that sexual orientation is immutable.

The word "immutable" does not appear in the amicus brief APA and five other mental health associations filed in the present case (2019 APA brief). Rather, it says at 7:

> *Sexual orientation* refers to an enduring disposition to experience sexual, affectional, or romantic attractions to men, women, or both. It encompasses an individual's sense of personal and social identity based on those attractions, on behaviors expressing them, and on membership in a community of others who share them.

(emphasis in original). "Enduring" does not mean "immutable." My homosexual urges endured for at least two years, as I will discuss. Then they mutated to hetero.

Consider the many male celebrities who were married to women but are now married to men: Elton

John, Barry Manilow, and others. Their sexual orientation mutated. Some of them might now claim they were always gay, but they are referring to their thoughts (orientation), not behavior. The day they married their wives, they were heterosexual. In *Barry Manilow Reveals Why He Didn't Come Out for Decades: I Thought I Would 'Disappoint' Fans If They Knew I Was Gay*, PEOPLE magazine reported in 2017:

> "I was in love with Susan," says Manilow of the woman he married after graduating high school, "I just was not ready for marriage." The star maintains he wasn't struggling with his sexuality at the time of their one-year matrimony.[4]

If a now-gay man conceived a child via sexual intercourse with a woman years ago, he was heterosexual that day, too. If sexual orientation is merely a state of mind, not behavior, Title VII does not encompass it.

On January 21, 2019, former U.S. senator Harris Wofford of Pennsylvania died at 92. At 22 he married a woman. They remained married for 48 years until her death. At 90 he married a man. In *Harris Wofford, civil rights activist who helped*

[4] https://people.com/music/barry-manilow-hid-sexuality-thought-being-gay-would-disappoint-fans/ (last visited Aug. 12, 2019).

Kennedy win the White House, dies at 92, the Jan. 22 WASHINGTON POST reported:

> The courtly, professorial nonagenarian said he did not consider himself gay. "Too often, our society seeks to label people by pinning them on the wall — straight, gay or in between," he wrote. "I don't categorize myself based on the gender of those I love."

Some people go from homo to hetero. On February 16, 2019, the WASHINGTON POST reported: *Sharon Bottoms Mattes, who lost gay rights custody battle to her mother, dies at 48*. The custody battle was in the 1990s. Years later Sharon married a man (Mr. Mattes) and remained married to him until her death.

Chirlane McCray is a 64-year-old black woman. In 1979 she wrote an article "I Am a Lesbian" in ESSENCE magazine. She dispelled a common myth of that era that all or nearly all gay people are white. But in 1993 she married a man. They remain married today. He is Bill de Blasio, mayor of New York City and a presidential candidate.

McCray, like me, had homosexual "orientation" (thoughts and urges) for awhile but eventually chose to behave heterosexually. In a June 2013 ESSENCE article, *Chirlane McCray: From Gay Trailblazer to Politician's Wife*, McCray answered questions. Like Senator Wofford did, she now shuns labels.

> ESSENCE: "Do you consider yourself bisexual?"
>
> McCray: "I am more than just a label. Why are people so driven to labeling where we fall on the sexual spectrum? Labels put people in boxes, and those boxes are shaped like coffins. Finding the right person can be so hard that often, when a person finally finds someone she or he is comfortable with, she or he just makes it work. . . .
>
> ESSENCE: "Are you still attracted to women?"
>
> McCray: "I'm married, I'm monogamous, but I'm not dead and [laughs] Bill isn't either."

(brackets in original). McCray speaks for many people, including me, when she differentiates sexual orientation from sexual behavior. Millions of people have homosexual urges ("orientation"). Some give in to the urges, some don't. Some did but don't now. Some have homosexual urges but satisfy those urges via heterosexual behavior. An employer who discriminates against gay people is not discriminating against their "orientation." The employer is discriminating against their behavior, real or perceived by the employer. An employer who discriminates against gay people would not discriminate against McCray in 2019. McCray's

behavior, if not her "orientation," has been heterosexual since 1993.

Many employers believe that McCray and I did the "right" thing: We resisted our homosexual urges and married someone of the opposite sex. Many employers believe that Wofford at 90 did the "wrong" thing: He married a male. Many employers disagree with those employers.

The other amicus brief from medical/health associations in support of the plaintiffs is from the American Medical Association and 15 others. The word "immutable" is not in that brief, nor are any words implying immutability.

On March 6, 2017, I testified before the Connecticut General Assembly about my own sexual orientation and how it changed. I testified in opposition to HB 6695, a bill to ban conversion therapy on minors. My testimony is on the General Assembly's website.[5] Here is a summary.

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[5] https://www.cga.ct.gov/2017/PHdata/Tmy/2017HB-06695-R000307-Robinson,%20David%20A.,%20Attorney%20-TMY.PDF (last visited Aug. 12, 2019). Page 2 of my testimony refers to a book I wrote, CAN SEXUAL ORIENTATION CHANGE? ONE MAN'S MEMOIR. Numerous LGBT people complained about the book title. They insist that sexual orientation cannot change. So in 2018 I updated and retitled the book ORIENTATION AND CHOICE: ONE MAN'S SEXUAL JOURNEY. They still complain about it. They insist that homosexuality isn't a choice. I say that whatever one's sexual orientation is, one must make a choice: date a male or female. ORIENTATION AND CHOICE is sold on Amazon.

From ages 14 to 16 (early 1967 to early 1969), I was sexually excited looking at boys; not all boys, but some boys. Around my 16th birthday, I had a conversation with a male in his late teens or early 20s who knew I was sexually excited looking at some boys. He told me that the male sex organ, when erect, is designed to fit into the female sex organ. It was his way of telling me that sex should be between a male and female, not two males. As a result of that conversation, I decided to date females. It wasn't always easy for me. Not many females excited me but some did. I eventually married a woman and am very happy with her.

If that conversation occurs today between a person over 18 and person under 18 in Connecticut or 16 other states that ban "conversion therapy" on minors, it is "conversion therapy" according to those state laws. It is:

> a practice or treatment administered to a person under eighteen years of age that seeks to change the person's sexual orientation or gender identity, including, but not limited to, any effort to change gender expression or to eliminate or reduce sexual or romantic attraction or feelings toward persons of the same gender.

CONN. GEN. STAT. § 19a-907(1). If the person over 18 is a "health care provider," the conversation would

probably be illegal and the provider's license could be revoked. *Id.* § 19a-907a(b).

Whether my sexual orientation changed at 16 or I simply suppressed or ignored my sexual orientation thereafter is somewhat debatable. What is not debatable is this: An employer who discriminates against gays would not discriminate against me. My behavior since I turned 16 is heterosexual.

III. The best-selling nonfiction book of the 1970s was a sex education book by a psychiatrist who said homosexuality is mutable and can be cured if the patient wants to renounce homosexuality. The book infuriated LGBT activists. LGBT activists lobbied to declassify homosexuality as a mental illness in 1973.

Obergefell observes that homosexuality was classified as a mental disorder until 1973. 135 S. Ct. at 2596. I believe that the declassification in 1973 was in part a response to a book published in 1969 that virtually everyone over the age of 60 today remembers well, and most remember fondly, but hardly anyone under 40 today has heard of. For millions of Americans and others in the 1970s, this book was "the bible" on sex. I don't mean the Holy Bible. I mean Dr. David Reuben's EVERYTHING YOU ALWAYS WANTED TO

KNOW ABOUT SEX* (*BUT WERE AFRAID TO ASK*)*. Reuben's book

> was one of the first sex manuals that entered mainstream culture in the 1960s, and had a profound effect on sex education and in liberalizing attitudes towards sex. It was the most popular non-fiction book of its era and became part of the Sexual Revolution of modern America.
>
> The book was No. 1 best-seller in 51 countries and reached more than 100 million readers.[6]

Reuben's book has a question and answer format. On page 162 (Bantam Books 1971) Reuben says:

> Q. Couldn't homosexuals just be born that way?
>
> A. A lot of homosexuals would like to think so. They prefer to consider their problem the equivalent of a club foot or birthmark; just something to struggle through life with.

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[6] WIKIPEDIA, *Everything You Always Wanted to Know About Sex* (*But Were Afraid to Ask) (book)* https://en.wikipedia.org/wiki/Everything_You_Always_Wanted_to_Know_About_Sex*_(*But_Were_Afraid_to_Ask)_(book) (last visited Aug. 14, 2019).

> This explanation is a little tragic. It implies that all homosexuals are condemned without appeal to a life some of them say they enjoy so much. Actually for those who want to change there is a chance.
>
> Q. How?
>
> A. If a homosexual who wants to renounce homosexuality finds a psychiatrist who knows how to cure homosexuality, he has every chance of becoming a happy, well-adjusted, heterosexual.

Reuben's book infuriated LGBT activists. They vehemently opposed his assertion that homosexuality can be "changed" or "cured." In 1973 they persuaded some health organizations to declare that homosexuality is not a mental illness. They discouraged psychiatrists and psychologists from helping a person who has homosexual urges be heterosexual even if the person wants to be heterosexual and requests such help. They call such help "conversion therapy." If a boy has an urge to kiss boys, they don't want people to talk him out of it. They cannot prevent his parents and clergy from talking him out of it—the First Amendment and other issues get in the way—but they can, or think they can, prevent licensed health professionals from talking him out of it. They have persuaded 17 states to

prohibit licensed health professionals from engaging in "conversion therapy" on a minor, even if the minor wants to be heterosexual and requests the help. *E.g.*, CONN. GEN. STAT. § 19a-907 to 907c. For a violation, the state can revoke the professional's license. Many LGBT activists insist that sexual orientation is like race, color, sex, age, and national origin: A person can't change it. *See Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) ("sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth").

Except for one thing. Many LGBT activists say a person *can* change his or her sex. If a male (person who has a penis at birth) feels like a female, they say he is female. They call him "she." They want to allow him ("her") to use the ladies' restroom. A unisex restroom won't suffice. *Grimm v. Gloucester County Sch. Bd.*, 822 F.3d 709, 716 (4th Cir. 2016) (lengthy subsequent case history omitted); *Doe v. Regional Sch. Unit 26*, 86 A.3d 600, 603 (Me. 2014). They call him "her" even if he ("she") has not undergone sex-change surgery.

But sexual orientation? That's "immutable," many of them say. Did *Obergefell* say it? No. *Obergefell* merely said that some experts say it is immutable. *Obergefell* did not find or hold that sexual orientation is immutable. Any insinuation in *Obergefell* that sexual orientation is immutable is halfhearted at most.

Why does the LGBT community favor sex change but disfavor sexual orientation change? I can only guess. I guess they want to increase the percentage of people who identify as LGBT. Banning conversion therapy and encouraging sex change increases the percentage.

We don't hear much about Reuben or his book today. There is little about them on the internet. I had some difficulty finding the book—either the original (1969-70) edition or the 1999 edition—in a library or physical bookstore near me. It is missing or removed from many libraries. Some libraries have the 1972 Woody Allen movie of the same name but not Reuben's book. The book has become politically incorrect. It has been banished in many places. The book liberalized attitudes towards heterosexual sex but not homosexual sex.

Reuben's 1999 edition, probably in response to criticism about the original edition, is a bit more nuanced. He says:

> Q. What causes homosexuality?
>
> A. Like every complex area of human behavior, there's no simple explanation. Some people say it's "genetic"—you're born with it and there's nothing you can do about it. Other people call it a form of mental illness curable by psychotherapy. Still others believe it's a personal decision—a person simply

> decides to be a homosexual. Some people say it's a sexual perversion. Other people, most of them homosexuals, say it's normal—just like being heterosexual. To complicate matters further there are about ten other points of view.
>
> Q. Who's right?
>
> A. Everyone. Because we're talking about opinions and everyone is entitled to their own personal opinion. From a scientific standpoint, thousands of research projects are constantly under way, so let's just concentrate on what homosexuality *is* rather than *why* it is.

(emphasis in original).[7]

The debate over homosexuality is eternal. Homosexuality "has been discussed not for tens, or hundreds, but for thousands of years. . . . [It] was discussed among Romans and Greeks, and it is well known that the Bible is not quiet about it." Alfred W. Herzog, *Homosexuality and the Law*, 34 MEDICO-LEGAL J. 1 (1917).

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[7] EVERYTHING YOU ALWAYS WANTED TO KNOW ABOUT SEX* (*BUT WERE AFRAID TO ASK): ALL NEW EDITION 145 (1999) (hereinafter REUBEN 1999).

The Court should not end the debate. To hold, find, or opine that sexual orientation is immutable would send a wrong message to people young and old. It would tell them that: 1) if they are sexually excited looking at someone of the same sex, they are gay and will continue to be gay whether they want to or not; and 2) as a result, they should date (and marry) their own sex.

IV. The plaintiffs ask this Court to carve out an exception to the employment-at-will rule where Title VII does not.

Employment relationships are presumed to be "at will" in all U.S. states except Montana. NAT'L CONF. STATE LEGIS., *"At Will" Employment—Overview Employment at Will* (2008).[8] An employer can fire or refuse to hire an employee for any reason or no reason so long as the reason is not illegal and no contract is breached. *Id.* An illegal reason is one that violates a statute (e.g., Title VII) or clear public policy. *Id.* Reading the plaintiffs' briefs, I gather they were employees at will.

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), does not explicitly mention the employment-at-will rule but honors it. "This balance between employee rights and employer prerogatives turns out to be decisive in the case before us." *Id.* at 239. Title

[8] http://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx1 (last visited Aug. 14, 2019).

VII's "maintenance of employer prerogatives is evident from the statute itself and from its history, both in Congress and in this Court." *Id.* at 242. Title VII therefore should not be construed too broadly. "Employer prerogatives" is roughly synonymous with "employment-at-will."

Since an employer can fire an employee-at-will for any reason or no reason, an employer can fire an employee-at-will for the employer's own moral reasons so long as those reasons do not violate Title VII or other statute or clear public policy. *Contrast: Lawrence v. Texas,* 539 U.S. 558, 583 (2003) (morality is insufficient reason for government to criminalize homosexual behavior). Different employers have different moral values:

> [T]he terms "morally straight" and "clean" are by no means self-defining. Different people would attribute to those terms very different meanings. For example, some people may believe that engaging in homosexual conduct is not at odds with being "morally straight" and "clean." And others may believe that engaging in homosexual conduct is contrary to being "morally straight" and "clean."

Boy Scouts of America v. Dale, 530 U.S. 640, 650 (2000) (quotes in original).

There is consensus in the United States—embodied in Title VII, ADEA, and ADA—that being black, female, old, disabled, Muslim, or Mexican (or male or other race, religion, or national origin) is not immoral. There is no consensus on whether a man's having sex with a man, or woman with woman, is immoral. In some states the consensus is it is immoral. In *Ex parte De Ford*, 168 P. 58, 59 (Okla. Crim. 1917), the court provided a biological, not religious, explanation why most Oklahomans believe that penile-vaginal (penis inserted into vagina) sex is morally superior to oral and anal sex:

> In the order of nature the nourishment of the human body is accomplished by the operation of the alimentary canal, beginning with the mouth and ending with the rectum. In this process food enters the first opening, the mouth, and residuum and waste are discharged through the nether opening of the rectum. The natural functions of the organs for the reproduction of the species are entirely different from those of the nutritive system. It is self-evident that the use of either opening of the alimentary canal for the purpose of sexual copulation is against the natural design of the human body. In other words, it is an offense against nature. There can be no difference in reason whether such an unnatural coition takes

> place in the mouth or in the fundament—at one end of the alimentary canal or the other. The moral filthiness and iniquity against which the statute [statute prohibiting "sodomy"] is aimed is the same in both cases.

(*quoting State v. Start*, 132 P. 512, 513 (Or. 1913)). Some people reading this amicus brief might snicker, "That was a hundred years ago—ancient history. Society has changed." My response: Biology hasn't changed.

REUBEN 1999 says oral and anal sex are more common among gay couples than heterosexual couples because heterosexual couples have a third option: penile-vaginal sex (penis inserted into vagina).[9] Gay people don't want penile-vaginal sex, Reuben says.[10] So, in the eyes of many employers, heterosexual behavior and homosexual behavior are not "equal."

In other states, there is no consensus or the consensus is that homosexual sex is not immoral. *See, e.g.*, N.J. STAT. § 45:1-54(1)(a) ("The Legislature finds and declares that: Being lesbian, gay, or bisexual is not a disease, disorder, illness, deficiency, or shortcoming.").

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[9] *Supra* note 7, at 145, 153.
[10] *Id.* at 153.

Does an employer have the right to fire, or to refuse to hire, an employee because the employee engages in homosexual behavior? That is like asking: Does an employer have the right to fire an employee because the employee roots for the Yankees? The answer: Most employees are employees-at-will. Ordinarily, if the employee has the right to quit a job at any time for any reason or no reason, the employer has the right to fire the employee at any time for any reason or no reason, except the employer cannot fire the employee for an illegal reason. Congress and many states have declared that some reasons to fire an employee are illegal: for example, race, color, religious origin, sex, and national origin. Those reasons are fixed at birth (immutable) and do not affect behavior or job performance. After enacting Title VII in 1964, Congress realized that religious *behavior* may affect job performance somewhat, so, to further protect employees' religious freedom, Congress in 1972 amended Title VII to protect some (not all) religious behavior in the workplace. P.L. 92-261, § 2(7), 42 U.S.C. § 2000e(j). And because only women get pregnant, Congress in 1978 amended Title VII to protect women's behavior associated with pregnancy, childbirth, and related medical conditions. *Id.* § 2000e(k). Approximately 22 states have statutes that prohibit sexual orientation discrimination.

Connecticut enacted a statute that partly protects employees in private-sector workplaces from being fired for exercising their First Amendment rights. CONN. GEN. STAT. § 31-51q. This may apply to

the situation involving the employee who roots for the Yankees. It would apply to a question like: Does a Connecticut employer have the right to fire an employee because the employee loves (or hates) President Trump? Answering the question requires carefully reading the statute and applying it to the facts involving the particular employer and employee.

Some employers like or dislike an employee based in part on how the employee behaves while off-duty and outside the workplace. This may include the employee's sexual behavior. Suppose a male employee is married to a woman but having an affair with another woman. His employer learns about it. His employer thinks adultery is immoral. Does the employer have the right to fire the man for adultery? Adultery does not affect the man's job performance. Firing the man for adultery is firing him "because of sex." In most states, the employer has the right to fire the man for adultery. That is because in most states the employer can fire the man for any reason, except an illegal reason, or no reason. Whether the employer should or shouldn't fire the man isn't the question. The question is: Does the employer have the right to?

Many people don't want employers to have the right to fire employees "at will" (at the will of the employer). Many people don't want employers to have the right to fire an employee because of the employee's off-duty, off-premises, legal (not illegal) sexual behavior. They should lobby their legislators, not the courts. One of the first things I learned about

employment law—from a case decided the week I took the Massachusetts bar exam—is "Although the employment at will rule has been almost uniformly criticised, . . . it has been widely followed." *Fortune v. National Cash Register Co.*, 364 N.E.2d 1251, 1255 (Mass. 1977). Forty-two years later, it is still widely followed. It provides freedom to employers and employees. An employee is not a slave. Ordinarily, he can quit a job whenever he wants. Reciprocally, in most states the employer can fire him whenever the employer wants, unless firing him would violate a statute (or clear public policy) or breach a contract.

Many employers regard adultery, homosexual behavior, and transvestism[11] as equally immoral. Many employers look at the complementarity of the male and female sexual anatomy and conclude that the male anatomy is designed to fit into the female anatomy. "The vagina is tailor-made for the penis." David Reuben, EVERYTHING YOU ALWAYS WANTED TO KNOW ABOUT SEX* (*BUT WERE AFRAID TO ASK) ALL NEW EDITION 153 (1999). These employers believe it is immoral and unnatural ("against nature") for a man to insert his penis into or onto another man. The Bible says so. The Bible also says a man should not "put on a woman's garment." *Deuteronomy* 22:5 (King

[11] Some people may object to the word "transvestism" but MERCK MANUAL Consumer Version uses it. https://www.merckmanuals.com/home/mental-health-disorders/sexuality/transvestism (last visited Aug. 18, 2019).

James). The Bible says it is an "abomination" for a man to put on a woman's garment. *Id.* Many employers worship the Bible. *See also Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81 (1999) (Title VII "requires neither asexuality nor androgyny in the workplace").

It is up to Congress and the states, not the Court, to decide whether discrimination based on sexual orientation should be illegal. Title VII as written does not encompass it. With legislation, there are numerous possibilities, not just "yes" or "no." For example, a state may enact a statute that prohibits an employer to fire, or to refuse to hire, an employee because of the employee's off-duty, off-premises, legal (not illegal) sexual behavior.

V. If Title VII gives a male employee the right to be treated as female, Title VII gives a white employee the right to be treated as black.

In plaintiff Aimee Stephens's terminology, my "assigned sex at birth" was male. My "assigned race at birth" was white. If Title VII gives a male employee the right to be treated as female, it gives a white employee the right to be treated as black.

It would be easy for me to "identify" as or "transition" to black. I have the name. David Robinson is the only name that is in not only one but

two of the four major team sports Halls of Fame in the United States: NBA (David Robinson, San Antonio Spurs) and NFL (Dave Robinson, Green Bay Packers). Both are black. My father had the name of a black Baseball Hall of Famer: Jackie Robinson. My father's real name was Jacob but everyone called him Jack. When he was a teen in the 1930s, many called him Jackie. My skin gets quite dark in the summer sun. I am darker than some African-Americans.

If a male has the right to be treated as female, do I have the right to be treated as black? If I apply for a job, can I check "black" on the AA/EEO form? Is it any more fraudulent for me to say I am black than for a male to say he is female?

If the Court holds that Title VII gives a male employee the right to be treated as female, it imperils affirmative action programs designed to help blacks overcome past racial discrimination. Some whites will "identify" as or "transition" to black.

VI. Conclusion

The answer to both questions is "no."

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DAVID A. ROBINSON
Counsel of Record
P.O. Box 780
North Haven, CT 06473
Tel. 203-214-4078
E-Mail: davidr225@comcast.net