No. 17-1618

In The
Supreme Court of the United States

GERALD LYNN BOSTOCK,

Petitioner,

v.

CLAYTON COUNTY, GEORGIA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether discrimination against an employee because of sexual orientation constitutes prohibited employment discrimination "because of . . . sex" within the meaning of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2.

PARTIES TO THE PROCEEDING

Petitioner is Mr. Gerald Lynn Bostock, the Plaintiff in the United States District Court for the Northern District of Georgia and the Appellant in the United States Court of Appeals for the Eleventh Circuit.

Respondent is the government of Clayton County, Georgia, the Defendant in the United States District Court for the Northern District of Georgia and the Appellee in the United States Court of Appeals for the Eleventh Circuit.

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The opinion of the United States Court of Appeals for the Eleventh Circuit was issued on May 10, 2018, and is reproduced in the appendix to the petition at App. 1. On July 18, 2018, the Court of Appeals *sua sponte* issued an order denying rehearing en banc, and Judge Rosenbaum issued an opinion dissenting from that order in which Judge Jill Pryor joined. That order and opinion are reported at 894 F.3d 1335 (11th Cir. 2018), and reproduced in the appendix to Petitioner's Supplemental Brief filed in this Court on August 2, 2018, Supp. App. 1, as well as in the Joint Appendix at J.A. 168.

The Eleventh Circuit's panel decision affirmed the order of the United States District Court for the Northern District of Georgia dated July 21, 2017, entered as document number 24 in the District Court's docketed case number 1:16-CV-01460-ODE, and reproduced in the appendix to the petition at App. 26. The District Court's order adopted in its entirety the Final Report and Recommendation of the United States Magistrate Judge entered on November 3, 2016 and reproduced in the appendix to the petition at App. 5.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered judgment on May 10, 2018. 723 F. App'x 964. The Petition for Writ of Certiorari was timely filed on May 25, 2018, and granted on April 22,

2019, 139 S. Ct. 1599 (2019). The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the anti-discrimination provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2, including:

> **(a) EMPLOYER PRACTICES It shall be an unlawful employment practice for an employer –**
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin, or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. . . .

> **(m) IMPERMISSIBLE CONSIDERATION OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN IN EMPLOYMENT PRACTICES**
>
> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

STATEMENT OF THE CASE

Petitioner Gerald Lynn Bostock seeks the judgment of this Honorable Court that workplace discrimination against an employee on the basis of sexual orientation falls within the statutory prohibition of discrimination "because of sex" set forth in Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2 ("Title VII").[1] In holding that it does not, the United States Court of Appeals for the Eleventh Circuit below erroneously relied on *Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979), which predates this Court's expansive interpretation of the statutory language in several cases, including *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), as well as Congress's ratification of those decisions and the interpretative principles upon which they relied with the Civil Rights Act

[1] For ease of reference throughout this brief, ellipses are omitted from quotations of the statutory language prohibiting discrimination "because of . . . sex."

of 1991, Pub. L. No. 102-166, 105 Stat. 1071. That the Eleventh Circuit was wrong in refusing to conclude that *Blum* was undermined to the point of abrogation by these developments in the law is confirmed by the en banc decisions to the contrary in both the Second and Seventh Circuits. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018); *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339 (7th Cir. 2017). The plain language of Title VII, its statutory history, and this Court's precedents concerning the interpretation of the statute all compel the conclusion that sexual orientation discrimination constitutes unlawful discrimination "because of sex" within the meaning of Title VII.

A. Factual Background

For over ten years beginning in 2003, Petitioner Bostock advocated ardently for the interests of at risk children in the juvenile court system of Respondent Clayton County, Georgia. App. 27. During that time, he received favorable performance reviews as the County's Child Welfare Services Coordinator, and was given primary responsibility for the Court Appointed Special Advocates program ("CASA"). *Id.* CASA volunteers, also known as guardians *ad litem* in some jurisdictions, are advocates sworn by the judge of the juvenile court in which they serve to "advocate for the best interests of the child" during juvenile court dependency proceedings in Georgia. O.C.G.A. § 15-11-104(d).

Clayton County's CASA program flourished under Mr. Bostock's leadership. In 2007, it received the

Program of Excellence Award from Georgia CASA. App. 27. In 2010, it was the first county in the metropolitan Atlanta, Georgia area to provide a volunteer for every neglected or abused child in the juvenile court system. *See* Joel Hall, *Clayton CASA Welcomes New Volunteers*, CLAYTON NEWS DAILY, Mar. 10, 2010, *available at* http://www.news-daily.com/news/clayton-casa-welcomes-newvolunteers/article_331a8350-5ab2-5307-9130-2c3b15d08666.html (last visited June 22, 2019). In 2011 and 2012, Mr. Bostock was asked to serve on the National CASA Standards and Policy Committee. App. 27. He is a dedicated social services professional who has for many years been committed to ensuring that abused and neglected children have safe homes in which to live, grow, and thrive.

Mr. Bostock is also gay. *Id*. In January 2013, he began participating in a gay recreational softball league called the Hotlanta Softball League. *Id.* He also actively promoted the Clayton County CASA program as a volunteer opportunity for league members. *Id*. But in the months that followed, his participation in the league and his sexual orientation were openly criticized by one or more individuals with significant influence in the County's decisionmaking. *Id.* In April of 2013, Clayton County initiated an unwarranted "audit" of the CASA program funds managed by Mr. Bostock. *Id.* In May, his sexual orientation and participation in the softball league were the subject of disparaging comments at a meeting of the Friends of Clayton County CASA Advisory Board. *Id.* One month later, on June 3, 2013, he was fired. *Id.* at 28. Clayton

County falsely claimed that he mismanaged the CASA program funds, but stated that the reason for his termination was "conduct unbecoming of a county employee." *Id*. Mr. Bostock maintains that he never engaged in any misconduct or mismanagement of funds, and that Clayton County's "audit" and its representations to the contrary are mere pretext for discrimination against him on the basis of his sexual orientation.

B. The District Court's Dismissal of Mr. Bostock's Case

Mr. Bostock filed this lawsuit *pro se* on May 5, 2016, alleging that he was fired because of his sexual orientation in violation of Title VII. *Id.* at 8. After securing counsel, he amended his complaint to include a claim for sex discrimination based on his failure to conform to a sex stereotype. *Id.* at 8-9. Clayton County moved to dismiss under Fed. R. Civ. P. 12(b)(6), arguing, among other things, that Mr. Bostock could not "state a viable claim for relief under established law because Title VII does not protect [Mr. Bostock] (or anyone else) from discrimination due to his sexual orientation." *Id.* at 28, 31. The Magistrate Judge agreed, relying on *Blum v. Gulf Oil Corp.*, which had held that "discharge for homosexuality is not prohibited by Title VII," 597 F.2d 936, 938 (5th Cir. 1979).[2] *Id.* at 9-17. The

[2] Decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981 remain binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

Magistrate Judge also rejected Mr. Bostock's sex stereotype claim on the ground that he was "bootstrapping a conclusory gender stereotyping allegation to his sexual orientation discrimination claim." *Id.* at 9-20. Accordingly, the Magistrate Judge recommended dismissal of Mr. Bostock's claims for sex discrimination based on sexual orientation and failure to conform to a sex stereotype. *Id.* at 17-22.[3]

Pursuant to Fed. R. Civ. P. 72(b), Mr. Bostock timely filed Objections to the Magistrate Judge's Report and Recommendation on November 17, 2016. App. 29. The District Judge deferred ruling on Mr. Bostock's objections pending the decision of the Eleventh Circuit in *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248 (11th Cir. 2017), because that case also presented the question of whether discrimination on the basis of sexual orientation is actionable under Title VII. App. 29. On March 10, 2017, a divided panel of the Eleventh Circuit issued its decision in *Evans*, answering that question in the negative. 850 F.3d at 1255-57. The *Evans* majority rested its erroneous conclusion on the determination that it was bound to follow the former Fifth Circuit's decision in *Blum* under the prior panel precedent rule, which requires Eleventh Circuit panels to follow a prior panel's decision unless a later en banc or Supreme Court decision overrules or undermines the

[3] The Magistrate Judge also recommended dismissal of Mr. Bostock's claim for sex stereotype discrimination because he did not reference the claim as such in the charge of discrimination he filed with the United States Equal Employment Opportunity Commission, and therefore did not properly exhaust his administrative remedies. App. 22-24.

prior panel decision to the point of abrogation. *Id.* at 1255 (citations omitted). The *Evans* panel rejected the argument that *Blum* was undermined to the point of abrogation by this Court's decisions in *Price Waterhouse*, 490 U.S. 228 (1989), *superseded on other grounds by statute*, Pub. L. No. 102-166, 105 Stat. 1071 (1991) and *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998). 850 F.3d at 1255-56. On July 7, 2017, after the Eleventh Circuit denied a petition for rehearing en banc in *Evans*, the District Court in this case followed the *Evans* panel opinion and dismissed Mr. Bostock's second amended complaint with prejudice, holding in part that, "[a]s a matter of law, the Eleventh Circuit has . . . foreclosed the possibility of a Title VII action alleging discrimination on the basis of sexual orientation as a form of sex discrimination[.]" *Id.* at 31.

C. The Eleventh Circuit's Affirmance of the Dismissal

Because of the prior panel precedent rule, Mr. Bostock presented his appeal of the District Court's dismissal of his sexual orientation discrimination claim to the Eleventh Circuit along with a petition for initial hearing en banc pursuant to Fed. R. App. P. 35(b)-(c). App. 46 n.3, 60.[4] On May 3, 2018, the Eleventh Circuit

[4] On appeal, Mr. Bostock abandoned his separately pleaded claim for sex discrimination based on a sex stereotype, App. 3, although as explained below, a claim for sexual orientation discrimination *is* a claim for discrimination based on the failure to conform to a gender stereotype – the failure to conform to the

again refused to consider en banc the question of whether discrimination on the basis of sexual orientation is discrimination "because of sex" within the meaning of Title VII. *Id.* at 1. The Eleventh Circuit held that:

> [T]he district court did not err in dismissing Bostock's complaint for sexual orientation discrimination under Title VII because our holding in *Evans* forecloses Bostock's claim. And under our prior panel precedent rule, we cannot overrule a prior panel's holding, regardless of whether we think it was wrong, unless an intervening Supreme Court or Eleventh Circuit en banc decision is issued. *United States v. Kaley*, 579 F.3d 1246, 1255-56 (11th Cir. 2009); *United States v. Steele*, 147 F.3d 1316, 1317-18 (11th Cir. 1998) (en banc).

App. 3. Having already unsuccessfully petitioned the Eleventh Circuit for initial hearing en banc, *id.* at 46 n.3, Mr. Bostock timely filed his Petition for Writ of Certiorari in this Court on May 25, 2018. However, on July 18, 2018, the Eleventh Circuit *sua sponte* issued an order yet again denying rehearing en banc. Circuit Judge Rosenbaum issued an opinion dissenting from that denial in which Circuit Judge Jill Pryor joined. J.A. 168. As explained in Petitioner's Supplemental Brief filed on August 2, 2018, the dissent explained succinctly how the Eleventh Circuit's continued adherence to *Blum* despite the changes brought about by this Court's post-*Blum* decisions constituted reliance

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sex-based stereotype that men should be attracted only to women, *see infra*, pp. 23-29.

on the "precedential equivalent of an Edsel with a missing engine[.]" Supp. Br. 3 (quotation omitted).

SUMMARY OF ARGUMENT

The plain language of Title VII itself establishes that sexual orientation discrimination is prohibited discrimination "because of sex." Sexual orientation discrimination is discrimination "because of sex" because sexual orientation is a sex-based classification within the meaning of Title VII, and it is disparate treatment of an employee that would not occur "but for" his sex. Sexual orientation discrimination is also impermissible associational discrimination, and discrimination on the basis of a failure to conform to a sex-based stereotype under *Price Waterhouse*. This Court explicitly held in *Oncale* that Title VII prohibits "any kind" of sex-based discrimination if it meets the statutory requirements, 523 U.S. at 80, and for all these reasons, sexual orientation discrimination does.

The statutory history strongly supports Mr. Bostock's position and fatally undermines Respondent's primary argument that Congress did not intend to forbid sexual orientation discrimination when it enacted Title VII. Congress specifically and unequivocally mandated a broad classification-based application of the ban on sex discrimination with the Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076. It went even further in passing the Civil Rights Act of 1991, which ratified and incorporated this

Court's expansive interpretations of what constitutes discrimination "because of sex" under Title VII in *Newport News Shipbuilding and Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669 (1983) ("*Newport News*"), *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986) ("*Meritor*"), and *Price Waterhouse*, 490 U.S. 228. Not surprisingly, in holding that same-sex sexual harassment is actionable under Title VII, the Court in *Oncale* confirmed that the statute prohibits forms of sex discrimination that Congress may not have envisioned in 1964, and instead goes beyond what was contemplated to cover "reasonably comparable evils." 523 U.S. at 75. Sexual orientation discrimination is clearly such a "reasonably comparable evil," and is therefore also prohibited.

The interpretation of Title VII advanced by Mr. Bostock is also necessary to harmonize and give effect to different parts of the statute. In passing the Civil Rights Act of 1991, Congress also chose to codify a lessened causation standard for claims of workplace discrimination, providing that unlawful sex discrimination can be established by proof that sex was one motivating factor for a challenged employment practice, even if another legitimate factor also motivated the practice. Pub. L. No. 102-166, § 107(a) (codified at 42 U.S.C. § 2000e-2(m)). Because sexual orientation is defined in part by a person's sex, the statutory prohibition of discrimination "because of sex" must be interpreted to include sexual orientation discrimination, or it will conflict with 42 U.S.C. § 2000e-2(m). Finally, Title VII must be read to prohibit sexual orientation discrimination because the contrary interpretation is

profoundly unworkable. The raft of conflicting lower court decisions in cases with similar facts but markedly different outcomes threatens the consistency and predictability necessary for the rule of law.

The question before the Court is a simple one – whether "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale*, 523 U.S. at 79. Both Congress and the Court have clearly determined that the prohibition of discrimination "because of sex" in Title VII must be interpreted broadly, and discrimination against an employee on the basis of sexual orientation – whether gay or straight – is fundamentally a form of discrimination based on sex. Old cases decided before *Newport News*, *Meritor*, *Price Waterhouse*, *Oncale*, and the passage of the Civil Rights Act of 1991 have been undermined to the point of abrogation by these developments in the law, and the judgment of the Eleventh Circuit to the contrary is in error. Mr. Bostock prays that the Court reverse that judgment and permit him the opportunity to prove that the termination of his employment because of his sexual orientation was discrimination "because of sex" in violation of Title VII.

ARGUMENT

I. The Plain Language of Title VII Forbids Sexual Orientation Discrimination Because it is a Form of Sex Discrimination

This Court's "precedents make clear that the starting point for [its] analysis is the statutory text" of

Title VII. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003); *see also Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). The plain language of Title VII requires the conclusion that sexual orientation discrimination is discrimination "because of sex" because (1) sexual orientation is necessarily a sex-based classification; (2) sexual orientation discrimination is associational sex discrimination; (3) sexual orientation discrimination is discrimination because of a failure to conform to a sex stereotype under *Price Waterhouse*, 490 U.S. 228; and (4) the Court explicitly held in *Oncale*, 523 U.S. 75 (1998), that the statutory language prohibits "any kind" of sex discrimination, even forms not contemplated by Congress when Title VII was first enacted.

A. Sexual Orientation Discrimination is Sex Discrimination Because Sexual Orientation is a Sex-Based Classification

Sexual orientation discrimination constitutes sex discrimination under the plain language of Title VII because one simply cannot consider an individual's sexual orientation without first considering his sex. A "homosexual" person is one "[h]aving a sexual propensity for one's *own* sex," *Homosexual*, Oxford Dictionary of Current English (5th ed. 1964) (emphasis supplied), or "of, relating to, or characterized by a tendency to direct sexual desire toward another of the *same* sex," *Homosexual*, Webster's New International Dictionary (3d ed. 1961) (emphasis supplied). Because a person's sex is a necessary element of his sexual orientation, it

follows without question that one cannot define a person's sexual orientation without first taking his sex into account. *See Zarda*, 883 F.3d 100, 113 (2d Cir. 2018); *Hively*, 853 F.3d 339, 350 (7th Cir. 2017) (noting that "[i]t would require considerable calisthenics to remove the 'sex' from 'sexual orientation' "); *Hively*, 853 F.3d at 358 (Flaum, J., concurring) ("[o]ne cannot consider a person's homosexuality without also accounting for their sex: doing so would render 'same' and 'own' [in the dictionary definition of 'homosexuality'] meaningless"). But the prohibition of discrimination "because of sex" in Title VII forbids employers from relying on sex-based considerations in making employment decisions. *See, e.g.*, *Price Waterhouse*, 490 U.S. at 241-42, 250-51 (plurality) (holding that an employer that makes decisions in reliance on sex-based stereotypes "has acted on the basis of gender" in violation of Title VII); *id.* at 258-61 (White, J., concurring); *id.* at 261 (O'Connor, J., concurring); *City of Los Angeles, Dep't of Water and Power v. Manhart*, 435 U.S. 702, 711-12 (1978). Accordingly, Title VII prohibits sexual orientation discrimination because it necessarily rests on a sex-based consideration.

The Court has adhered to this common sense interpretation of Title VII for decades. In *Manhart*, the Court struck down a rule that required female employees to make higher pension fund contributions than male employees because actuarial tables showed that women usually live longer than men. 435 U.S. at 711-13. The employer argued that the rule was justified in part because it was based on the expected longevity of

the employees, not their sex. *Id.* But the Court was not fooled. It held that the City's rule was "in direct conflict with both the language and the policy" of Title VII because it did not pass the "simple test of whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.' " *Id.* at 711 (citations omitted). The Court reaffirmed this "simple test" five years later when it held that an employer's insurance policy discriminated against male employees in violation of Title VII because it provided more limited benefits to their pregnant wives than it did to the male husbands of female employees. *Newport News*, 462 U.S. at 681-85.

Discrimination on the basis of sexual orientation fails the "simple test." When an employer fires a female employee because she is a lesbian – i.e., because she is a woman who is sexually attracted to other women – the employer has treated that female employee differently than it would treat a male employee who was sexually attracted to women. The employer has acted "in a manner which but for that person's sex would be different," and has therefore violated Title VII. *Manhart*, 435 U.S. at 711. Respondent and others may argue that the "simple test" does not apply to sexual orientation because it is limited to cases like *Manhart* where the disparate treatment was based on a trait that is inextricably linked with sex. *See Zarda*, 883 F.3d at 151-52 (Lynch, J., dissenting). According to this argument, only traits that are truly sex-dependent like longevity or childbearing capacity are subject to the "simple test," and because men *and* women can be gay or

lesbian, same-sex attraction is not linked with sex and the "simple test" does not apply. *Id.* But the difficulty with this argument – that only truly class-based disparate treatment is actionable under Title VII – is that it has no basis in the text of Title VII or the Court's decisions. Rather, the Court has consistently upheld a classification-based, rather than a class-based, approach in applying the statute. As the *Manhart* Court explained, Title VII requires "a focus on fairness to *individuals* rather than classes" and that focus is "unambiguous." 435 U.S. at 708-09 (emphasis supplied); *see also, e.g.*, *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (per curiam); *Manhart*, 435 U.S. 702; *Connecticut v. Teal*, 457 U.S. 440, 455 (1982); *Price Waterhouse*, 490 U.S. 228; *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 192, 197 (1991) ("*Johnson Controls*"); *Oncale*, 523 U.S. 75.

Indeed, the Court in *Phillips* was not concerned that the employer refused to hire only that subset of women with pre-school aged children while its policy did not evince "bias against women as such," and instead readily concluded that the policy violated Title VII. 400 U.S. at 543. In *Manhart*, *Newport News*, and *Johnson Controls*, too, the Court found violations of Title VII where only certain subgroups of each gender were adversely affected by the policies at issue. *Manhart*, 435 U.S. at 709-10; *Newport News*, 462 U.S. at 681-85; *Johnson Controls*, 499 U.S. at 192, 197-200 (holding that the exclusion of only those women with childbearing capacity from jobs which exposed them to

lead violated Title VII); *see also Teal*, 457 U.S. at 455 (noting that "[i]t is clear that Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group"). The *Price Waterhouse* Court likewise never asked whether *all* women *always* avoid profanity and wear jewelry, but instead held that the employer's belief that Ann Hopkins should do so was impermissibly sex-based. 490 U.S. at 241-42, 250-51 (plurality); *id.* at 258-61 (White, J.); *id.* at 261 (O'Connor, J.). And in *Oncale*, the fact that other men working on the offshore oil platform with the plaintiff were not also sexually harassed did not undercut the inescapable conclusion that he was discriminated against "because of sex." 523 U.S. at 80-82.

The Court has refused time and again to narrow Title VII to prohibit only discrimination against men or women based on biological traits linked exclusively to them as such. The argument that sexual orientation discrimination is not sex discrimination because it targets only gay men and not all men, or because both men and women can be gay or lesbian, is therefore meritless. This Court "need not leave [its] common sense at the doorstep when [it] interprets a statute." *Price Waterhouse*, 490 U.S. at 241. Discrimination against a gay or lesbian employee on the basis of sexual orientation is plainly discrimination "because of sex" under Title VII because an employer *must* consider the employee's sex in order to consider his or her sexual orientation, and because the employer

necessarily treats the employee differently than it would if she or he were a member of the opposite sex.

B. Sexual Orientation Discrimination is Associational Sex Discrimination

Sexual orientation discrimination is also discrimination "because of sex" because it is discrimination on the basis of an employee's association with another person of the same sex. The Court has recognized since at least 1964 that discrimination against a person because of his or her racial association is a form of unconstitutional race discrimination. *See McLaughlin v. Florida*, 379 U.S. 184, 192-95 (1964) (striking down a statute that criminalized unmarried interracial cohabitation). And it has upheld that basic logic in various constitutional and statutory contexts ever since. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (holding that a statute prohibiting interracial marriage amounted to unconstitutional discrimination on the basis of race); *Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 410 U.S. 431, 440 (1973) (rejecting the argument that a white couple could not maintain a race discrimination claim under 42 U.S.C. § 1981 against a swimming pool association that denied admission to the couple's black guest); *Bob Jones Univ. v. United States*, 461 U.S. 574, 605 (1983) (upholding the determination of the Internal Revenue Service that a private university's policy of denying admission to individuals who were married to persons of a different race was racially discriminatory and the university was therefore not a

"charitable" organization entitled to tax-exempt status under 26 U.S.C. § 501(c)(3)).

All five Circuits to consider the issue have held that the *Loving* rationale is equally applicable in the Title VII context. *See Zarda*, 883 F.3d at 124 (holding that "the prohibition on associational discrimination applies with equal force to all the classes protected by Title VII, including sex"); *Hively*, 853 F.3d at 349 (same); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 589 (5th Cir. 1998) (holding that Title VII prohibits employment discrimination based upon an interracial relationship), *vacated in part on other grounds by Williams v. Wal-Mart Stores, Inc.*, 182 F.3d 333 (5th Cir. 1999); *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc.*, 173 F.3d 988, 994-95 (6th Cir. 1999) (holding that Title VII prohibits discrimination against a person because of his association with his child of a different race); *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986) (holding that Title VII prohibits discrimination against a person because of his marriage to or association with a person of a different race).[5]

Because Constitutional cases like *Loving* "can provide helpful guidance in this statutory context," *Ricci*

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[5] The EEOC has likewise held that an adverse employment action taken on the basis of an interracial association constitutes unlawful race discrimination under Title VII. *See, e.g.*, Dec. No. 71-969, 1973 EEOC Dec. (CCH) ¶ 6193 (Dec. 24, 1970); Dec. No. 71-1902, 1973 EEOC Dec. (CCH) ¶ 6281 (April 28, 1971); Dec. No. 76-23, 1983 EEOC Dec. (CCH) ¶ 6615 (Aug. 25, 1975); Dec. No. 79-03, 1983 EEOC Dec. (CCH) ¶ 6734 (Oct. 6, 1978).

v. DeStefano, 557 U.S. 557, 582 (2009), and because the principles of non-discrimination embodied in Title VII "apply with equal force" to all of the protected classes enumerated in the statute, *Price Waterhouse*, 490 U.S. at 243 n.9, there is no principled reason why the associational theory of discrimination should not also apply to sex discrimination under Title VII, *cf. Meritor*, 477 U.S. at 66 (holding that "[n]othing in Title VII" suggests that sex-based harassment should not be prohibited to the same extent as harassment based on race, religion, and national origin). To discriminate against a person because of the sex of another person with whom he is associated is, *ipso facto*, to discriminate against *him* because of *his* sex. *See Newport News*, 462 U.S. at 684; *cf. Tetro*, 173 F.3d at 994-95; *Parr*, 791 F.2d at 892.

Respondent and others may resist the associational theory of discrimination by arguing, as the United States did before the Second Circuit in *Zarda*, that an employer who discriminates on the basis of sexual orientation is not discriminating against a man or woman on the basis of his or her sex, "but rather is engaged in sex-neutral treatment of homosexual men and women alike." Br. for the U.S. as Amicus Curiae Supporting Defendants-Appellees, *Zarda v. Altitude Express, Inc.*, No. 15-3775 (2d Cir. July 26, 2017), 2017 WL 3277292, *6, 22. But "mere equal application" to members of both races could not save the statutory prohibition on interracial marriage in *Loving*, because even an equally applicable classification must have a legitimate basis. 388 U.S. at 8; *see also McLaughlin*,

379 U.S. at 190-91 (citing cases). Employment discrimination against a person because of his association with another person of the same sex decidedly does not.[6]

The dissenting judges in *Zarda* and *Hively* also suggested that the *Loving* rationale cannot apply to discrimination based on sexual orientation because prohibitions of interracial marriage were based on animus toward the associated black Americans and founded on the odious doctrine of white supremacy, while discrimination against gay and lesbian people is not premised on sex-based animus toward the associated persons or an infamous ideology of hate and oppression. *Zarda*, 883 F.3d at 159-60 (Lynch, J.); *Hively*, 853 F.3d at 367-69 (Sykes, J.). But this argument lacks merit for at least three reasons. First, it begs the question of whether the animus is "sex-based" or not. *See supra*, pp. 13-18. Second, there is no requirement of animus to show a violation of Title VII. *Ricci*, 557 U.S. at 579-80 (noting that even "well intentioned" or "benevolent" motivations cannot justify disparate treatment under Title VII). *See also Loving*, 388 U.S. at 11 n.11 (noting that interracial marriage bans constituted

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[6] Indeed, there is no conceivable reason why an individual's sexual orientation could ever be relevant to her ability to perform her job. Given that Title VII was meant to "assure equality of employment opportunities," *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973), and "drive employers to focus on qualifications rather than on . . . sex," *Price Waterhouse*, 490 U.S. at 243, an interpretation of Title VII that permits sexual orientation discrimination would flatly contradict the very purpose of the statute.

unlawful racial classifications "even assuming an even-handed state purpose to protect the 'integrity' of all races" rather than the invidious purpose of promoting white supremacy).

The third reason why this argument lacks merit is that, while Title VII was obviously aimed at eradicating the scourge of race discrimination in American employment, it was equally intended to "strike at the entire spectrum of disparate treatment of men and women in employment." *Oncale*, 523 U.S. at 78 (citing *Meritor*, 477 U.S. at 64). The ambitious goal of Title VII was to destroy not only the barriers to merit-based equal employment opportunity posed by racism, but also those posed by sexism and insistence on traditional gender roles. *See* William N. Eskridge, Jr., *Title VII's Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 Yale L.J. 322, 347-57 (2017) ("*LGBT Workplace Protections*") (setting forth how the legislative history of the 1972 amendments to Title VII and the Pregnancy Discrimination Act of 1978 demonstrate congressional focus on attacking sexism). Sexism is undeniably reinforced by insistence on sex-based familial and social roles for men and women. *See Nevada Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 736 (2003) (explaining that stereotypes about the roles of men and women are "mutually reinforcing" and have created a "self-fulfilling cycle of discrimination" against women in the workplace). Gay and lesbian people, by the simple fact of their intimate association with a member of the same sex, necessarily defy these stereotypical roles.

See I. Bennett Capers, *Sex(ual Orientation) and Title VII*, 91 Colum. L. Rev. 1158, 1159-70 (1991); Br. of Anti-Discrimination Scholars as Amicus Curiae in Support of the Employees, pp. 8-12. The recognition of sexual orientation discrimination as associational sex discrimination thus enjoys not only the logic but also the laudable policy justification of *Loving*: to confront and dismantle a long-established obstacle to social freedom and equal protection of the law.

C. Sexual Orientation Discrimination is Sex Stereotype Discrimination Under *Price Waterhouse v. Hopkins*

Title VII also forbids sexual orientation discrimination because it constitutes discrimination on the basis of a failure to conform to a sex-based stereotype. In *Price Waterhouse*, the Court explained the scope of the sex discrimination prohibition through its review of the case of Ann Hopkins, a woman who was denied partnership at the Price Waterhouse accounting firm. *Id.* at 231-34. The evidence showed that some of the partners who voted to pass Ms. Hopkins up for partnership did so because she was too aggressive, "macho," and needed to "take a course at charm school." *Id.* at 235. The man who informed Ms. Hopkins of the decision specifically told her that, to advance, she should "walk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* Six members of this Court agreed that these facts proved Ms. Hopkins's sex was a motivating factor in the decision to deny her partnership in violation of

Title VII. *Id.* at 241-42, 250-51 (plurality); *id.* at 258-61 (White, J., concurring in the judgment); *id.* at 261 (O'Connor, J., concurring in the judgment).

The *Price Waterhouse* Court clearly held that sex stereotyping constitutes sex discrimination under Title VII. Indeed, it was unequivocal in rejecting the argument that sex stereotyping lacks "legal relevance," explaining that:

> [W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'

490 U.S. at 250-51 (quoting *Manhart*, 435 U.S. at 707 n.13). Four members of the Court joined this description in the plurality opinion, *id.* at 228-58, and Justices White and O'Connor joined the judgment with concurring language that leaves no doubt that acting on the basis of a sex stereotype constitutes discrimination "because of sex" in violation of Title VII. *See id.* at 259-60 (White, J.) (agreeing that the record supported the finding that gender was shown to be a substantial factor in the denial of partnership to Hopkins); *id.* at 261, 275 (O'Connor, J.) (concurring in the judgment and stating that the case was one "where [the] employee [had] demonstrated by direct evidence that

[sex] played a substantial role in a particular employment decision").[7]

Almost every Circuit has since recognized that, under *Price Waterhouse*, discrimination against an employee for his or her failure to conform to a sex

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[7] Even the dissenting Justices did not appear to dispute that sex stereotyping can constitute sex discrimination, agreeing that "Hopkins plainly presented a strong case both of her own professional qualifications and of the presence of discrimination in Price Waterhouse's partnership process," and doubting that it would have been reversible error if the "District Court found on this record that sex discrimination caused the adverse decision." *Id.* at 294-95. Notably, the dissenting Justices also reaffirmed the "simple test" of *Manhart*. *Id.* at 282 (citing *Newport News*, 462 U.S. at 683). Instead, the disagreement in *Price Waterhouse* had to do with the burdens of proof for the employee's claim and the employer's defense. The plurality and concurring Justices agreed that an employee need only show that her protected class status was one motivating or substantial factor in the employment decision (and that Ms. Hopkins had done so), and that the lower court erroneously required the employer to satisfy a clear and convincing evidence standard to establish its affirmative defense that it would have made the same employment decision in the absence of the unlawful motive. 490 U.S. 254-55, 260, 261. The dissenting Justices disagreed that a violation was shown because the District Court did not find intentional discrimination was a "but for" cause of the denial of partnership. *Id.* at 295.

Two years after *Price Waterhouse*, Congress passed the Civil Rights Act of 1991, in part to codify the lessened causation standard upon which the plurality and concurrence agreed, but it also went further to remove the employer's ability to completely defeat liability with the affirmative defense. *See Univ. of Tx. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 348-50 (2013) (citing and discussing 490 U.S. 228 and Pub. L. No. 102-166). As explained in more detail below, the 1991 amendments strongly support Petitioner's position that sexual orientation discrimination is prohibited sex discrimination under Title VII. *Infra*, pp. 23-26.

stereotype is discrimination "because of sex" that violates Title VII. *See, e.g.*, *Christiansen v. Omnicom Group, Inc.*, 852 F.3d 195, 200-01 (2d Cir. 2017); *E.E.O.C. v. Boh Bros. Constr. Co., L.L.C.*, 689 F.3d 444, 453-56 (5th Cir. 2012); *Lewis v. Heartland Inns of Am., L.L.C.*, 591 F.3d 1033, 1037-42 (8th Cir. 2010); *Chadwick v. WellPoint, Inc.*, 561 F.3d 38, 45 (1st Cir. 2009); *Smith v. City of Salem, Ohio*, 378 F.3d 566, 574 (6th Cir. 2004); *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 262 (3d Cir. 2001); *Nichols v. Azteca Rest. Enter., Inc.*, 256 F.3d 864, 874 (9th Cir. 2001); *E.E.O.C. v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1284 n.20 (11th Cir. 2000); *Bellaver v. Quanex Corp.*, 200 F.3d 485, 492 (7th Cir. 2000). *See also Parker v. Reema Consulting Servs., Inc.*, 915 F.3d 297, 303 (4th Cir. 2019) (holding that an employee could state a claim under *Price Waterhouse* for discrimination on the basis of *conformity* to a negative gender stereotype).[8]

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[8] Some courts have even expressly recognized that gay and lesbian employees may avail themselves of the sex stereotype theory of sex discrimination, so long as they observe what Petitioner contends is a legal fiction that the discrimination they allege is based strictly on the failure to conform to masculine or feminine stereotypes rather than sexual orientation. *See Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1254 (11th Cir. 2017) (remanding with instruction to grant a lesbian plaintiff leave to amend her complaint to include a *Price Waterhouse* sex stereotype claim); *Prowel v. Wise Business Forms, Inc.*, 579 F.3d 285, 290-93 (3d Cir. 2009) (remanding to the district court for trial on the question of whether discrimination against the gay male employee was harassed because of his effeminacy or his sexual orientation). *But see Franchina v. City of Providence*, 881 F.3d 32, 54 (1st Cir. 2018) (upholding a verdict for the lesbian plaintiff under *Price Waterhouse* and rejecting the argument that the jury should have been

Though the Court had already held in *Manhart* that Title VII forbids employment decisions "predicated on mere 'stereotyped' impressions about the characteristics of males or females," 435 U.S. at 707 n.13 (citation omitted), *Price Waterhouse* was an evolution in the legal understanding of sex as gender, or " . . . the social or cultural, as opposed to the biological, distinctions between the sexes." *Gender*, 3.b., Oxford English Dictionary (2d ed. 1989). Thus, "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender" in violation of Title VII. *Price Waterhouse*, 490 U.S. at 250. This understanding of sex as gender, including a person's conformity or non-conformity with social roles typically associated with one sex or the other, must necessarily protect gay and lesbian employees from discrimination under Title VII, because "an employer who acts on the basis of a belief that a woman cannot be [attracted to other women] or that that she must not be, has acted on the basis of gender." *Zarda*, 883 F.3d at 120-21 (citation omitted); *Hively*, 853 F.3d at 346; *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002) ("the gender stereotype at work here is that 'real' men should date women, and not other men").

Respondent and others may argue that sexual orientation discrimination is not sex stereotype discrimination

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instructed that it could not find for the plaintiff if the harassment was based on her sexual orientation because it could be based on her sexual orientation *and* her sex). As explained below, this is an untenable and unworkable distinction. *Infra*, pp. 51-57.

because "heterosexuality is not a female stereotype; it is not a male stereotype; it is not a sex-specific stereotype at all." *Hively*, 853 F.3d at 370 (Sykes, J., dissenting). But this implies a requirement for the sex stereotype theory of discrimination that does not exist – that the stereotype must be sex-*specific* to men or women as such, rather than sex-*based* as to the individual employee. As explained above, the Court has adhered to a classification-based approach under Title VII which is "unambiguous" and "focuses on fairness to individuals rather than classes." *See supra*, p. 16 (citing *Manhart*, 435 U.S. at 708-09). "Mere equal application," *Loving*, 388 U.S. at 8, of a sex stereotype against members of both sexes – that people of one sex should be attracted to members of the opposite sex – cannot prevent it from constituting an impermissible sex-based stereotype when applied to an individual of either sex.

One need only examine the array of opinions in *Price Waterhouse*, including the dissent, to understand why the classification-based approach obtains in the sex stereotype context as well. Every member of this Court agreed that it would not have been a violation of Title VII if Price Waterhouse could prove it denied Ms. Hopkins partnership because she was aggressive and curt. 490 U.S. at 258 (plurality); *id.* at 259-60 (White, J., concurring); *id.* at 279-80 (O'Connor, J., concurring); *id.* at 295 (Kennedy, J., dissenting). The problem arose because Price Waterhouse held those traits – which can be exhibited by men *or* women – against Ms. Hopkins *because she was a woman*. *Id.* at 258 (plurality)

("[w]e sit not to determine whether Ms. Hopkins is nice, but to decide whether the partners reacted negatively to her personality because she is a woman"). Sex stereotype discrimination against a male employee is actionable sex discrimination not because he lacks traits that are "specific" or "exclusive" to men, but because the employer is dissatisfied with him lacking those traits, whatever they are, *because he is a man. Cf. Oncale*, 523 U.S. at 80-81. It follows that sexual orientation discrimination against a man is sex stereotype discrimination because it is discrimination against him for failing to have the trait of being attracted to women *because he is a man.* The employer has acted "on the basis of a belief that [the man] cannot be [attracted to other men] or that [he] must not be," because he is a man, and so has acted on the basis of his gender in violation of Title VII. *Price Waterhouse*, 490 U.S. at 250.

D. The Court Clearly Held in *Oncale* that Title VII Prohibits "Any Kind" of Sex-Based Discrimination

The Court's decision in *Oncale* also requires the conclusion that Title VII prohibits sexual orientation discrimination. In *Oncale*, the Court addressed egregious sexual harassment perpetrated against a male employee on an offshore oil platform by several of the men with whom he worked. 523 U.S. at 76-77. The harassment included being "forcibly subjected to sex-related, humiliating actions," physically assaulted, and threatened with rape. *Id.* The Fifth Circuit upheld

dismissal of Mr. Oncale's claim for sex discrimination in violation of Title VII, holding that the statute did not prohibit same-sex sexual harassment. *Id.* But this Court reversed in a unanimous decision explaining the broad scope of the ban on sex discrimination in Title VII.

The Court specifically rejected any "categorical rule excluding same-sex harassment claims from the coverage of Title VII," because there was "no justification in the statutory language" or the Court's precedents for such a rule. *Id.* at 79. Critically, the Court went further to explicitly hold that the statutory language "because of sex" encompasses forms of discrimination that Congress might not have contemplated when it passed Title VII. *Id.* at 79-80. Noting that same-sex sexual harassment was "assuredly not the principal evil Congress was concerned with when it enacted Title VII," the Court nevertheless held that the statutory language goes beyond the forms of discrimination expressly contemplated to cover "reasonably comparable evils," and "any kind" of sex-based discrimination that meets the statutory requirements. *Id.* This holding, faithful to the plain language of Title VII, should be dispositive in this case. It confirms yet again that the ban on sex discrimination in the statute is broad enough to cover not only sex discrimination against women, but "reasonably comparable evils" of "any kind" too, of which sexual orientation discrimination is surely one.

The *Oncale* Court's discussion about how same-sex harassment can be proved under Title VII bolsters the conclusion that sexual orientation discrimination is a covered form of sex discrimination. The Court specifically rejected any requirement for the particular motive or reasoning behind the intent to discriminate against a person because of sex. *Id.* at 80-81. Rather, the Court explained that discrimination "because of sex" can be shown with credible evidence that the harasser is gay or lesbian, "but harassing conduct need not be motivated by sexual desire" to support a claim for sex discrimination. *Id.* at 80. It might just as easily be shown by evidence that a female harasser harbored hostility toward other women in the workplace because they are women, or the plaintiff can "offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace." *Id.* The last approach is, of course, the *Manhart* "simple test." 435 U.S. at 711. But all six Circuits to consider the issue have held that the categories in *Oncale* are illustrative, not exhaustive. *See E.E.O.C. v. Boh Bros. Constr. Co., L.L.C.*, 731 F.3d 444, 455-56 n.6 (5th Cir. 2013). It is clear after *Oncale*, if not before, that *any* discrimination "because of sex," whether based on animus, sexual desire, a comparative analysis, or any other reason – such as sexual orientation – violates Title VII.

II. The Statutory History of Title VII Confirms that it Forbids Sexual Orientation Discrimination as a Form of Sex Discrimination

While it is clear from the text of Title VII that it prohibits sexual orientation discrimination as a form of discrimination "because of sex," the Court should "interpret the relevant words not in a vacuum, but with reference to the statutory context, structure, history, and purpose." *Abramski v. United States*, 573 U.S. 169, 179 (2014) (quotation omitted). That context, including the amendments in 1978 and 1991 and this Court's interpretations in *Manhart*, *Newport News*, *Meritor*, *Price Waterhouse*, and *Oncale*, further compels the conclusion that Title VII must be understood to prohibit sexual orientation discrimination.

Indeed, the statutory history fatally undermines Respondent's primary argument that recognizing sexual orientation discrimination to be within the scope of Title VII does violence to the "original public meaning" of the statute, *Hively*, 853 F.3d at 362-63 (Sykes, J., dissenting), and betrays a failure to interpret the words "as taking their ordinary, contemporary, and common meaning . . . at the time Congress enacted the statute," *Zarda*, 883 F.3d at 167 (Livingston, J., dissenting) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)). This argument fails at the outset because it ignores the fact that a broad definition of "sex" was already understood in 1964 to include "[t]he sphere of behavior dominated by the relations between male and female," and "[t]he whole sphere of behavior related even indirectly to the sexual functions and embracing all affectionate

and pleasure-seeking conduct." *Sex*, 2., 3., Webster's New International Dictionary of the English Language 2296 (2d unabridged ed. 1961). But just as importantly, it ignores the evolution of Title VII that has been taking place in Congress and this Court's decisions for over fifty years.

The Court has expressly recognized that "[w]ords in statutes can enlarge or contract their scope as other changes, in law or in the world, require their application to new instances or make old applications anachronistic." *West v. Gibson*, 527 U.S. 212, 218 (1999) (citing cases); *see also Wisconsin Central Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018) ("[w]hile every statute's *meaning* is fixed at the time of enactment, new *applications* may arise in light of changes in the world") (emphasis in original). The conclusion that Title VII must be interpreted broadly to prohibit sexual orientation discrimination follows inexorably from such changes, including (1) the expansion of Title VII in 1978 to reject limitations on the sex discrimination prohibition and codify the classification-based approach to sex discrimination; (2) the Court's expansive interpretations of the statutory language in *Manhart*, *Newport News*, *Meritor* and *Price Waterhouse* and the fact Congress ratified and incorporated these in Title VII with the Civil Rights Act of 1991; and (3) the Court's holding in *Oncale* that the prohibition of sex discrimination in Title VII "go[es] beyond the principal evils" contemplated by Congress in 1964 to forbid "reasonably comparable evils" and "any kind" of sex-based discrimination, 523 U.S. at 79.

A. Congress Rejected Limitations on the Sex Discrimination Prohibition in Title VII and Confirmed the Classification-Based Approach with the 1978 Pregnancy Discrimination Act

The Court has previously noted the "somewhat bizarre path" by which "sex" came to be included in the enumeration of protected groups in Title VII – it may have been included as an attempt to thwart passage of the bill. *Price Waterhouse*, 490 U.S. at 243 n.9 (citation omitted). *But see* Eskridge, *LGBT Workplace Protections*, 127 Yale L.J. at 347. Because it was a last minute addition, "we are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on 'sex.'" *Meritor*, 477 U.S. at 63-64. This is undoubtedly why "[i]n analyzing a statute, [the Court must] begin by examining the text . . . , not by psychoanalyzing those who enacted it," *Carter v. United States*, 530 U.S. 255, 270-71 (2000) (citation omitted), though we do know that during the hearings on the 1972 amendments, congressional reports reflect the view that sex discrimination was "no less serious than other prohibited forms of discrimination, and that it is to be accorded the same degree of concern given to any type of similarly unlawful conduct." S. Rep. No. 92-415, p. 7 (Oct. 28, 1971).

And we also know that, after the Court narrowly interpreted Title VII to permit discrimination on the basis of pregnancy even though only women can become pregnant, *Gen. Elec. Co. v. Gilbert*, 425 U.S. 125, 136-40 (1976), Congress responded by passing the

Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076. The Act amended Title VII to provide that:

> The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title, 42 U.S.C. 2000e-2, shall be interpreted to permit otherwise.

Id. (codified at 42 U.S.C. § 2000e-2(k)). The House and Senate Reports made clear that the purpose of the Pregnancy Discrimination Act was a broader understanding of the definition of sex discrimination in the statute, and to ensure that Title VII protected "against all forms of employment discrimination based on sex," including pregnancy and related medical conditions. S. Rep. No. 95-331, pp. 2-3; H.R. Rep. No. 95-948, pp. 3-4.[9]

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[9] In defining discrimination "because of sex" to "include, but not be limited to," discrimination because of "pregnancy, childbirth, or related medical conditions," the language of § 2000e(k) reflects the intent to expand the definition of "sex" discrimination even beyond these enumerated types of sex-based discrimination. *See Cooper Distributing Co., Inc. v. Amana Refrigeration, Inc.*, 63 F.3d 262, 280 (3d Cir. 1995) (Alito, J.) (explaining that the rule of

As Justice Stevens, who dissented in *Gilbert*, 429 U.S. at 160-62, later explained, *Gilbert* had been the "one notable exception" to the Court's usual textualist approach to analyzing the sometimes broader-than-expected scope of statutory prohibitions, *Sutton v. United Air Lines*, 527 U.S. 471, 506 (1999) (Stevens, J., dissenting). And Congress definitely saw it that way. The Senate specifically endorsed the classification-based approach to sex discrimination with the Pregnancy Discrimination Act, quoting with approval as "correctly express[ing] both the principle and the meaning of Title VII" the words of Justice Brennan in *Gilbert* that "[s]urely it offends commonsense to suggest . . . that a classification revolving around pregnancy is not, at the minimum, strongly 'sex related.'" S. Rep. No. 95-331, p. 3; *see also Newport News*, 462 U.S. at 681 (noting that "[p]roponents of the legislation stressed throughout the debates that Congress had *always* intended to protect *all* individuals from sex discrimination in employment – including but not limited to pregnant women workers.") (emphasis supplied). The Pregnancy Discrimination Act of 1978, along with *Manhart*, thus confirms that the statutory ban on sex discrimination in Title VII must be read broadly to prohibit discrimination on account of any sex-based classifications, even those not enumerated in the statute.

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ejusdem generis does not apply to limit the scope of a statute when the language expresses a contrary intent by using the phrase "including, but not limited to").

B. Congress Incorporated into Title VII an Expansive Definition of Sex-Based Discrimination from *Newport News*, *Meritor*, and *Price Waterhouse* with the Civil Rights Act of 1991

After the 1978 amendment, the Court began to interpret the sex discrimination prohibition in Title VII more broadly. In 1983, the Court held that male employees were discriminated against "because of sex" in violation of Title VII when their employer denied insurance coverage for pregnancy to their wives while providing full coverage to the husbands of female employees. *Newport News*, 462 U.S. at 685. The Court rejected the argument that the male employees could not maintain claims for sex discrimination because Congress was focused on protecting women, not men, when it passed Title VII. *Id.* at 679. This, the Court said, did not "create a 'negative inference' limiting the scope of the act to the specific problem that motivated its enactment." 462 U.S. at 679-80. Instead, the Court applied the "simple test" of *Manhart* and found that the pregnancy limitation in the case discriminated against male employees. *Id.* at 683, 685.[10]

The Court again interpreted the sex discrimination prohibition expansively in *Meritor*, 477 U.S. 57 (1986). The employee in that case alleged that she was

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[10] In finding that sex-based discrimination against only male employees with pregnant spouses violated the statute, the Court also confirmed again the classification-based approach to Title VII that recognizes unlawful sex-based discrimination even when the target is only a subgroup of men or women.

discriminated against because of her sex when her supervisor subjected her to unwanted touching and sexual advances in the workplace over a period of years. *Id.* at 59-60. In attempting to determine whether sexual harassment fell within the statutory language, the Court noted first that there was little legislative history from 1964 to guide the inquiry as to what constitutes "discrimination based on 'sex,'" but concluded that, "[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminates' on the basis of sex." *Id.* at 64-65. The Court also rejected the employer's argument that only "economic" or "tangible" discrimination was actionable under Title VII. *Id.* at 66-67. Instead, the Court noted that the EEOC Guidelines took the position that "sexual harassment" was a form of sex discrimination and lower courts agreed. *Id.* Accordingly, the Court held that a "hostile or abusive work environment" based on sex falls within the statutory prohibition. *Id.* at 66-67.

The Court further expounded the meaning of the statutory language in *Price Waterhouse* as discussed above, explaining that because Title VII "even forbids employers to make gender an *indirect* stumbling block to employment opportunities," discrimination against an employee for failing to conform to a gender stereotype constitutes unlawful sex discrimination. *See supra*, pp. 23-29 (citations omitted). The Court also recognized the possibility of other forms of sex discrimination arising from a combination of sex-based considerations and other legitimate considerations. Specifically, the

Court held that "Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations," so that the statute is violated when an employer considers "both gender *and* legitimate factors at the time of making a decision." 490 U.S. at 241 (emphasis supplied). Congress confirmed and codified this lessened causation standard for Title VII discrimination claims with § 107(a) of the Civil Rights Act of 1991, providing that a violation of the Act is shown by proof that sex or another protected characteristic "was also a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m).

These holdings – that the language of Title VII is not limited to forms of sex discrimination "that motivated its enactment," *Newport News*, 462 U.S. at 679-80, includes "sexual harassment" without economic impact, *Meritor*, 477 U.S. at 64-67, and encompasses "sex stereotype" discrimination and reliance on sex-based considerations alongside legitimate considerations despite the statutory silence on these points, *Price Waterhouse*, 490 U.S. at 240-42 – were all effectively incorporated into Title VII by the Civil Rights Act of 1991. *See Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 239-40 (2009) (noting that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change" and concluding that Congress approved of the Court's prior interpretations of the Individuals with Disabilities in Education Act because it did not abrogate them or repeal those parts

of the statute in a subsequent amendment of another part); *see also North Star Steel Co. v. Thomas*, 515 U.S. 29, 34 (1995) ("it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with [the Court's] precedents . . . and that it expect[s] its enactment[s] to be interpreted in conformity with them") (citing *Cannon v. Univ. of Chicago*, 441 U.S. 677, 699 (1979)); *Shapiro v. United States*, 335 U.S. 1, 16 (1948) ("[i]n adopting the language used in the earlier act, Congress 'must' be considered to have adopted also the construction given by this Court to such language, and made it a part of the enactment"). As a result, while the holdings of *Newport News*, *Meritor*, and *Price Waterhouse* already carried "enhanced force" because they are precedents interpreting a statute, *Kimble v. Marvel Entm't, L.L.C.*, 135 S. Ct. 2401, 2409 (2015), they by now form the foundation of a congressional mandate that the statutory language of Title VII be interpreted broadly to prohibit forms of sex discrimination not explicitly set forth in the statute.

Respondent and others may argue to the contrary that when Congress passed the Civil Rights Act of 1991, it implicitly ratified the interpretation of a handful of lower courts that Title VII does not prohibit sexual orientation discrimination. *See* Br. for the U.S. as Amicus Curiae, *Zarda*, 2017 WL 3277292, *8-10. But while Congress can express its intent by reference to the decisions of lower courts, the record must be clear that it did. *Cf. Texas Dep't of Hous. and Comm. Affairs v. Inclusive Cmty's Project, Inc.*, 135 S. Ct. 2507, 2520 (2015) (holding that Congress adopted the scope of

disparate impact liability for the Fair Housing Act set forth in unanimous holdings of the Circuit Courts where several committee reports and congressional testimony explicitly addressed them). There is no evidence that Congress had any "background understanding," *id.* at 2520, of lower court rulings on sexual orientation discrimination under Title VII in 1991, *see Zarda*, 883 F.3d at 129. Rather, the congressional remarks concern *this Court's* interpretations of Title VII. *See* H.R. Rep. No. 102-40, 45, 1991 U.S.C.C.A.N. 549, 583 n.39 (noting that the holding in *Price Waterhouse* that "evidence of sex stereotyping is sufficient to prove gender discrimination" would not be affected by the Act), 638 (discussing *Manhart*, *Newport News*, and *Johnson Controls* with approval). There is no basis to assume Congress adopted the rulings of a few lower courts that Title VII did not prohibit sexual orientation discrimination. *Zarda*, 883 F.3d at 129. Instead, it must be presumed that Congress ratified this Court's decisions in *Manhart*, *Newport News*, *Meritor*, and *Price Waterhouse.*[11] It is *these* decisions, including the guidance they provide about how to interpret Title VII – that there is no "negative inference" that limits the language, *Newport News*, 462 U.S. at 679-80, and that it covers discrimination built on sex-based assumptions about behavior, *Price Waterhouse*, 490 U.S. at 240-42 – that Congress

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[11] As well as some others. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 250-51 (1994) (noting that "[o]ther sections of the [Civil Rights] Act [of 1991] were obviously drafted with 'recent decisions of the Supreme Court' in mind" and citing other cases and provisions).

incorporated in Title VII in 1991. *Cf. Forest Grove Sch. Dist.*, 557 U.S. at 239-40.

Respondent also argues that Title VII cannot be understood to cover sexual orientation discrimination because legislation that would have amended the statute to specifically include it has failed to pass Congress many times. Br. of Resp. in Opp. to Cert., p. 21 n.4. Respondent concedes that "[c]ongressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction," *id.* at p. 23 (citing *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990)), yet maintains no one could have thought that Title VII prohibited sexual orientation discrimination because lower courts held that it did not, *id.* at pp. 23-24. But that is exactly what the then-Speaker of the House of Representatives John Boehner said about one such bill in 2013. *See* Ed O'Keefe, *Senate passes job-bias bill for gays*, WASH. POST, Nov. 8, 2013; CNN Newsroom, Transcript of Nov. 14, 2013 Broadcast, *available at* http://transcripts.cnn.com/TRANSCRIPTS/1311/14/cnr.06.html (reporting Mr. Boehner's statement in response to a question concerning the Employment Discrimination Act, which would have prohibited sexual orientation discrimination in employment, that "as someone who has worked in this employment law area for all of my years in the state house and all of my years here, I see no basis or no need for this" because "people are already protected") (last visited June 22, 2019). Regardless, "the verdict of quiescent years cannot be invoked to baptize a statutory gloss that is otherwise impermissible."

Zuber v. Allen, 396 U.S. 168, 185 n.21 (1969). The Court simply cannot read as much from what Congress did *not* do over the years as it can from what Congress *did* do with the Civil Rights Act of 1991. *See BNSF Ry. Co. v. Loos*, 139 S. Ct. 893, 906 (2019) (Gorsuch, J., dissenting) (noting that the "statutory history" of "enacted changes Congress made to the relevant statutory text over time" is "the sort of textual evidence everyone agrees can sometimes shed light on meaning" as opposed to the "sort of unenacted legislative history that often is neither truly legislative . . . nor historical").[12]

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[12] Similarly, Respondent argues that the prohibition of sexual orientation discrimination in other statutes means that "sex" as used in Title VII cannot include sexual orientation. Br. of Resp. in Opp. to Cert., pp. 17-18 (citations omitted). To begin with, these statutes cannot be read *in pari materia* with Title VII because they deal with sex discrimination "in entirely different" fields, and there is no indication that Title VII was intended to be read with them. *Fort Stewart Sch. v. Fed. Labor Relations Auth.*, 495 U.S. 641, 647-48 (1990). Moreover, all of these statutes were enacted after Title VII, and "Congress's use of similar language in other statutes . . . tells us nothing about Congress's understanding of the language it enacted" in Title VII. *Food Mktg. Inst. v. Argus Leader Media*, 588 U.S. ___ (2019), No. 18-481, 2019 WL 2570624, *6 (June 24, 2019); *see also Gutierrez v. Ada*, 528 U.S. 250, 257-58 (2000) ("later laws that do not seek to clarify an earlier enacted general term and do not depend for their effectiveness upon clarification, or a change in the meaning of an earlier statute, are beside the point in reading the first enactment") (quotations and citation omitted).

C. The Court Unanimously Recognized in *Oncale* that Title VII Must be Read to Prohibit Forms of Sex Discrimination not Contemplated by Congress in 1964

Just as *Newport News* verified that Congress confirmed a broad application of the sex discrimination prohibition with the Pregnancy Discrimination Act, *Oncale* reflected that Congress codified expansive interpretation of the statutory language with the Civil Rights Act of 1991. Accordingly, the unanimous *Oncale* Court squarely held that the statutory language reaches further than the particular types of discrimination Congress was concerned with in 1964:

> As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.

523 U.S. at 79; *see also Lewis v. City of Chicago, Ill.*, 560 U.S. 205, 215 (2010) (Scalia, J.) ("[i]t is not for us to rewrite [Title VII] so that it covers only what we think is necessary to achieve what we think Congress really intended").[13]

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[13] No doubt this is because any indications in the legislative history which are contrary to the plain language of the statute "may reflect nothing more than the speakers' incomplete

The Court has thus already rejected the argument that the scope of the ban on sex discrimination in Title VII is limited by the "ordinary, contemporary, common" meaning of "sex" at the time the statute was passed. *See Zarda*, 883 F.3d at 137 (Lohier, J., concurring and explaining that "[t]ime and time again, the Supreme Court has told us that the cart of legislative history is pulled by the plain text, not the other way around"). And for good reason: the statutory history makes clear that the prohibition must "extend to . . . [discrimination] *of any kind* that meets the statutory requirements," which are simply that the discrimination be "because of sex," *Oncale*, 523 U.S. at 75 (emphasis supplied). It extends to sex-based discrimination of "any kind" regardless of whether all members of one sex are targeted, *Newport News*, 462 U.S. at 679-80, whether the precise form of discrimination appears in the statute, *Meritor*, 477 U.S. at 65, whether the sex-related consideration is based on biology or behavior, *Price Waterhouse*, 490 U.S. at 240-42, or whether Congress contemplated it in 1964, *Oncale*, 523 U.S. at 75. Accordingly, Title VII extends to sexual orientation discrimination because it meets the statutory requirements, *see supra*, pp. 12-31, and there is no difficulty in interpreting the statute to reach more broadly than Congress may have expected in 1964.

Indeed, the Court has often interpreted statutory language more broadly than it might have been interpreted at the time the statute was passed. *See, e.g.*,

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understanding of the world upon which the statute will operate." *Fort Stewart Sch.*, 495 U.S. at 650 (Scalia, J.) (citation omitted).

West, 527 U.S. at 218 (interpreting the original language of Title VII permitting "appropriate" relief against the federal government to allow the award of compensatory damages even though such damages were not available until the 1991 amendments); *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759, 768-70 (2019) (interpreting the International Organizations Immunities Act of 1945 to provide immunity consistent with the restrictive theory of foreign sovereign immunity adopted by the Foreign Sovereign Immunities Act of 1976); *Kimble*, 135 S. Ct. at 2412-14 (2015) (noting that the Sherman Act has been interpreted dynamically); *Oncale*, 523 U.S. at 79-80; *Allied-Bruce Terminix Co.'s, Inc. v. Dobson*, 513 U.S. 265, 273-76 (1995) (interpreting the Federal Arbitration Act to incorporate the definition of commerce as expanded by the Court's decisions since the Act was passed in 1925);[14] *Meritor*, 477 U.S.

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[14] Because constitutional cases "can provide helpful guidance in this statutory context," *Ricci*, 557 U.S. at 582, the Court's decisions concerning the constitutional rights of gay and lesbian people decided since Title VII was enacted should also be understood as changes "in law or in the world," *West*, 527 U.S. at 218, which require a broader reading of Title VII. These include *Romer v. Evans*, 517 U.S. 620, 631-35 (1996) (holding that a state constitutional prohibition of governmental action to protect gay and lesbian people was a violation of the Equal Protection Clause of the Fourteenth Amendment), *Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003) (holding that a statute prohibiting same-sex sexual intercourse was an unconstitutional deprivation of substantive due process), *and Obergefell v. Hodges*, 135 S. Ct. 2584, 2603-05 (2015) (holding that the Equal Protection Clause protects the right of gay and lesbian persons to marry a member of the same sex). It would be anachronistic, to say the least, to read Title VII to permit a form of discrimination that the Court has held to violate the Constitution.

at 63-67. There is no difficulty in doing so where, as here, the proposed interpretation is completely consistent with the statutory text and there are exceedingly strong indications in the statutory history and the Court's decisions that the statutory language should be read broadly in conformity with certain subsequent developments in the law. Indeed, in this context – where Congress has ratified and incorporated the Court's expansive interpretations of the language into the statute, considerations of *stare decisis* impose a "considerable burden upon those who would seek a different interpretation that would necessarily unsettle many Court precedents." *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 451-52 (2008).

III. Title VII Must be Interpreted to Prohibit Sexual Orientation Discrimination Because the Contrary Interpretation Would Place Different Parts of the Statute in Conflict and is Profoundly Unworkable

There are at least two other reasons why the Court must conclude that Title VII prohibits sexual orientation discrimination as a form of sex discrimination. First, refusal to recognize that Title VII prohibits sexual orientation discrimination would place 42 U.S.C. § 2000e-2(m) at odds with the other anti-discrimination provisions of § 2000e-2 and render it meaningless. Second, it is profoundly unworkable as demonstrated by contradictory lower court decisions which have tried unsuccessfully to distinguish

between sex-based stereotype discrimination and sexual orientation discrimination.

A. Title VII Must Be Interpreted to Prohibit Sexual Orientation Discrimination to Give Effect to all the Anti-Discrimination Provisions of the Statute

Interpreting Title VII to prohibit sexual orientation discrimination is necessary to harmonize and give effect to all the anti-discrimination provisions of 42 U.S.C. § 2000e-2. It is well established that the Court's task "in interpreting [these] separate provisions of a single Act is to give the Act 'the most harmonious, comprehensive meaning possible' in light of the legislative policy and purpose." *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 631-32 (1973) (quotation omitted). Reading Title VII to prohibit sexual orientation discrimination is necessary to avoid placing the anti-discrimination provisions of § 2000e-2 in conflict with the ban on employment practices motivated even in part by sex, § 2000e-2(m), and rendering the latter meaningless.

The Court explained in *Price Waterhouse* that "[t]he critical inquiry, the one commanded by the words of 42 U.S.C. § 2000e-2(a)(1)," is whether:

> gender was a factor in the employment decision at the moment it was made. Moreover, since we know that the words "because of" do not mean "solely because of," ***we also know that Title VII meant to condemn even***

> ***those decisions based on a mixture of legitimate and illegitimate considerations.*** When, therefore, an employer considers both gender and legitimate factors at the time of making a decision, that decision was "because of" sex and the other, legitimate considerations – even if we may say later, in the context of litigation, that the decision would have been the same if gender had not been taken into account.

490 U.S. at 241 (emphasis supplied). As discussed above, Congress explicitly approved this lessened "motivating factor" causation standard for Title VII discrimination claims and codified it at 42 U.S.C. § 2000e-2(m) with § 107(a) of the Civil Rights Act of 1991. *See Nassar*, 570 U.S. at 347-49 (citing and discussing *Price Waterhouse* and Pub. L. No. 102-166). The Court must interpret Title VII to prohibit sexual orientation discrimination for consistency between § 2000e-2(m) and the other anti-discrimination provisions of § 2000e-2 in the first place because, in their misguided efforts to determine whether discrimination is motivated by an employee's failure to conform to a sex-based stereotype or her sexual orientation, the lower courts are erroneously throwing out cases where it is motivated by *both*. *See, e.g.*, *Kay v. Independence Blue Cross*, 142 F. App'x 48, 50-51 (3d Cir. 2005) (noting that the harassment included referring to "real men" as opposed to the "fem" plaintiff and assuming that this was evidence of sex stereotyping but nevertheless affirming the district court's dismissal because other evidence indicated sexual orientation bias); *Swift v.*

Countrywide Home Loans, Inc., 770 F. Supp. 2d 483, 488 (E.D.N.Y. 2011) (determining that the plaintiff's claim for sex discrimination was really one for sexual orientation discrimination even though the court acknowledged that he was disparaged with terms referring to the "non-conformism of his behavior").

But the Court must also interpret Title VII to prohibit sexual orientation for consistency between 42 U.S.C. § 2000e-2(m) and the other anti-discrimination provisions for a more fundamental reason. As explained above, a person's sex is a necessary element of his sexual orientation because a gay or lesbian sexual orientation is defined as experiencing sexual desire for a person of one's "own" or same sex. *Supra*, pp. 13-14. This means that sexual orientation is a sex-based classification under Title VII. *Id.* But it also means that sexual orientation is discrimination "because of sex" under *Price Waterhouse* and § 2000e-2(m). Specifically, even if sexual orientation *was* a "legitimate consideration" for an employment decision (which it is not), an employment decision on that basis would still be " 'because of' sex *and* the other, legitimate consideration[,]" *Price Waterhouse*, 490 U.S. at 241, because sexual orientation is dependent on the sex of the employee. As a result, such an employment decision would still violate Title VII under 42 U.S.C. § 2000e-2(m). The Court must therefore conclude that sexual orientation discrimination is discrimination "because of sex" to harmonize the anti-discrimination provisions of § 2000e-2 with § 2000e-2(m) and avoid rendering the latter meaningless. *See, e.g.*, *Food and Drug Admin. v. Brown &*

Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) (holding that, where possible, the Court must interpret a statute "as a symmetrical and coherent regulatory scheme," fitting "all parts into an harmonious whole"); *Weinberger*, 412 U.S. at 631-32; *Petition of Pub. Nat. Bank of New York*, 278 U.S. 101, 104 (1928) (noting that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant") (quotation omitted).

B. The Attempt to Distinguish Between Sex Stereotype Discrimination Based on Gay or Lesbian "Traits" and Sexual Orientation Discrimination is Profoundly Unworkable

The Court must also recognize that Title VII prohibits sexual orientation discrimination because a refusal to do so would perpetuate the puzzling morass of conflicting lower court decisions. Even the courts have admitted the difficulty of properly applying *Price Waterhouse* and *Oncale* to claims brought by gay and lesbian employees. *See, e.g.*, *Prowel*, 579 F.3d at 291 (noting that "the line between sexual orientation discrimination and discrimination 'because of sex' can be difficult to draw"); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005) (explaining that sex stereotype claims can present problems because " 'stereotypical notices about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality' ") (citations omitted),

overruled by Zarda, 883 F.3d 100; *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1065 n.5 (7th Cir. 2003) (conceding that "distinguishing between failure to adhere to sex stereotypes . . . and discrimination based on sexual orientation . . . may be difficult") *overruled by Hively*, 853 F.3d 339, 350 (en banc) (noting that "the effort to [remove the 'sex' from 'sexual orientation'] has led to confusing and contradictory results").

For example, some courts dismiss claims for sex discrimination where the plaintiff alleges verbal harassment reflecting a perception that he or she is gay, while others do not. *Compare, e.g.*, *Schmedding v. Tnemec Co., Inc.*, 187 F.3d 862, 865 (8th Cir. 1999) (permitting a claim for same-sex sexual harassment to proceed where a male plaintiff alleged he was harassed because of his "perceived sexual preference," because the fact that "some of the harassment alleged . . . includes taunts of being homosexual . . . " did not make the complaint one for sexual orientation discrimination) *and E.E.O.C. v. Boh Bros. Constr. Co., L.L.C.*, 768 F. Supp. 2d 883, 893 (E.D. La. 2011) (denying summary judgment on a sex stereotyping discrimination claim where the alleged harasser said he thought the employee's use of wet wipes instead of toilet paper was "feminine" or "kind of homo" and the supervisor made jokes about the employee being gay) *with Kay*, 142 F. App'x at 50-51 (affirming the dismissal of a complaint because the epithets directed toward the plaintiff, including "faggot," "fem," and suggesting he was not a

"real man" indicated sexual orientation discrimination and not sex stereotype discrimination).

Other courts seek to divine whether the employer is motivated to discriminate because of the employee's sexual orientation or his failure to conform to a sex stereotype by tabulating and comparing the "relative frequency" of comments reflecting either type of bias. *See Zarda*, 883 F.3d at 121 (citing and discussing cases). As might be expected, these efforts are inconsistent in their outcomes. *Compare, e.g.*, *Hamm*, 332 F.3d at 1062-65 n.4 (upholding summary judgment against a plaintiff who was called "girl scout" and mocked for having a "high-pitched" voice because the evidence pointed to the conclusion that he was being discriminated against because of sexual orientation) *and E.E.O.C. v. Family Dollar Stores, Inc.*, No. CIV.A. 1:06-CV-2569-TWT, 2008 WL 4098723, at *1, *16-20 (N.D. Ga. Aug. 28, 2008) (granting summary judgment on a sex stereotype claim even though the alleged harasser said the employee was "half-female," and told him "now you using tampons," because the record "clearly reflect[ed] that the harassment at issue was based *primarily*" on the plaintiff's perceived sexual orientation) (emphasis supplied) *with Nichols*, 256 F.3d at 870, 874-75 (holding that an employee proved a sex-based hostile work environment even though the harasser called him a "faggot" because "the most vulgar name-calling directed at [the plaintiff] was cast in female terms"). Cases are all over the map with varying analytical approaches. *See generally* Br. for GLBTQ Advocates and Defenders and the National Center for Lesbian Rights

as Amici Curiae in Support of the Petitioner in Case 17-1618 and Respondents in Cases 17-1623 and 18-107, pp. 4-12.

Some judges have actually admitted that attempting to apply *Price Waterhouse* and *Oncale* while precluding sexual orientation discrimination claims is simply "unworkable." *Christiansen*, 852 F.3d at 205 (Katzman, C.J., concurring). Judge Posner of the Seventh Circuit wrote a concurrence in *Hamm* specially for the purpose of "recording [his] conviction that the case law has gone off the tracks in the matter of 'sex stereotyping[.]'" 332 F.3d at 1066. In that opinion, written fifteen years ago, he explained how the lower courts had distorted this Court's decision in *Price Waterhouse* by trying to avoid recognizing discrimination based on sexual orientation as actionable:

> Hostility to effeminate men and to homosexual men, or to masculine women and to lesbians, will often be indistinguishable as a practical matter, especially the former. Effeminate men often are disliked by other men because they are suspected of being homosexual (though the opposite is also true – effeminate homosexual men may be disliked by heterosexual men because they are effeminate rather than because they are homosexual), while mannish women are disliked by some men because they are suspected of being lesbians and by other men merely because they are not attractive to those men; a further complication is that men are more hostile to male homosexuality than they are to lesbianism.

> *To suppose courts capable of disentangling the motives for disliking the nonstereotypical man or woman is a fantasy.*

Id. at 1067 (emphasis supplied). Moreover, the ill-conceived attempt to determine whether the motive for discrimination is a failure to conform to sex stereotypes or sexual orientation necessarily promotes an investigation of the plaintiff's sexual orientation, which was assuredly *not* the policy of Title VII. *Id*.

Numerous commentators have also rightly criticized this course of jurisprudence for causing more problems than it purported to solve. *See, e.g.*, Eskridge, *LGBT Workplace Protections*, 127 Yale L.J. at 343 (arguing that "[a]s administrators, judges, and legislators have responded to our evolving understanding of the workplace, they have crafted a series of legal rules and precedents that render the exclusion of LGBT employees from Title VII increasingly anomalous and profoundly unworkable"); Zachary R. Herz, *Price's Progress: Sex Stereotyping and Its Potential for Antidiscrimination Law*, 124 Yale L.J. 396, 425 (2014); Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 Am. U. L. Rev. 715, 754 (2014) (surveying cases); Anthony E. Varona, Jeffrey M. Monks, *En/gendering Equality: Seeking Relief Under Title VII Against Employment Discrimination Based on Sexual Orientation*, 7 Wm. & Mary J. Women & L. 67, 94-98 (2000). Importantly, the fact that discrimination based on a person's failure to conform to a sex stereotype is so often indistinguishable from discrimination on the basis of sexual orientation further reinforces the

common sense conclusion that a heterosexual orientation *is* a sex-based stereotype.

Ultimately, a refusal to recognize that Title VII prohibits sexual orientation discrimination invites judicial speculation into whether and to what extent sex-based discrimination is based on sex stereotypes rather than sexual orientation, and leads to confusing and contradictory results.[15] The Court must therefore

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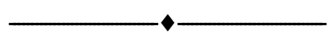
[15] This infects other areas of Title VII jurisprudence as well. For example, the "opposition clause" of Title VII protects employees from retaliation based on their opposition to practices made unlawful under Title VII, *Crawford v. Metro. Gov't of Nashville and Davidson Cnty., Tn.*, 555 U.S. 271, 276 (2009), but many lower courts require employees alleging retaliation for protected opposition activity must demonstrate that their belief that they were opposing conduct made unlawful under Title VII was reasonable, which is often measured by the substantive law, *see, e.g.*, *Brannum v. Mo. Dep't of Corr.*, 518 F.3d 542, 549 (8th Cir. 2008); *Clover v. Total Sys. Servs., Inc.*, 176 F.3d 1346, 1351 (11th Cir. 1999). To the extent that it is unclear whether Title VII prohibits sexual orientation discrimination, and whether an employee is being lawfully discriminated against because of sexual orientation or unlawfully on the basis of a sex stereotype, the scope of the opposition clause of Title VII also remains unclear, and the remedial policy of the statute is undermined.

Another example is the question of whether a plaintiff has exhausted his administrative remedies before the Equal Employment Opportunity Commission as required before bringing a lawsuit in court. *See Gregory v. Ga. Dep't of Human Res.*, 355 F.3d 1277, 1279-80 (11th Cir. 2004). Generally speaking, "a plaintiff's judicial complaint is limited by the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination," which depends on whether the court determines that the charge alleged sufficient facts to put the Commission and the employer on notice of the allegations. *See id.* (citations omitted). If the court decides that the employee did not provide enough factual information in the charge, then she will

recognize that Title VII prohibits sexual orientation discrimination because the alternative is a continuation of the confusing mess that threatens the consistency and predictability required for the rule of law in this area. *See, e.g.*, *United States v. Powell*, 469 U.S. 57, 66 (1984) (rejecting as "imprudent and unworkable" a rule that invited judicial speculation or inquiries into the jury's deliberations in criminal cases); *Swift & Co. v. Wickham*, 382 U.S. 111, 124-25 (1965) (rejecting a rule for determining the scope of the three-judge court statute because it was "in practice unworkable," uniformly criticized by commentators, and lower courts avoided dealing with it or interpreted it with uncertainty).



CONCLUSION

For all the reasons set forth above, Petitioner prays that this Honorable Court reverse the erroneous

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be barred from pursuing that claim in the lawsuit. *Id*. Indeed, the Magistrate Judge below decided that Mr. Bostock could not assert his claim for sex discrimination because he did not reference it as such in the charge of discrimination he filed with the Commission, despite the fact that he checked the only box on the charge applicable to both sexual orientation and sex stereotype discrimination: "sex." App. 8, 22-24. Mr. Bostock has since abandoned this articulation of his sex discrimination claim, *id*. at 41 n.1, but the issue highlights the continuing confusion caused by the unsettled law of how to "properly" allege the various forms of sex discrimination. *See also Norris v. Diakin Drivetrain Components*, 46 F. App'x 344 (6th Cir. 2002) (holding that the plaintiff did not exhaust his same-sex sexual harassment claim by alleging sexual orientation discrimination in his charge and dismissing the case).

judgment of the Eleventh Circuit Court of Appeals that he cannot state a claim for relief under Title VII on the theory that he was subjected to discrimination "because of sex" when he was fired for being gay. That Title VII so protects him and every other employee, whether gay or straight, is the best reading of the statute and the one that comports with the congressional intent to "strike at the entire spectrum of disparate treatment of men and women in employment." *Oncale*, 523 U.S. at 78 (citing *Meritor*, 477 U.S. at 64).

Respectfully submitted,

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