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

In the Supreme Court of the United States

GERARD LYNN BOSTOCK, *Petitioner*
v.
CLAYTON COUNTY, GEORGIA*, Respondent*

ALTITUDE EXPRESS, INC. *et al.*, *Petitioners*
v.
MELISSA ZARDA *et al.*, *Respondents*

R.G.& G.R.HARRIS FUNERAL HOMES, *Petitioner*,
v.
E.E.O.C. *et al., Respondents*

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

BRIEF OF *AMICUS CURIAE* AMERICAN PUBLIC PHILOSOPHY INSTITUTE IN SUPPORT OF EMPLOYERS

DAVID R. UPHAM
Counsel of Record
University of Dallas
1845 E. Northgate Drive
Irving, TX 75062
(972)-721-5186
davidrupham@yahoo.com

QUESTION PRESENTED

Does Title VII, fairly construed, prohibit employers from adopting traditional sex-conscious norms as to marriage, sexual ethics, and appropriate attire?

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INTEREST OF *AMICUS*[1]

The American Public Philosophy Institute ("APPI"), an independent 501(c)(3) public charity, is an interdisciplinary group of scholars from various universities that promote a natural law public philosophy rooted in the principles of the American Founding, one that pursues freedom and prosperity, grounded on the moral integrity of the culture and of our social and political institutions.

The APPI opposes any misinterpretation of the Civil Rights Act of 1964 that would defeat its generous and inclusive purpose by constructively evicting from our nation's employment markets the large minority of Americans who still hold traditional beliefs as to marriage and family. *Amicus* wishes to submit to this Court evidence to show that Title VII of the Act, according to its original plain meaning, in no way prohibits private employers from recognizing and adopting traditional norms as to marriage, sexual ethics, and appropriate attire.

SUMMARY OF ARGUMENT

Over a half-century ago, our nation's Congress passed the Civil Rights Act of 1964 by an

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[1] No one (including a party or its counsel) other than the *Amicus curiae,* its members, and its counsel authored this brief in whole or in part, or made a monetary contribution intended to fund its preparation or submission. *Amicus* certifies that all petitioners and respondents have consented to the filing of this brief, either by a blanket consent filed with this Court or by specific written consent.

overwhelming, bipartisan majority.[2] Title VII of that Act (hereinafter, "Title VII") made it "unlawful" for any "employer" "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's…sex…." Pub. L. No. 88-352, 78 Stat. 241, § 703(a)(1) (codified at 42 USC § 2000-2(a)(1) (1994)). The statute has since been amended by nearly unanimous bipartisan majorities. Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978); Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

Does this statute, fairly construed, prohibit employers from adopting traditional sex-conscious norms as to marriage, sexual ethics, and appropriate attire?

In urging this Court to give an affirmative answer, the Plaintiffs and their supporting *amici* rely chiefly on a textualist argument: *viz.*, that the "plain" and "unambiguous" meaning of Title VII comprehensively prohibits employers from making an individual's "sex" the but-for cause of withholding from him a benefit or imposing on him a burden.

With no disrespect intended to any of the participants in these cases, *Amicus* does not think this question is close at all. The Plaintiffs' textualist argument is only superficially plausible.

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[2] *See* 110 Cong. Rec. 14,511 (1964) (regarding Roll Call No. 436, the Senate's roll call for the Civil Rights Act of 1964); 110 Cong. Rec. 15,897 (1964) (concerning Roll Call No. 179, the House's roll call vote on the Senate's version of the Civil Rights Act of 1964).

When Title VII was adopted, the norm against "sex discrimination" had, in all respects relevant to the cases at bar, a well established legal meaning. This norm had long been incorporated, in various ways, in American and international law. According to this legal tradition, the prohibition had never encompassed traditional norms as to marriage, sexual ethics, and appropriate attire. The evidence for this original legal meaning is unambiguous and overwhelming.

Further, this original meaning is coherent, reflecting a definition of "discriminate against" that was limited to (1) distinctions that invidiously obstructed equal opportunity and/or (2) distinctions made (not merely recognized) by employers. Title VII prohibits the employers from making a sex discrimination so as to obstruct equal opportunity, but does not prohibit employers from recognizing a sex distinction proceeding from a source prior to employment markets—whether biology, the *ius gentium*, or some other fundamental custom adopted by both sexes.

Finally, fidelity to this original meaning is necessary to safeguard the bipartisan and inclusive spirit of the law. Title VII and each of its amendments were passed by overwhelming bipartisan majorities. Plaintiffs' novel reading, in contrast, is highly partisan and would have an exclusionary impact on the large minority of relatively poor Americans who still hold traditional beliefs.

ARGUMENT

I. The Plaintiffs' sex-blind reading is inconsistent with the original, unambiguous legal meaning of Title VII.

A. The Plaintiffs' reading would prohibit employers from adopting traditional, sex-conscious norms concerning marriage, sexual ethics, and appropriate attire.

By the breadth of the Plaintiffs' arguments, the three cases at bar all involve whether employers may adopt policies reflecting various sex-specific traditional beliefs, *e.g.,* that marriage is properly defined as male-female, that sexual activity should be reserved for marriage so defined, and that men and women should dress in sex-specific ways. Although the facts of the cases do not clearly implicate such beliefs,[3] the Plaintiffs' reading of Title

[3] Plaintiff Stephens alleges that that the motive for termination was employer's "view" that it was "wrong for a biological male to dress[] as a woman." Brief of Plaintiff Stephens at 9. But neither Plaintiff Bostock nor Plaintiff Zarda clearly allege disapprobation as a motive. Plaintiff Bostock claims that persons "criticized" his sexual orientation but does not specify whether this criticism involved any traditional moral view. Brief of Plaintiff Bostock at 5. Plaintiff Zarda alleges that he was terminated for disclosing his sexual orientation but does not allege that anyone's disapprobation of any conduct—whether any sexual conduct, the disclosure thereof, or otherwise—was a motive. Brief of Plaintiff Zarda at 4–5. Indeed, much "sexual-orientation" discrimination might not involve any moral beliefs at all—but just arise from animosity or thoughtless caprice. *Amicus* objects strongly to the suggestion made recently by judicial authority that traditional moral views can be reduced to animosity or caprice or any other disregard of

VII would surely prohibit employers from making such traditional views the basis for many employment decisions. According to the Plaintiffs, Title VII is violated whenever an individual's sex is the but-for cause of any adverse employment decision.[4] If a traditional employer should reserve the word "marriage" or monetary spousal benefits only to individuals in opposite-sex couplings, or mandate sex-specific restrooms or attire, the sex of an individual would be the but-for cause of the decision.

Respondents Zarda and Moore state the matter clearly:

> Employers, like all other Americans, retain the right to their moral views about how individuals of a particular sex should lead their lives. But Title VII prevents an employer from using those views to limit individuals' employment opportunities.[5]

In other words, employers must check such beliefs at the door of our nation's employment markets. And,

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the dignity of human persons who identify as LGBT. *Amicus* further notes that the Plaintiffs here make no such suggestion.

[4] *See, e.g.*, Brief of Petitioner Bostock, at 10 (beginning the "Summary of Argument" section as follows: "The plain language of Title VII [prohibits any] disparate treatment of an employee that would not occur 'but for' his sex."). *See also* Brief of Respondents Zarda et al., at 15–17 (arguing from the "plain" and "unambiguous" meaning of Title VII). *See also, e.g.*, Brief for the American Bar Association, at 8–9; Brief of Kenneth B. Mehlman et al., at 6–15.

[5] Brief of Respondents Zarda et al., at 17.

by implication, current or aspiring employees must be forced to do the same—to avoid creating a hostile work environment by merely expressing such opinions.

B. Well before the adoption of Title VII, American law had long incorporated, in various ways, the norm proscribing adverse sex discrimination.

Although it seems largely conceded that the Congress that adopted Title VII did not expect such a result, the Plaintiffs and supporting *amici* contend that the text of Title VII plainly prohibits employers from making any sex-specific belief the basis for any employment decision adverse to any current or prospective employee. They further contend that this plain meaning of the text, rather than the "originally expected application" thereof, should define the law's scope.[6]

Though accepting this last point *arguendo*, *Amicus* points to Title VII's original *legal* meaning. It is a well established canon of statutory construction that the meaning of a legal text includes the well established legal meaning of any of its words or phrases: "[W]here Congress borrows terms of art in which are accumulated the legal tradition and

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[6] *See, e.g.*, Brief of Anti-Discrimination Scholars at 3 ("It is thus the meaning of a statutory text, not the manner in which a statute's drafters and their contemporaries expected it to be applied, that governs us today."); Brief of Statutory Interpretation and Equality Law Scholars at 17 n.5 ("As such, the use of originally expected applications in this context is simply an invitation to depart from the words of the statute, rather than an effort to ascertain their meaning.").

meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken." *Sekhar v. United States*, 570 U.S. 729, 733 (2013) (citations omitted),[7] for where "a word is obviously transplanted from another legal source…it brings the old soil with it," *id.* (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947)).

This canon applies to "sex discrimination" under Title VII. Despite a common assumption, the 1964 Civil Rights Act by no means marked the "first time" that "discrimination on the basis of sex was prohibited in the United States."[8] Rather, for decades, even generations, American law had incorporated the norm. By 1964, there was an extensive *tradition* of anti-sex-discrimination.

Beginning in the late nineteenth century, this norm had appeared chiefly in three ways. First, various western states adopted constitutional rules prohibiting all sex discrimination in public education. For instance, Kansas's first constitution directed the legislature to "make no distinction between the rights of males and females" in "providing for the formation and regulation of schools." KAN. CONST. art. II, § 23 (1861). Similarly, Wyoming's first constitution provided that "[i]n none of the public schools…shall

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[7] This opinion, authored by the late Justice Scalia, was for a unanimous Court.

[8] KARIN VOLKWEIN & GOPAL SANKARAN, SEXUAL HARASSMENT IN SPORT 93 (2002).

distinction or *discrimination* be made on account of *sex*, race or color," WYO. CONST. art. VII, § 10 (1890) (emphasis added), and Washington's charter likewise mandated that the state "make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste or sex," WASH. CONST. art. IX, § 1 (1890). Some western-state constitutions extended this principle to state universities by prohibiting exclusion from "any department" "on account of sex." CAL. CONST. art. IX. § 9 (1879); *accord* MONT. CONST. art. XI, § 9 (1889); *see also* WYO. CONST. art. VII, § 16 (1890) (stipulating that the "university shall be equally open to students of both sexes, irrespective of race or color").

Second, western states likewise took the lead in prohibiting "sex" discrimination in the regulation of suffrage and other political rights. Wyoming's bill of rights prohibited any "distinction of race, color, [or] sex" in "the laws of this State affecting the political rights and privileges of its citizens." WYO. CONST. art. I, § 3 (1890). *See also, e.g.*., UTAH CONST. art. IV, § 1 (1896) ("The rights of citizens of the State of Utah to vote and hold office shall not be denied or abridged on account of sex."); *see also Rose v. Sullivan*, 56 Mont. 480, 484 (1919) (interpreting the removal of the word "male" by amendment as effectively eliminating "every political distinction based upon the consideration of sex").

These changes partly culminated in our whole Republic's adoption of the Nineteenth Amendment. Its mandate—that the "right…to vote shall not be denied or abridged…on account of sex"—was

contemporaneously and uncontroversially interpreted to bar "sex discrimination" as to suffrage. *Leser v, Board of Registry*, 139 Md. 46, 62 (1921) (explaining that the Nineteenth Amendment "forbids…discrimination on account of 'sex'"); *State v. Mittle*, 120 S.C. 526, 531 (1922) (holding that the Amendment does not confer the suffrage but "only prohibits discrimination…on account of sex"); *Prewitt v. Wilson*, 242 Ky. 231, 233 (1932) (affirming that the Amendment "prohibits discrimination against [women] on account of their sex in the exercise of [the suffrage]"); *cf. Gray v. Sanders*, 372 U.S. 368, 379 (1963) (concluding that the Amendment rendered sex "discrimination" impermissible).

Third, state authorities moved to prohibit sex discrimination in employment, the professions, and occupations in general. California's 1879 constitution stipulated that no one "on account of sex, be disqualified from entering upon or pursuing any lawful business, vocation, or profession." CAL. CONST. art. XX, § 18 (1879). That state's highest court read this language to prohibit "any discrimination of this kind based solely on distinctions of sex." *In re Application of Miller*, 162 Cal. 687, 692 (1912). Other western states passed even more comprehensive bans on sex discrimination by state actors. Both Utah and Wyoming provided that "[b]oth male and female citizens of this State shall enjoy equally all civil, political, and religious rights and privileges." WYO. CONST. art. VI, § 1 (1890); UTAH CONST. art. IV, § 1 (1896).

In the late nineteenth century, the anti-sex-discrimination norm also served to open the legal

profession to women. Even where these reforms (whether statutory or judicial) did not ban sex "discrimination" expressly[9] they were interpreted to have this effect. As Colorado's Supreme Court explained, by 1891, "the supreme court of the United States and other enlightened tribunals throughout the country…have finally, voluntarily, or in obedience to statutory injunction discarded the criterion of sex" and thus "no longer adhere to the rule of discrimination on the ground of sex." *In re Thomas*, 16 Colo. 441, 444, 447 (1891).

In the first half of the twentieth century, some states anticipated Title VII by beginning to apply this anti-sex-discrimination principle to some private employers.[10] Michigan, for instance, forbad certain manufacturing employers to "discriminate in any way in the payment of wages as between sexes." *See General Motors Corp. v. Attorney Gen.*, 294 Mich. 558, 562 (1940) (discussing the statute).

After World War II, bans on sex-discrimination rapidly proliferated in both number and scope, in both American and international law. Most notably, the Universal Declaration of Human Rights ("UDHR"), stipulated that "[e]veryone is entitled to all the rights and freedoms set forth in this

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[9] *See, e.g.*, Act of Congress Feb. 15, 1879, 20 Stat. 292. *See also* Judith Resnick, *"Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts*, 66 N.Y.U.L. REV. 1682, 1736 n.279 (1991) (discussing the statute's history).

[10] DEBORAH M. FIGART ET AL., LIVING WAGES, EQUAL WAGES: GENDER AND LABOUR MARKET POLICIES IN THE UNITED STATES 146 (2002) (listing the state equal-pay laws passed before 1963).

Declaration, *without distinction of any kind*, such as race, colour, *sex*…" G.A. Res. 217A (III), U.N. Doc. A/810 (1948), art. 2 (emphasis added). A few years later, the new constitution for Puerto Rico gave this rule pride of place in its Bill of Rights: "The dignity of the human being is inviolable. All men are equal before the law. No discrimination shall be made on account of race, color, sex, birth, social origin or condition, or political or religious ideas." P.R. CONST. BILL OF RIGHTS, § 1 (1952)

In 1952, Congress, via the landmark Immigration and Nationality Act ("INA"), extended this anti-discrimination rule to naturalization by prohibiting the denial or abridgement of this right "because of *race or sex…".* Ch. 477, § 311, 66 Stat. at 239 (1952) (current version at 8 U.S.C. § 1422) (emphasis added).[11] And just a year after adopting Title VII, Congress extended this antidiscrimination rule to immigration as well as naturalization. Immigration and Nationality Act of 1965, Pub. L. No. 89-236, § 2, 79 Stat. 911, 911-12 (1965) (current version at 8 U.S.C. § 1152(a)(1)(A)).

But of greatest relevance here is the fuller extension of the anti-sex-discrimination norm to public and private employment. After the War, equal-pay acts multiplied in both American and

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[11] CONGRESSIONAL RESEARCH SERVICE, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION: ANNOTATIONS OF CASES DECIDED BY THE SUPREME COURT OF THE UNITED STATES TO JUNE 29, 1972, at 286 (1973) (reading this prohibition as a bar to "discrimination").

international law[12]—leading to Congress's near-unanimous adoption of the Equal Pay Act in 1963. The Act barred any employer from paying "wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of *the opposite sex*." Pub. L. No. 88-38, 77 Stat. 56 (1963) (current version at 29 U.S.C. § 206(d)(1)) (emphasis added).[13]

Parenthetically *Amicus* notes that the use of the term "opposite sex" indicates that the 88th Congress understood "sex" as binary, with a mutual complementarity between the two sexes. The same Congress adopted Title VII a year later.

Moreover, six years before Title VII, the International Labour Organization declared that "discrimination constitutes a violation of rights enunciated by the [UDHR]," and recommended that nations adopt a bar on public and private employment discrimination, including that "made on

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[12] *See, e.g.*., Int'l Labour Org. [ILO], Equal Remuneration Convention (No. 100), art. 2(1) (1951) https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C100 (stipulating that the signatories will work to establish "equal remuneration for men and women workers for work of equal value" defined as "rates of remuneration established without discrimination based on sex"); Dorothy Sue Cobble, *Recapturing Working Class Feminism: Union Women in the Postwar Era*, *in* NOT JUNE CLEAVER: WOMEN AND GENDER IN POSTWAR AMERICA, 1945-1960, at 57, 65-66 (Joanne Meyerowitz ed. 1994) (discussing state law reforms).

[13] *Equal Pay Act for Women Enacted*, *in* CQ ALMANAC 1963, at 511-13 (19th ed., 1964), http://library.cqpress.com/cqalmanac/cqal63-1315824.

the basis of race, colour, *sex*, religion, political opinion, national extraction or social origin" (emphasis added).[14] Between 1958 and 1964, 46 countries ratified the treaty, roughly half of which were predominantly Islamic and Roman Catholic countries.[15]

Soon thereafter, in his first year in office, President Kennedy committed his administration to pursuing a comprehensive anti-sex-discrimination policy in federal and private employment. In December, he announced his "firm intent that the Federal careers service be maintained in every respect without *discrimination*," and ordered the Civil Service Commission to review and modify personnel policies "to assure that selection for any career position is hereinafter made solely on the basis of individual merit and fitness *without regard to sex*."[16] He concurrently established a "Commission

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[14] *See* Int'l Labour Org. [ILO], Discrimination (Employment and Occupation) (No. 111), preamb. and art. 1(1) (1958), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C111.

[15] These countries included Iraq, Tunisia, Syrian Arab Republic, Egypt, Pakistan, Somalia, Jordan, Morocco, Iran, Mali, Niger, Mauritania, Guinea, Libya, Portugal, Italy, Poland, Guatemala, Honduras, Costa Rica, Mexico, Ecuador, the Dominican Republic, and the Philippines. *See* Int'l Labour Org. [ILO], Ratifications of C111 - Discrimination (Employment and Occupation) Convention (No. 111) (1958), https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312256.

[16] John F. Kennedy, *Statement by the President on the Establishment of the President's Commission on the Status of Women*, Dec. 14, 1961, in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES [1961] 799, 800 (1962) (emphasis added).

on the Status of Women," whose task, in part, was to recommend policies "for overcoming discriminations in government and private employment on the basis of sex," or stated otherwise, to "assure non-discrimination on the basis of sex and to enhance constructive employment opportunities for women."[17] The Commission, in turn, recommended further action via executive order to bar sex discrimination by the Federal Civil Service and by Federal contractors.[18] While the Commission stopped short of proposing a federal statute covering other private employers, the states of Hawaii and Wisconsin contemporaneously adopted such statutes.[19]

C. By word and deafening silence, legal authorities had long established that the anti-sex-discrimination norm in no way precluded the adoption of traditional sex-conscious rules as to marriage, sexual ethics, and appropriate attire.

Throughout all this time, there is no record of any party ever contending—let alone any authority concluding—that these comprehensive anti-sex-

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[17] Executive Order 10980 Establishing the President's Commission on the Status of Women, Dec. 14, 1961., preamb. & § 201(f).

[18] AMERICAN WOMEN: REPORT OF THE PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN 30 (1963), *available at* https://www.dol.gov/wb/American%20Women%20Report.pdf.

[19] Leo Kanowitz, *Sex-Based Discrimination in American Law III: Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963*, 20 HASTINGS L.J. 305, 308 (1968)

discrimination rules precluded the adoption of traditional sex-specific rules as to marriage, sexual ethics, or appropriate attire. To the contrary, some of the same legislators that barred sex discrimination simultaneously adopted such sex-specific norms. The UDHR, for instance, both affirmed the right of everyone to enjoy all the rights listed "without distinction of …sex" and simultaneously indicated that marriage was the union of male and female: "Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family." G.A. Res. 217A (III), U.N. Doc. A/810 (1948), art. 16. Puerto Rico's constitution both prohibited sex "discrimination" and declared "the right of motherhood" (not *parenthood*) "to special care and assistance." P.R. CONST., BILL OF RIGHTS, § 20 (1952).

A decade before adopting Title VII, Congress both prohibited all sex discrimination in naturalization[20] and (1) expressly indicated that marriage was male-female,[21] (2) made marriage, so defined, the basis for preferential treatment in immigration and naturalization,[22] and (3) made ineligible for naturalization aliens who entered our territory with (a) the *intention* to engage in

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[20] Immigration and Nationality Act of 1952, Pub.L. 82–414, 66 Stat. 163, § 311.

[21] *Id.* § 202(a)(2) (employing language of "husband and wife").

[22] *Id.* § 202(a)(2) (adjusting national-origin quotas "to prevent the separation of *husband and wife*,") (emphasis added); § 319(a) (reducing the durational-residency requirement for spouses of citizens).

nonmarital (or "immoral") sexual acts[23] —or (b) the mere *propensity* to engage in one form thereof—homosexual acts.[24]

Moreover, President Kennedy's anti-sex-discrimination agenda proceeded from the manifest assumption that a comprehensive norm against sex discrimination did not undermine manifestly sex-specific traditional norms as to marriage, family life, and privacy. In implementing his directive to ensure that federal appointments be made "without discrimination" and "without regard to sex," the Civil Service Commission expressly permitted sex-specific appointments where sex blindness would require personnel to "shar[e] common living quarters with members of the opposite sex."[25] Indeed, in his executive order establishing the Commission on Women, President Kennedy explained that the very purpose of "overcoming discriminations in government and private employment on the basis of sex" was *precisely* to "enable women to continue their

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[23] *Id*. § 212(a)(13).

[24] *Id*. § 212(a)(4) (declaring inadmissible those "afflicted with psychopathic personality"). For a brief notice of this seeming tension, *see* Siobhan B. Somerville, *Sexual Aliens and the Racialized State: A Queer Reading of the 1952 U.S. Immigration and Nationality Act*, in QUEER MIGRATIONS: SEXUALITY, U.S. CITIZENSHIP, AND BORDER CROSSINGS 75, 76 (Eithne Luibheid & Lionel Cantu Jr., eds. 2005).

[25] UNITED STATES CIVIL SERV. COMM'N, FEDERAL PERSONNEL MANUAL, ch. 713-7 & -8 (1963) (quoted and praised in Pauli Murray & Mary O. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232, 244–45 (1965)).

role as wives and mothers while making a maximum contribution to the world around them."[26] Pursuant to that order, the Committee published, just months before the adoption of Title VII, a report that repeatedly and emphatically indicated that this anti-sex-discrimination policy would be *complementary* with the preservation of traditional, sex-specific norms as to marriage and family.[27] The eradication of sex discrimination in federal and private employment markets would be, so to speak, the handmaid of the traditional family.

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[26] Executive Order No. 10980 (Dec. 14, 1961). *Cf.* S. Rep. No. 176, 88th Cong., 1st Sess., 1 (1963) (recommending the Equal Pay Act to remedy unequal pay structures that were partly based "on an ancient but outmoded belief that a man, *because of his role in society*, should be paid more than a woman even though his duties are the same") (emphasis added) (quoted in *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974)).

[27] AMERICAN WOMEN REPORT at 30 (1963) (concluding that "[e]qual opportunity for women should be the governing principle in private employment" and recommending an executive order defining and barring sex discrimination in federal employment and extending a similar rule to federal contractors, and that such federal policies would serve as a "showcase" for the adoption of the policy by state and private employers):*id.* at 16 ("Widening the choices for women beyond their doorstep does not imply neglect of their education for responsibilities in the home."); *id.* at 17 ("Women should have opportunity for education about sex and human reproduction in the context of education for family responsibility."); *id.* at 18 ("The Commission recognizes the fundamental responsibility of mothers and homemakers and society's stake in strong family life.").

But the deafening silence is perhaps more conclusive evidence.[28] Public schools in various states and Puerto Rico had long operated under constitutions that expressly prohibited all sex discrimination in schools and elsewhere. Throughout all this time, there seems to be no record of anyone ever claiming that these prohibitions affected the countless ways that the schools surely adopted and regularly enforced sex-specific norms—*e.g.*, sex separation in restrooms and sports, rules of appropriate attire for students and teachers, rules of appropriate appellation for teachers (Sir, Ma'am, etc.), or rules defining any spousal benefits for school personnel.[29] Likewise the state and federal rules prohibiting sex discrimination as to voting likewise had no effect whatsoever on such fundamental

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[28] *Mississippi v. Johnson*, 71 U.S. 475, 500 (1867) (holding that where "[o]ccasions have not been wanting," the fact that an argument "had never been made in any case indicates the general judgment of the profession that no such [argument] should be entertained").

[29] Such a challenge, even in a mild form, did not appear until the 1970s, when two girls in Washington State sought the equal right to participate on their school's only football team. And in the case, a sympathetic court indicated the probable inadequacy of the old constitutional provision—despite its seemingly comprehensive and dispositive language—and relied instead on the recent state equal-rights amendment. *Darrin v. Gould*, 85 Wn.2d 859, 870-71 (Wash. 1975). The pre-1964 anti-sex-discrimination provisions in state constitutions were "interpreted more narrowly" than the post-1970 equal-rights amendments. Lujuana Wolfe Treadwell & Nancy Wallace Page, Comment, *Equal Rights Provisions: The Experience under State Constitutions* 65 CAL. L. REV. 1086, 1103 (1977).

customs as rules of attire or appellations at voting places.

The ban on sex discrimination required not unisexuality but equal opportunity. According to one commentator in 1883, the bar had this scope: "[In] about two hundred of the chartered [colleges] in the United States…students are admitted *without distinction on account of sex*, into any courses of study for which they may show themselves properly qualified; both sexes together listening to the same lectures at the same hours, standing the same examinations, and taking the same degrees after their fitness for these has been demonstrated by successful mastery of the courses leading to them."[30]

Of particular relevance to the cases at bar was the deafening silence throughout the protracted and lamentable litigation as to whether the INA, by rendering inadmissible (and thus ineligible for naturalization) aliens with a "psychopathic personality," had used a term too vague to encompass homosexual persons. *Fleuti v. Rosenberg*, 302 F.2d 652 (9th Cir. 1962); *Rosenberg v. Fleuti*, 374 U.S. 449 (1963); *Boutilier v. INS*, 387 U.S. 118 (1967). If the meaning of "sex discrimination" had been as plain and unambiguous as Plaintiffs allege, then the

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[30] Walter LeConte Stevens, *University Education for Women*, 136 N. AMER. REV. 25, 31 (1883) (emphasis added). *Cf. Healy v. Loomis Inst.*, 102 Conn. 410, 416-17 (1925) (holding that the intended beneficiaries of an educational trust were "both males and females…without discrimination of sex," and noting, without apparent controversy, that the trustees retained the option to "maintain either a girls' department or a coeducational institution").

obvious interpretive steps to take would have been (1) to cite the INA's blanket prohibition on discrimination "because of sex," (2) to explain that such discrimination plainly encompassed "sexual-orientation" discrimination, and (3) to conclude that any textual ambiguity in the term "psychopathic personality" should be resolved in favor of this unambiguous and generous antidiscrimination provision. The argument would have readily disposed of these cases.

Yet no one ever raised the point, in this Court or elsewhere. In truth, no member of this Court's bench or bar—including counsel representing the persons egregiously affected—even imagined that to prohibit sex discrimination was to prohibit traditional sex-specific norms as to marriage and sexual ethics.

II. This original legal meaning was coherent, but the Plaintiffs' reading would render the law absurd, as indicated by Plaintiffs' own conduct.

As the Plaintiffs point out, it seems undeniable that all these traditional norms involve *distinctions* that took account of sex. How then, in 1964, was it uniformly understood that to prohibit sex discrimination did not preclude the enforcement of rules that incorporated such distinctions? How did the generation that adopted Title VII tolerate such apparent exceptions to apparently comprehensive bans on sex discrimination?

A. This original legal meaning was coherent insofar as the verb "to discriminate" had come to mean to distinguish so as to invidiously obstruct equal opportunity.

There are at least two possible ways to reconcile these apparent exceptions with the comprehensive ban. First, the word "discriminate" had perhaps already acquired a specialized meaning. Discrimination had come to mean only invidious distinction, and in particular, a distinction that targeted individuals as members of a disfavored class.

Perhaps the most relevant (but overlooked) evidence for this definition is found in the 1958 "Convention Concerning Discrimination in Respect of Employment and Occupation." There, the drafters and signatories defined "discrimination" in these terms: "any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of *nullifying or impairing equality of opportunity* or treatment in employment or occupation" (emphasis added).[31] In other words, "to discriminate" on the basis of sex means "to distinguish so as to nullify or impair equal opportunity on the basis of sex." In 1963, the President's Commission on the Status of Women

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[31] *See* Int'l Labour Org. [ILO], Discrimination (Employment and Occupation) Convention (No. 111), art. 1(1) (1958), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C111 (emphasis added).

likewise treated sex "discrimination" as interchangeable with "unjustified [sex] discrimination,"—the denial of "equal opportunity."[32] For this reason, Pauli Murray, the Commission member who championed the most extensive application of the anti-sex-discrimination norm, explained that sex-specific bathrooms and dormitories would be unaffected, for "[u]nlike separation of the races, in our culture separation of the sexes in these situations carries no implication of inferiority for either sex."[33]

Equal opportunity of women and men would likewise seem unimpaired by traditional norms that defined marriage as male-female, disfavored sex outside marriage, or prescribed sex-specific rules of grooming and attire. Therefore, sex discrimination, as the term was traditionally understood by 1964, plainly did not encompass these traditional norms.

B. This original legal meaning was coherent insofar as the law prohibited only the employers' *making* a discrimination not their *recognizing* some distinction made anteriorly by nature, the *ius gentium*, or some other deep custom.

Another way to explain the apparent exceptions is to note that the verb "to discriminate against" meant *to make* an adverse distinction,[34] and that the

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[32] AMERICAN WOMEN REPORT at 30.

[33] Murray & Eastwood, *Jane* Crow, at 239.

[34] 4 OXFORD ENGLISH DICTIONARY 757, 758 (2d ed. 1989) (first defining "to discriminate" as "to make or constitute a

statute subjects only employers to the ban. Title VII, like all these anti-sex-discrimination norms, imposed the prohibition on discrete individuals or groups. But this prohibition did not extend to the whole world. If something in the world prior to employment market made a sex distinction, the employers' mere *recognition* of the same does not run afoul of the plain text of Title VII.

According to the virtually unanimous opinion of the time, at least two sorts of sex distinctions were, *prior* to employment markets and indeed to state actors—(1) those made by biology and (2) those made by a fundamental custom reflecting the opinions and interests of both sexes. In *Reid v. Reid* (1971), a leading member of this Court's bar (and current member of its bench) indicated that rules closely related to these distinctions were beyond the reach of the anti-sex-discrimination norm. She mentioned norms reflecting *bona fide* "biological difference between the sexes" (such as maternity),[35] and "basic"

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difference," and first defining to "discriminate against" as "to make an adverse distinction"); Int'l Labour Org. [ILO], Discrimination (Employment and Occupation) Convention (No. 111), art. 1(1) (1958), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C111 (defining "discrimination" chiefly as a "any distinction, exclusion or preference *made* on the basis of race, colour, sex," etc.) (emphasis added).

[35] Brief for the Appellant at 14, *Reed v. Reed*, No. 70-4 (1971), *available at* https://documents.alexanderstreet.com/d/1000675826 (objecting to any sex-based classification for "a purpose unrelated to any biological difference between the sexes"); *id.* at 19 & n.13 (indicating that *maternity* is one such "biological difference"). *Accord Nguyen v. INS*, 533 U.S. 53, 64 (2001) (holding a

and "fundamental" customs, such as those mandating the "separation of the sexes in restrooms, sleeping quarters in prisons and other public institutions, [and] separate living quarters for male and female members of the Armed Forces"[36] Hence, the prospect of compulsory sex-integrated restrooms was "a canard."[37]

A year later, Judge William A. Bootle (a hero of desegregation in Georgia)[38] extended this *ad absurdum* to sex-specific standards of attire. He explained it would be "patently ridiculous" to interpret Title VII to compel employers to permit male employees to dress as women.[39]

In identifying these fundamental norms, both Ms. Ginsburg and Judge Bootle specified one essential criterion: the *recognition by both sexes*. Where fundamental sex-specific norms reflected "the

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statutory "use of gender specific terms," by taking "into account a biological difference," is "inherent in a sensible statutory scheme").

[36] Brief for the Appellant at 19 n.13, *Reed v. Reed*, No. 70-4 (1971)

[37] *Id*.

[38] Tom Bennett & Derrick Henry, *William Augustus Bootle*, ATLANTA CONSTITUTION, Jan. 26, 2005, *available at* https://www.legacy.com/obituaries/atlanta/obituary.aspx?n=william-augustus-bootle&pid=3086464.

[39] *Willingham v. Macon Telegraph Pub. Co.*, 352 F. Supp. 1018, 1020–21 (M.D. Ga. 1972) (emphasis added); *accord Fagan v. National Cash Register Co.*, 481 F.2d 1115, 1124 (D.C. Cir. 1973) (affirming that Title VII would not preclude an employer's "reasonable grooming standards *which take cognizance of societal mores*") (emphasis added).

basic interest shared by members of both sexes"[40] and were "customarily *recognized* by the sexes…[s]uch recognition and rules predicated thereon do not constitute 'sexual discrimination.'"[41]

The traditional sex specific norms all reflect distinctions made by either biology or by some fundamental custom made by and for both sexes.

According to the prevailing view, marriage reflected biological differences; it was defined as the association "based in the distinction of sex." JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE 25 (1852) *accord* BLACK'S LAW DICTIONARY 1123 (4th ed. 1968). Marriage, so defined, was said to be anterior and foundational to all society. *See, e.g.*, *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885) (holding that new states of the Union should be established "on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman"); *accord United States v. Bitty*, 208 U.S. 393, 401 (1908). Accordingly, the UDHR, both decried all sex discrimination and declared that the family, founded by the union of man and woman, was "the natural and fundamental group unit of society." UDHR, art. 16(3).

To be sure, the almost opposite idea prevails today among American jurists. The new view is that *marriage is a social construct*. *See, e.g.*, *Goodridge v. Department of Public Health*, 440 Mass. 309, 321

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[40] Brief for the Appellant at 19 n.13, *Reed v. Reed*, No. 70-4 (1971).

[41] *Willingham*, 352 F. Supp. at 1021.

(2003) (holding that "the government creates civil marriage"). But the traditional view is that society is a marital construct.[42]

Moreover, according to the prevailing view, sex outside marriage was already illicit, whether by *ius gentium* or some other deep and broad custom recognized by both sexes.[43] Hence, state action that barred such conduct did not create but defined and specified a preexisting prohibition. *See, e.g.*, *Poe v. Ullman*, 367 U.S. 497, 546 (1961) (affirming that "laws forbidding adultery, fornication and homosexual practices…, confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis") (Harlan, J., dissenting); *McLaughlin v. Florida*, 379 U.S. 184, 193, 196 (1964) (stating that a law punishing fornication and adultery "deal…with" or "reach" activity that is "illicit"); *Eisenstadt v. Baird*, 405 U.S. 438, 448 (1972) (referring to "the problems of extramarital and premarital sexual relations as '[e]vils'…requiring different remedies").

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[42] *Accord* JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS 100 (1834) (calling marriage "the parent, and not the child of society").

[43] At the time of the adoption of Title VII, both sexes endorsed the norm against nonmarital sex, but relative to men, women were (1) more likely to disapprove of premarital sex, (2) much more likely to characterize it as "wicked" rather than "unfortunate" and (3) only half as likely (5% of women v. 10% of men, in one poll) to endorse a discriminatory standard applying this norm only to women. Hazel Gaudet Erskine, *The Polls: Morality*, 30 PUBLIC OPINION QUARTERLY 669, 673–77 (1967).

Sex-specific rules of appropriate attire seem likewise to arise from a fundamental *ius gentium*. Across societies, human beings wear sex-specific clothing that simultaneously both conceals sex (by hiding the most manifest evidence thereof—organs of generation, and to a lesser extent, the secondary sexual characteristics)—and reveals the sex that is concealed. Human beings in societies seem to have a deep inclination both to hide and disclose, and to not see, but to see. This inclination—this modesty—seems strongest where the sexes engage in common activities. This fundamental norm is virtually ubiquitous—even if its local specification varies greatly.

Accordingly, when an employer mandates "appropriate" attire, the authority does not *make* a sex discrimination but merely *accepts* a prior distinction. So when this Court defines "[a]ppropriate attire for counsel" as "traditional business dress in traditional dark colors (e.g., navy blue or charcoal gray),"[44] this Court does not make a "sex discrimination," even though "traditional business dress" undoubtedly is sex-specific. Rather, this Court merely accepts a traditional norm favorable to both sexes and consistent with equal opportunity.

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[44] UNITED STATES SUPREME COURT, GUIDE FOR COUNSEL IN CASES TO BE ARGUED BEFORE THE SUPREME COURT OF THE UNITED STATES 3 (October Term 2018).

C. These two aspects of the meaning of "to discriminate" explain the leading disputes about the scope of the anti-sex-discrimination norm.

Therefore insofar as traditional, sex-conscious norms as to marriage, sexual activity, and appropriate attire do not obstruct equal opportunity and insofar as these norms were made by something anterior to employment markets, an employer's adoption of such norms does not constitute adverse sex discrimination. Such norms plainly do not fall under Title VII, according to its original plain meaning—and therefore, there was no record of anyone saying otherwise.

To be sure, in the 1960s, there were a variety of disputes as to the precise scope of the anti-sex-discrimination norm. But these debates, *Amicus* submits, can be understood largely as reasonable disagreements in light of this definition of discrimination.

For instance, in 1961, the Chief Justice of this Court concluded that a law specifically exempting females from mandatory jury duty was consistent with "a good faith effort to have women perform jury duty without *discrimination* on *the ground of sex*." *Hoyt v. Florida*, 368 U.S. 57, 69 (1961) (Warren, C.J., concurring) (emphasis added). And in 1963, the President's Commission on the Status of Women treated the following question as serious: "Is it discrimination, when providing [on-the-job] training,

to limit it to men on the assumption that women will not be in the labor force continually?"[45]

If Plaintiffs' reading of sex discrimination represents the original plain meaning, then these remarks were inexplicably absurd. But if instead (1) "sex discrimination" had come to be synonymous with "obstructing equal opportunity" and if (2) the prohibitions covered only the making of a sex distinction rather than *accepting* one that obstructed equality, then these disputes seem intelligible. It was indeed arguable, for instance, that a rule exempting women from jury duty in no way obstructed women's equal opportunity; an exemption is not a barrier. Further, it was arguable that the presumption of women's greater domestic burdens, especially as to young children, was proximately (though imprecisely) related to the biological differences between the sexes as to pregnancy, nursing, and maternity in general.

It was, however, equally plausible, if not more so, to contend that even an exemption could indirectly obstruct equal opportunity. It was further arguable that the presumptions behind such rules involved, as Pauli Murray and Mary Eastwood contended, not merely the *acceptance* of a biological distinction, but "unwarranted extensions" therefrom.[46] To conclusively presume that "men do not get pregnant but women do," was reasonable, but

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[45] Report at 30. The dispute on the Committee on this point is elaborated in CYNTHIA HARRISON, ON ACCOUNT OF SEX: THE POLITICS OF WOMEN'S ISSUES, 1945-1968, at 146–51 (1988).

[46] Murray & Eastwood, *Jane Crow*, at 239.

it was not true that all women become pregnant, and still less true that mothers but not fathers had the preponderant care of young children. The more remote and inexact the generalizations became, the less justified they were. It was thus "arbitrary" to say, by putative derivation, that males presumptively handle family finances—as indicated by this Court's unanimous and emphatic conclusion in *Reid v. Reid*.[47]

Title VII did not immediately resolve all these disputes. Reasonable disagreement remained as to what extent the bar on sex discrimination, whether statutory or constitutional prohibited some manifestly sex-specific rules. Their resolution required liquidation by administrative and judicial decisions—all involving reasonable disagreements.[48]

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[47] *See Reed v. Reed*. 404 U.S. 71, 76 (1971) (holding that to give males an automatic preference was an "arbitrary legislative choice").

[48] *See, e.g.*., the discussion in the *per curiam* and concurring opinions in *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971). *See also* Leo Kanowitz, *Sex-Based Discrimination in American Law III: Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963*, 20 HASTINGS L.J. 305, 320, 335 (1968) (noting that "[o]ne of the *most difficult questions* raised by the sex provisions of Title VII has been their effect on the so-called 'protective' laws of the states" and recommending that generally Title VII should be read to require "the extension of state protective laws to men" on a facially sex-neutral basis) (emphasis added).

D. This coherent original meaning is irreconcilable with Plaintiffs' analogy to interracial marriage—a rehash and amplification of a specious segregationist argument.

By Plaintiffs' and supporting *amici*'s "plain" reading, Title VII requires employers to treat same-sex couples equally with opposite-sex couples as to the status and privileges of marriage—much as employers must treat interracial marriage as equal to intraracial marriage. Plaintiffs and *amici* note the textual equivalence between race and sex and then draw a comparison between "associational" sex discrimination and "associational" race discrimination. They contend that disfavoring same-sex (putative) marriage is sex discrimination, much as disfavoring interracial marriage is race discrimination. Both are equally prohibited by Title VII.[49]

This sort of equivalence is not new. For generations, racial segregationists frequently claimed that racial segregation was comparable to sex separation. *Roberts v. City of Boston*, 59 Mass. 198 209 (1849) (holding that the principle of equality "before the law" "without distinction of age or sex, birth or color, origin or condition" permitted the segregation of children by race as well as by age and sex); *Plessy v. Ferguson*, 163 U.S. 537, 544–45 (1896) (citing this holding with approval).

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[49] *See, e.g.*, Brief of Petitioner Bostock, at 17; Brief of Respondents Zarda et al., at 22-24.

The argument was specious then—and specious now. In our Republic, racial discrimination has always been invidious, designed to separate and subordinate—and thus to obstruct equal opportunity; it was undoubtedly "discrimination." Moreover, not one aspect of American racism can be plausibly traced to mere *acceptance* of some norm of biology, *ius gentium*, or other custom endorsed by all races.[50] Indeed, the very notion of a racist "*ius gentium*" is a virtual contradiction in terms. All these local "traditions" (so called),[51] were made by peculiar and local decision, with an obvious origin in the peculiar and monstrous injustice of slavery—the very existence of which is banned by the highest law of our land. U.S. CONST. amend. XIII, § 1.

But even the segregationists never took this argument to the extreme that Plaintiffs do here. In all the litigation over bans on interracial marriage, segregationists sometimes drew comparisons to anti-incest and anti-polygamy laws, but no one mentioned the male-female definition of marriage. No one compared such a definition, so universal and rooted in nature, to the manifestly artificial and local obstacles to interracial marriage.[52]

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[50] *Amicus* notes that the defense of employers' affirmative action policies under Title VII could perhaps rely on this traditional definition of discrimination but could not rely on the traditional contrast between making and recognizing distinctions. Race-preferential policies are decidedly made by governments or employers.

[51] *Plessy,* 163 U.S. at 550.

[52] David R. Upham, *Interracial Marriage and the Original Understanding of the Privileges or Immunities Clause*, 42

Accordingly, when attorneys first made this comparison before this Court,[53] it was unanimously and summarily rejected as unserious[54]—just eight years after this Court unanimously endorsed the Civil Rights Act of 1964,[55] five years after this Court unanimously invalidated interracial-marriage bans as unconstitutional,[56] and one year after the Court unanimously held some sex-discriminatory laws to be likewise invalid.[57]

E. A law requiring human beings to be sex blind is absurd, as indicated by the Plaintiffs' own conduct.

Plaintiffs' sex-blind reading not only makes our ancestors seem absurd but renders Title VII absurd. Every cell in every human body—including those composing the brain and organs of perception—is marked by the fact of union between the opposite sexes—indeed countless generations thereof. To

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HASTINGS CONST. L. Q. 213, 218–20 (2015). *See Plessy*, 163 U.S. at 544–45 (1896) (endorsing the comparison of race and sex segregation in schools and next discussing laws restricting racial exogamy without any parallel comparison).

[53] *Baker v. Nelson*, Appellants' Main Brief at 12-13 (1972), *available at* https://www.nytimes.com/interactive/2015/05/13/us/document-baker-vs-nelson-case.html (citing *inter alia*. both *Loving* and *Reed*).

[54] *Baker v. Nelson*, 409 U.S. 810 (1972).

[55] *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

[56] *Loving v. Virginia*, 388 U.S. 1 (1967).

[57] *Reed v. Reed*, 404 U.S. 71 (1971).

demand that human beings be sex blind is akin to demanding that someone jump over his own shadow.

The absurdity is shown by Plaintiffs' own conduct in these cases. By their own definition and by their own factual allegations, each of the Plaintiffs suffered sex discrimination, in part because the Plaintiffs themselves had engaged in employment-related sex discrimination.

> (1) Zarda chose to disclose to women customers, as such, his sexual orientation.[58]
>
> (2) Bostock recruited from an athletic league whose governing rules manifestly discriminate on the basis of sexual orientation and transgender status by capping the number of "non-LGBT" members.[59]
>
> (3) Stephens presented as a woman precisely by first identifying the clothing customarily worn by women and then choosing to dress accordingly.[60]

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[58] Brief of Respondents Zarda et al., at 3-4.

[59] Brief of Petitioner Bostock, at 5. Bostock recruited from the Hotlanta Softball League, BRIEF, an active member of the North American Gay Amateur Athletic Alliance ("NAGAAA"), *About Hotlanta Softball League*, https://www.hotlantasoftball.org/page/show/1533142-about-hotlanta-softball-league. The governing rules of NAGAAA permit teams to have a maximum of only three "non-LGBT" members. NAGAAA GOVERNING MANUAL §§ 20.14–20.16 (2019), http://www.nagaaasoftball.org/wp-content/uploads/2019/02/NAGAAA-Governing-Manual-021719.pdf.

[60] Brief of Plaintiff Stephens, at 6-9.

III. Plaintiffs' novel and partisan reading would do violence to the inclusive and bipartisan spirit of the Civil Rights Act.

Amicus notes finally that fidelity to this original meaning of the Civil Rights Act would be consistent with the law's inclusive and bipartisan spirit. But Plaintiffs' novel and anti-tradition reading would do violence to the law.

Congress adopted the Civil Rights Act of 1964 by "overwhelming" broad and bipartisan majorities.[61] Congress later strengthened the Act by even greater supermajorities. As President Johnson said on signing the Act, its purpose was "not to divide, but to end divisions"—"to make our Nation whole" to do "the great works ordained for this Nation by the just and wise God who is the Father of us all."[62]

Roughly 30% of Americans still believe what was prevalent in 1964: that marriage is male-female and that sexual activity and childbirth should be reserved to marriage so defined.[63] For the most part, these Americans, like President Johnson, still believe in God and call God "Father."

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[61] Lyndon B. Johnson, *Radio and Television Remarks Upon Signing the Civil Rights Bill,* July 2, 1964, *in* PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON, 1963–64, at 842, 843 (1965).

[62] *Id*.

[63] Megan Brenan, *Birth Control Still Tops List of Morally Acceptable Issues*, GALLUP, May 29, 2019, *available at* https://news.gallup.com/poll/257858/birth-control-tops-list-morally-acceptable-issues.aspx.

These Americans are relatively poor. Unlike the Plaintiffs in this case, they cannot count *any* Fortune 200 company as their friend—let alone a coalition of them with combined annual revenue well over a trillion dollars.[64] To be sure, the 30% still have friends among some of our elected officials, but only in one part of one political party.[65]

Therefore, what Plaintiffs ask of this Court would be not only novel, but partisan, favoring the party wielding at least half the nation's political power and the vast bulk of the nation's employment-market power. Such a decision would be hostile to the broad, inclusive, and bipartisan spirit of the Civil Rights Act.

CONCLUSION

For the foregoing reasons, the Court should decide in favor of the Defendants.

Respectfully submitted,

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[64] *See, e.g.,* Brief of 206 Businesses (including Apple; Amazon; CVS Health; AT&T Services, Inc.; General Motors; JPMorgan Chase & Co.; Bank of America; Microsoft Corporation; Wells Fargo & Company; Citigroup Inc.; Comcast NBCUniversal; State Farm Mutual Automobile Insurance Company; IBM Corporation; The Procter & Gamble Company; Prudential Financial, Inc.; The Walt Disney Company; HP Inc.; Facebook, Inc.; Pfizer Inc.; and The Goldman Sachs Group, Inc.).

[65] Some leading Republicans have filed a brief on behalf of the Plaintiffs. *See* Brief of Kenneth B. Mehlman et al. *Amicus* does not expect any Democratic official to join a brief favoring the Defendants.

DAVID R. UPHAM
Counsel of Record
Unviersity of Dallas
1845 E. Northgate Drive
Irving, TX 75062
972-721-5186
davidrupham@yahoo.com

August 22, 2018