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

In the Supreme Court of the United States

GERALD LYNN BOSTOCK, PETITIONER
v.
CLAYTON COUNTY, GEORGIA, RESPONDENT

ALTITUDE EXPRESS, INC. ET AL., PETITIONERS
v.
MELISSA ZARDA, AS EXECUTOR OF THE ESTATE OF DONALD ZARDA, ET AL., RESPONDENTS

R.G. & G.R. HARRIS FUNERAL HOMES, INC., PETITIONER
v.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ET AL., RESPONDENTS

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

BRIEF OF HISTORIANS AS AMICI CURIAE IN SUPPORT OF EMPLOYEES

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INTEREST OF AMICI CURIAE

Amici are well-recognized academic historians whose many decades of scholarly study and research focus on the history of gender, sexuality, and law in the United States.[*]

[*] Pursuant to Rule 37.6, amici curiae affirm that no counsel for a party authored this brief in whole or in part and that no person other

A summary of the qualifications and affiliations of the individual amici is provided in the appendix to this brief. Amici file this brief solely as individuals and institutional affiliations are given for identification purposes only.

Amici aim to provide the Court with accurate historical perspective as it considers the question of whether Title VII's sex discrimination provision requires protecting people against discrimination because they are lesbian, gay, bisexual, or transgender (LGBT). Amici have examined the opinions of the Courts of Appeals in these and related cases, in which several jurists contend that prevailing understandings of "sex"-based discrimination around the time of Title VII's enactment must have excluded discrimination on account of being LGBT. As professional scholars who have dedicated their careers to the study of the history of gender, sexuality, and law, we find this assertion to be unsupported by the historical evidence.

SUMMARY OF ARGUMENT

This brief uses historical evidence from the first decade after Title VII's enactment to show that public understandings of the word "sex," and of "discrimination because of . . . sex," 42 U.S.C. § 2000e-2(a)(1), were then, as they are now, sufficiently broad and multidimensional to include discrimination against lesbian, gay, bisexual, and transgender individuals.

I. In 1964, the word "sex" encompassed a variety of

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than amici or their counsel has made any monetary contributions intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief, and copies of their letters of consent are on file with the Clerk's Office.

social meanings, as it does today. The term referred not only to the male sex and female sex, but also to a broad range of behaviors, social roles, and sexual practices. Public understandings also reflected a growing awareness of "sex variation" and LGBT individuals—not simply as criminal or medical concerns, but as part of contemporary American life.

II. Consistent with the public's capacious understanding of "sex" in the 1960s, Title VII's sex discrimination provision was not simply viewed as prohibiting employment decisions that placed women at a comparative disadvantage to men or vice versa. Rather, the law was seen as centrally concerned with enabling men and women to depart from conventional norms of masculinity and femininity, then called "sex roles," without suffering detrimental employment consequences.

III. Because public understandings closely linked LGBT individuals with sex-role nonconformity, Title VII's sex discrimination provision soon raised questions about the law's coverage of discrimination against LGBT individuals. Strikingly, in the provision's first decade, LGBT individuals filed claims seeking protection under the sex discrimination provision. Some officials at the Equal Employment Opportunity Commission (EEOC) interpreted Title VII to cover claims of discrimination based on sexual orientation and transgender identity. Regional offices received and processed these claims; some EEOC commissioners publicly invited them.

IV. By the early 1970s, equal rights based on sex were closely associated with equal rights for LGBT individuals because of how clearly both developments challenged the imposition of sex-stereotyped roles on women and men. Both proponents and opponents of equal rights recog-

nized, and declared publicly, that prohibiting discrimination because of sex entailed proscribing discrimination against individuals because they were LGBT. It was not until 1975, in the context of rising anti-gay and anti-sex equality lobbying, that the EEOC and federal courts began to articulate an anti-coverage position premised on their unsupported speculations about Congressional intent regarding the scope of Title VII.

The historical evidence thus demonstrates that, in the critical first decade of federal anti-discrimination law, Title VII's prohibition on discrimination "because of . . . sex" was capacious enough to include the discrimination suffered by LGBT individuals such as Aimee Stephens, Donald Zarda, and Gerald Lynn Bostock. Legal arguments to the contrary are unsupported by the historical record.

ARGUMENT

Several prominent jurists in these and related cases have reasoned that public understandings of "sex" and of LGBT individuals in the 1960s preclude the conclusion that Title VII's bar on sex discrimination could have extended to LGBT persons.[1] That logic is flawed. Public understandings of "sex" in these years encompassed not only the male sex and female sex but also a range of social norms associated with masculinity and femininity. Because the public conceptualized LGBT persons largely in terms of their failure to conform to accepted masculine

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[1] *See, e.g.*, *Zarda* v. *Altitude Express, Inc.*, 883 F.3d 100, 144–45 (2d Cir. 2018) (en banc) (Lynch, J., dissenting); *see also Hively* v. *Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 362–63 (7th Cir. 2017) (en banc) (Sykes, J., dissenting); *Wittmer* v. *Phillips 66 Co.*, 915 F.3d 328, 333–34 (5th Cir. 2019) (Ho, J., concurring).

and feminine conventions, Title VII's protections against sex discrimination were thus understood within the first decade after its passage, by supporters and opponents of LGBT rights and by the EEOC, as potentially covering LGBT employees.

I. THE HISTORICAL CONTEXT SURROUNDING TITLE VII'S ENACTMENT FEATURED A BROAD RANGE OF PUBLIC MEANINGS FOR THE WORD "SEX" AND GROWING PUBLIC AWARENESS OF LGBT INDIVIDUALS

It is difficult to understand contemporary debates about the scope of Title VII's bar on sex discrimination or its potential application to LGBT individuals without some historical context about the public's conceptions of both "sex" and LGBT individuals themselves. That context demonstrates that conceptions of both "sex" and LGBT persons were far more wide-ranging than commonly assumed.

A. "Sex" Encompassed a Wide Spectrum of Public Meanings in the 1960s

1. In 1964, as today, the word "sex" lent itself to a variety of social meanings. Both public and scientific discourse employed "sex" expansively, as an adjective and a noun, to invoke sexual desire, conduct, and social roles, as well as to refer to the male sex and female sex. Social scientists in the 1950s and early 1960s used the term *sex roles* to describe culturally- or conventionally-defined behaviors expected of men and women, and psychologists

used *psychological sex* and sometimes *sex-role identification* to mean "gender identity."[2] A commonly relied-upon dictionary of the time, the Random House unabridged dictionary of 1966, gives another rough indication of the word's broad reach. Although dictionary definitions often incompletely reflect usage, the five listed definitions of "sex" are indicative:

> 1. the fact or character of being either male or female . . . . 2. either of the two groups of persons exhibiting this character . . . . 3. the sum of structural and functional differences by which the male and female are distinguished, or the phenomena or behavior dependent on these differences. 4. the instinct or attraction drawing one sex toward another, or its manifestations in life and conduct. 5. coitus. . . .[3]

Note that the third definition, in stressing "behavior," evokes the range of social habits and characteristics—that is, sex roles—associated with men and women. The fourth, in identifying "manifestations" of sexual "instinct" in "life or conduct," encompasses a broad constellation of sex-related practices, desires, and experiences. The 1961

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[2] Joanne Meyerowitz, *A History of 'Gender,'* 113 Am. Hist. Rev. 1346, 1354 (2008).

[3] "Sex," *Random House Dictionary of the English Language* (Unabridged ed. 1966); *cf.* William N. Eskridge, Jr., *Title VII's History and the Sex Discrimination Argument for LGBT Workplace Protections,* 127 Yale L.J. 246, 347–52 (2017).

edition of the *Oxford English Dictionary*, the authoritative reference on English usage over time, is in accord, defining the term "sex" as invoking not simply male and female organisms, but also the whole "class of phenomena with which [the differences between male and female] are concerned."[4]

2. This broad understanding of sex, as evoking a range of sex roles, sexual expression, and sexual instincts, shaped public knowledge about LGBT individuals. Mid-twentieth century writers sometimes grouped LGBT people under the term "sex variants"—a term introduced by psychiatrist George Henry to mean primarily persons he considered homosexuals, though he sometimes also included individuals who wished to change their sex, regardless of their sexual desires.[5] In 1941, Henry published *Sex Variants: A Study of Homosexual Patterns,* a book whose purpose Henry shorthanded as, simply, a

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[4] "Sex," *Oxford English Dictionary* (vol. IX 1961). Notably, the updated 2008 edition also includes the following usage, with examples extending through the mid-twentieth century: "1. a. Either of the two main categories (male and female) into which humans . . . are divided. b. In extended use, esp. as the third sex. A (notional) third division of humanity regarded as analogous to, or as falling between, the male and female sexes; *spec.* that consisting of: (a) eunuchs or transsexuals . . . (c) homosexual people collectively." *See Oxford English Dictionary* (3d ed. 2008).

[5] Henry L. Minton, *Departing from Deviance: A History of Homosexual Rights and Emancipatory Science in America* 58–64 (2002). We use homosexuality (and sometimes transsexuality) in this brief to reference language used at the time.

"study of *sex*."[6] By the 1950s, the term "sex variants" circulated beyond the medical profession, sometimes appearing in popular media to designate homosexual persons.[7] Some LGBT activists themselves adopted the phrase, as in the Mattachine Society's call in 1954 for further study of the law's impact on "the sex variant."[8]

The word "sex" thus covered a broad range of meaning in the mid-twentieth century—one that encompassed the behavior, practices, and identities of LGBT individuals.

B. At the Same Time, the Public Was Well Aware of LGBT Persons in American Society

By the time of Title VII's passage in 1964, much of the public was well aware of the presence of LGBT people among them.

1. From the time of World War II, when draft recruiters were instructed to screen out men exhibiting "homosexual tendencies," not only the military but the general public also recognized that some Americans departed from conventional sexual practice. Alfred Kinsey's publi-

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[6] George W. Henry, *Sex Variants: A Study of Homosexual Patterns* ix–x (1941) (emphasis added).

[7] *See, e.g.*, W.C. Alvarez, *Medical Consultant Gives Advice*, Tampa Times, Sept. 18, 1958, at 11; George E. Sokolsky, *These Days*, News-Palladium, Dec. 7, 1960, at 2.

[8] Minutes of Coordinating Council Meeting, The Mattachine Society 5 (Feb. 7, 1954) (on file with the GLBT Historical Society, San Francisco); *see also* Frank S. Caprio, *Variations in Sexual Behavior* (1955) (referring to homosexuality as a form of "sex variation").

cation in 1948 of his long-researched study, *Sexual Behavior in the Human Male,* had even more powerful popular impact. Kinsey astonished readers with his finding that 37 percent of American men had experienced orgasm with another man; his claim that sexual identity varied across a spectrum, with no bright line dividing heterosexuals from homosexuals; and his conclusion that there was no "normal" or "abnormal" in human sexual behavior.[9] Five years later, Kinsey's *Sexual Behavior in the Human Female* was similarly eye-opening and commented-upon.[10]

Contemporary political developments also kept homosexuality in the public eye. Beginning in the early 1950s, the federal government's campaign to purge suspected gay or lesbian employees, which led to more terminations than the contemporaneous purge of supposed Communists, alerted the public to sexual variation even at high levels of office. The virulence of the government's persecution sparked the formation of "homophile" organizations, the initial gay and transgender rights groups.[11]

In the early 1960s, in part because of homophile activism, newspapers, popular magazines, and other media embarked on deeper investigations into the diversity of LGBT lives in America. Jess Stearn's 1961 book *The*

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[9] Alfred C. Kinsey et al., *Sexual Behavior in the Human Male* (1948).

[10] Alfred C. Kinsey, *Sexual Behavior in the Human Female* (1953).

[11] David K. Johnson, *The Lavender Scare: The Cold War Persecution of Gays and Lesbians in The Federal Government* ch. 8 (2004).

Sixth Man—its title reflecting a misinterpretation of Kinsey's findings as suggesting that one in six American men was gay—became a bestseller, in part because of its sensationalism.[12] Other examples included a sympathetic 1963 profile of *New York's 'Middle-class' Homosexuals* in the genteel magazine *Harper's*; a front-page article in the *New York Times* about the visibility of homosexuals in Manhattan; and an extensive report on *Homosexuality in America* in *Life* magazine, the nation's highest-circulation weekly family magazine, shortly before Title VII's passage.[13] Early in 1967, CBS aired an hour-long documentary on the subject, containing numerous interviews with gay men and hosted by well-known reporter Mike Wallace.[14] Although most states still criminalized sodomy, the efflorescence of journalistic coverage was far less concerned with LGBT lives as a criminal matter than as a cultural phenomenon.

2. The public was also well aware of individuals whose sex at birth did not match their own sense of who they

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[12] Jess Stearn, *The Sixth Man: A Startling Investigation on the Spread of Homosexuality in America* (1961). Donald Webster Cory, *The Homosexual in America: A Subjective Approach* (1951) was an earlier serious study, and Cory later also wrote *The Lesbian in America* (1964).

[13] William J. Helmer, *New York's 'Middle-class' Homosexuals*, Harper's, March 1963, at 85–92; Robert C. Doty, *Growth of Overt Homosexuality In City Provokes Wide Concern*, N.Y. Times (Dec. 17, 1963), at A1; Paul Welch, *Homosexuality in America*, Life, June 26, 1964, at 66–74.

[14] *The Homosexuals*, CBS Reports (first aired Mar. 7, 1967).

were. In December 1952, the *New York Daily News* broke the story of former GI Christine Jorgensen's "sex change" surgery.[15] Media attention—including Jorgensen's own five-part autobiographical account, published in the nationally syndicated Sunday magazine *American Weekly* in 1953—continued for years.[16] Other individuals who had sought "sex change" soon began speaking publicly about their experiences. By 1966, when Harry Benjamin published his foundational book, *The Transsexual Phenomenon*, the idea of "sex change" was widespread and Jorgensen was a household name.[17]

In sum, by the time of Title VII's passage in 1964, the public's understanding of the concept of "sex" was far broader, and its awareness of LGBT persons far deeper, than some jurists have suggested.

II. IN ACCORD WITH THE PUBLIC'S CAPACIOUS UNDERSTANDING OF "SEX," TITLE VII'S PROTECTIONS AGAINST SEX DISCRIMINATION WERE UNDERSTOOD TO PROHIBIT EMPLOYERS FROM REQUIRING CONFORMITY TO SEX-ROLE EXPECTATIONS IN THE WORKPLACE

The public's broad definitions of sex in the 1960s, as encompassing both a person's identity as male or female and the characteristics and cultural practices associated

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[15] *Ex-GI Becomes Blonde Beauty*, N.Y. Daily News, Dec. 1, 1952.

[16] Christine Jorgensen, *The Story of My Life*, American Weekly, Feb. 15, 22, Mar. 1, 8 & 15, 1953; *see also* Joanne Meyerowitz, *How Sex Changed: A History of Transsexuality in the United States* 64–66 (1980).

[17] Harry Benjamin, *The Transsexual Phenomenon* (1966).

with being a man or woman, governed early understandings of Title VII's bar on sex-based discrimination. As a result, some observers were quick to recognize the potential impact of the law on employers' ability to require conformity to conventional sex stereotypes in the workplace.

1. The precise meaning of "sex discrimination" was not immediately evident in the aftermath of Title VII's passage, in part because that term was not a well-established legal concept in 1964. Resistance to the idea that sex discrimination was worthy of redress at all limited meaningful enforcement of Title VII immediately after its enactment.[18] From the beginning, however, the paradigmatic instances of discrimination "because of . . . sex" challenged in EEOC complaints and federal lawsuits centrally concerned the imposition of gender norms in the workplace. Core examples included classified ads grouping job listings under the headings "Male Help Wanted" and "Female Help Wanted"; employers holding female employees to conventional standards of female attractiveness, such as youth, low weight, and unmarried status; and companies excluding men or women from certain jobs altogether. Some observers, including some EEOC officials, immediately understood that these practices were unlawful under Title VII because they imposed sex-based stereotypes about the type of work men and women should do, or how men or (especially) women ought to look and behave.

Early press coverage spotlights how far Title VII's

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[18] Alice Kessler-Harris, *In Pursuit of Equity: Women, Men, and the Quest for Economic Citizenship in 20th-Century America* 246–66 (2001); John D. Skrentny, *The Minority Rights Revolution* 111–19 (2002).

prohibition on sex discrimination disrupted settled norms about masculinity and femininity. Fear and ridicule littered articles elaborating the potential consequences of Title VII's sex provision. Days before the Civil Rights Act took effect, a *Wall Street Journal* reporter imagined the parade of horribles that would result:

> A shapeless, knobby-kneed male "bunny" serving drinks to a group of stunned business men in a Playboy Club.
>
> A matronly vice president gleefully participating in an old office sport by chasing a male secretary around a big leather-topped desk.
>
> A black-jacketed truck driver skillfully maneuvering a giant rig into a dime-sized dock space—and then checking her lipstick in the rear-view mirror before hopping out.[19]

Businessmen balked at the idea of female pilots and locomotive engineers, or male "stewardesses."[20] Critical commentators jeered the so-called "bunny problem"—the specter of men being hired as Playboy bunnies.[21]

2. The prospect of women entering traditionally male

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[19] *Sex & Employment: New Hiring Law Seen Bringing More Jobs, Benefits for Women*, Wall St. J., June 22, 1965, at 1.

[20] *See, e.g.*, *ibid.*; Arelo Sederberg, *Civil Rights for Women Pose Business Headache*, L.A. Times, Oct. 6, 1964; John Herbers, *For Instance, Can She Pitch for the Mets?*, N.Y. Times, Aug. 20, 1965, at 1.

[21] *A New Worry, Bunnies*, St. Louis Post-Dispatch, Aug. 27, 1965, at 16.

jobs, and men seeking "women's work," sparked fears that outlawing sex discrimination would produce masculinized women and feminized men. As one businessman complained in 1965, "In our culture, a female is a target for a 'pass.' This she must recognize. However, many women have chosen to solve this problem by 'de-sexing' themselves," including by wearing "mannish clothes."[22] That August, the *New York Times* published a scathing editorial titled *De-Sexing the Job Market*, contending that perhaps "it would have been better if Congress had just abolished sex itself" and calling the prospect of enforcing Title VII's ban on sex discrimination "revolution, chaos."[23]

These fears reflected anxieties about Title VII's challenge to expectations about how women and men should dress, speak, and comport themselves in the workplace. But the EEOC clearly placed this challenge at the heart of Title VII. Even in the early period of sluggish attention to sex discrimination, Richard K. Berg, deputy general counsel of the EEOC, declared: "The Commission is going to put the burden on the employers. If they can't think of any reason not to [hire women for jobs traditionally held by men], they'd better do it."[24] Even the "bunny problem," Berg suggested, did not "obvious[ly]" merit an exception to Title VII's requirement.[25] Sure enough, the

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[22] *Are Women Executives People?*, Harv. Bus. Rev., July-Aug. 1965, at 172.

[23] *De-Sexing the Job Market*, N.Y. Times, Aug. 21, 1965, at 20.

[24] *The Burden of the Bunnies*, Det. Free Press, Aug. 23, 1965, at 6.

[25] *Ibid.*; *see also* Herbers, *Can She Pitch*, *supra* note 20.

EEOC's earliest guidelines, issued in 1965, included as a violation "[t]he refusal to hire an individual 'based on stereotyped characterizations of the sexes.'"[26]

3. By 1971, the EEOC and federal courts recognized that a core principle behind Title VII's ban on sex discrimination was to allow employees to depart from conventional masculinity and femininity without facing workplace exclusion or penalty. In *Phillips* v. *Martin-Marietta Corp.*, for example, this Court invalidated a company's exclusion of women with pre-school aged children from certain job categories, recognizing that an employer could not exclude a particular subset of women based upon a sex-based stereotype—that women with young children belong at home and are not reliable workers.[27] The EEOC and federal courts also decisively rejected em-

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[26] EEOC Guidelines on Discrimination Because of Sex, 30 Fed. Reg. 14926, 14927 (Dec. 2, 1965) (codified as amended 29 C.F.R. § 1604.2(a)(1)(ii)).

[27] *See, e.g.*, *Phillips* v. *Martin-Marietta Corp.*, 400 U.S. 542 (1971) (*per curiam*); *see also Diaz* v. *Pan Am. World Airways, Inc.*, 442 F. 2d 385 (5th Cir. 1971) (rejecting defense based on customer preferences grounded in sex stereotypes). This understanding of sex discrimination as prohibiting the imposition of stereotypes to the detriment of both men and women also pervaded early constitutional sex equality jurisprudence. *See* Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. Rev. 1 (2010); *see also Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975) (invalidating exclusion of fathers from federal "mother's insurance" benefits); *Stanton* v. *Stanton*, 421 U.S. 7 (1975) (invalidating a state statute requiring parents to support boys longer than girls).

ployers' push to interpret the bona fide occupational qualification exception as a license to exclude men from traditionally female jobs and vice versa.

This broad approach to Title VII's sex-discrimination ban meant that, from the provision's first years, comparative disadvantage for one sex was not a prerequisite for relief under Title VII. Complainants succeeded, for instance, when they challenged airlines for imposing sex-based age, weight, and marital status restrictions on stewardesses, or for excluding men from flight attendant positions altogether.[28] Because these hiring practices enforced conformity with conventional sex roles, the EEOC and the courts found them impermissible.

Notably, however, some employers were not simply concerned with ensuring that only women performed "women's work" and men "men's work." They also worried about the *type* of men who might apply for conventionally feminine positions. Pan Am, for instance, refused to employ male stewards not only because they lacked the sex appeal of young single women, but also out of a more inchoate fear: that men who performed such feminine work might be gay—or, at least, that their presence might lead passengers to believe they were.[29]

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[28] *See, e.g.*, *Diaz*, 442 F.2d 385.

[29] Phil Tiemeyer, *Plane Queer: Labor, Sexuality, and AIDS in the History of Male Flight Attendants* ch. 3 (2013).

III. AT A TIME WHEN THE PUBLIC COMMONLY ASSOCIATED LGBT PEOPLE WITH GENDER NONCONFORMITY, EARLY INTERPRETATIONS OF TITLE VII OFTEN MADE ROOM FOR LGBT INDIVIDUALS AS POTENTIAL CLAIMANTS

What made an airline like Pan Am associate a male flight attendant with homosexuality? It was the broader, and pervasive, cultural linkage between sexual variation and lack of conformity to traditional norms of masculinity and femininity—a linkage that raised immediate questions about Title VII's applicability to LGBT employees.

A. Public Understandings Linked Being Lesbian, Gay, Bisexual, and Transgender Together and Associated Them All with Gender Nonconformity

In the 1960s, gay and transgender people were often defined in the public imagination as much by their gender nonconforming demeanor and conduct as by their sexual practices. These beliefs were pervasive, and their impact was felt broadly in LGBT individuals' interactions with society.

1. The connection between homosexuality and gender nonconformity in the United States dated back at least to the late-nineteenth century. Medical accounts of same-sex attraction conflicted, but one widely-believed theory held that because men were conventionally attracted to women, a man who was attracted to another man could not be a true male, but instead must be female,

in mind and possibly in part in body.[30] Some researchers and popular writers explicitly identified homosexuals—a conceptual category that often included individuals who identified with another sex—as an "intermediate sex" or "third sex," blending elements of both male and female.[31] Although the idea of a third sex dissipated by the mid-twentieth century, the association between homosexuality, transgender status, and gender nonconformity lingered well into the 1960s. Indeed, the popular association of gay men with physical effeminacy was so pervasive that journalists covering gay culture in the mid-1960s almost invariably began by cautioning readers against that stereotype. As *Life* magazine warned in 1964, many people still (wrongly) believed that "all homosexuals have effeminate, 'swishy' manners and would like nothing better . . . than to dress like women, pluck their eyebrows and use lipstick."[32]

2. Such stereotypes were not simply the stock-in-trade of popular culture. They shaped the policing of gay and transgender life and had the force of law, upheld by

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[30] George Chauncey, *Gay New York: Gender, Urban Culture, and the Making of the Gay Male World, 1890–1940* 49 (1994)

[31] *Sexology Uncensored: The Documents of Sexual Science* 39–72 (Lucy Bland & Laura Down eds. 1998).

[32] Ernest Havemann, *Why?*, Life, June 26, 1964, at 77; *see also* Stearn, *Sixth Man*, *supra* note 12, at 39; Helmer, *'Middle-class' Homosexuals*, *supra* note 13, at 86; Jean M. White, *Homosexuals Are in All Kinds of Jobs, Find Place in Many Levels of Society*, Wash. Post, Feb. 2, 1965, at A1; Irving Bieber, *Speaking Frankly on a Once Taboo Subject*, N.Y. Times Mag., Aug. 23, 1964, at 75.

state courts and agencies. The enforcement of state liquor laws, one of the most sustained regulatory campaigns against gay and transgender life in the 1950s and 1960s, provides an illuminating example. Tasked with enforcing liquor regulations that prohibited bars and restaurants from serving homosexuals, investigators regularly pointed to patrons' violation of gender conventions (their *sex roles*) to identify them as homosexual, even when they observed no sexual conduct.[33]

In 1960, for example, a New York court upheld a ruling by the state's Liquor Authority that the owner of Brooklyn's Fulton Bar & Grill had permitted it to "be used as a gathering place for homosexuals"[34] because "the majority of patrons were . . . wearing tight fitting trousers" and "3 male patrons walk[ed] to the rear of the premises with a sway to their hips . . . ."[35] New Jersey liquor officials, too, identified patrons as homosexual or lesbian based largely on their gender nonconforming demeanor and behavior—identifying lesbian patrons, for instance, less through their overtly affectionate or erotic conduct than by their ostensibly gender-inappropriate behavior and appearance: wearing men's trousers, button-downs, and ties; failing to wear sufficient makeup or jewelry; or engaging in

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[33] Chauncey, *supra* note 30, at 344–46.

[34] *Fulton Bar & Grill, Inc.* v. *State Liquor Auth.*, 205 N.Y.S.2d 37, 38 (App. Div. 1960).

[35] Hearing Officer's Summary and Findings, *Fulton Bar & Grill, Inc.* v. *State Liquor Auth.*, Papers on Appeal, at 68 (N.Y. App. Div. Mar. 31, 1960).

indelicate acts like swearing or drinking beer straight from the bottle.[36] Often, officials explicitly conflated male homosexuality and gender inversion, using derogatory terms like "fag," "fairy," and "homosexual" interchangeably with "female impersonator" to refer to gay men or transgender people.[37] As late as 1964, one investigator defined a "homosexual" as, in key part, someone "who attempts to act opposite their sex."[38]

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[36] For grooming and clothing, *see, e.g.*, *In re Pine Brook Diner and Marge's Keyhole Cocktail Lounge*, N.J. Dep't of Law & Pub. Safety, Div. of Alcoholic Beverage Control, Bulletin 1406, item 2, at 3 (1961); *In re Helene's*, N.J. Dep't of Law & Pub. Safety, Div. of Alcoholic Beverage Control, Bulletin 1405, item 3, at 12 (1961); *In re King Bar & Liquor Store*, N.J. Dep't of Law & Pub. Safety, Div. of Alcoholic Beverage Control, Bulletin 1437, item 3, at 5–6 (1962); *In re Hollywood Café*, N.J. Dep't of Law & Pub. Safety, Div. of Alcoholic Beverage Control, Bulletin 1393, item 2, at 4 (1961). For conduct, *see, e.g.*, *In re Jack's Star Bar*, N.J. Dep't of Law & Pub. Safety, Div. of Alcoholic Beverage Control, Bulletin 1667, item 3, at 7–8 (1966); *In re Hollywood Café*, *supra* at 5; *In re Club Tequila*, N.J. Dep't of Law & Pub. Safety, Div. of Alcoholic Beverage Control, Bulletin 1557, item 1, at 2 (1964).

[37] *In re Log Cabin Inn*, N.J. Dep't of Law & Pub. Safety, Div. of Alcoholic Beverage Control, Bulletin 279, item 8, at 11 (1938); *McCracken* v. *Caldwell*, N.J. Dep't of Law & Pub. Safety, Div. of Alcoholic Beverage Control, Bulletin 456, item 3, at 3 (1941); *In re Jessie Lloyd*, N.J. Dep't of Law & Pub. Safety, Div. of Alcoholic Beverage Control, Bulletin 1045, item 7, at 11 (1955); Minutes, *Gloria Bar & Grill* v. *Bruckman*, Record on Review, at 144, 232 (N.Y. App. Div. Feb. 6, 1940); *In re Joy House*, N.J. Dep't of Law & Pub. Safety, Div. of Alcoholic Beverage Control, Bulletin 1473, item 1, at 1 (1962).

[38] *In re Wardell Hotel*, N.J. Dep't of Law & Pub. Safety, Div. of Alcoholic Beverage Control, Bulletin 1529, item 2, at 5 (1963). The

3. The association between LGBT people and gender nonconformity was salient in the professional world as well. Employer assumptions about occupational preferences built upon this linkage. Like Pan Am, many suspected that gender variant people were drawn to non-traditional jobs and, conversely, that *only* LGBT people might want jobs considered atypical for their sex.[39] For example, the Strong Interest Vocational Blank, the gold standard of mid-century vocational testing, asserted that men's interest in traditionally female jobs might indicate homosexuality.[40] The military likewise used occupational data to ferret out homosexuality among male recruits; soldiers in "effeminate" occupations were eyed with particular suspicion.[41] In detecting lesbianism among female officers, the military treated career ambition itself as a marker for homosexuality. "[R]apid advancement" of

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reason that investigators described homosexual patrons in such gendered terms was not necessarily because those patrons were unusually effeminate or masculine in presentation. It was because homoerotic affection itself was seen as intrinsically gender nonconforming. Describing a pair of male customers singing to each other affectionately, one official speculated that they "sang into each other's face . . . as a female would sing perhaps to a male." *In re Paddock Inn*, N.J. Dep't of Law & Pub. Safety, Div. of Alcoholic Beverage Control, Bulletin 1543, item 3, at 9 (1964).

[39] Allan Bérubé, *My Desire for History: Essays in Gay, Community, and Labor History* ch. 14 (2011).

[40] Edward K. Strong, Jr., *Vocational Interests of Men and Women* 240 (1943).

[41] Allan Bérubé, *Coming Out Under Fire: The History of Gay Men and Women in World War Two* 20 (1990).

women through the ranks, warned one 1952 Navy memo, was a tell-tale sign of lesbianism, as "female homosexuals" worked hard to "compensate for or to avoid suspicion of [their] sexual weakness."[42] Women working in construction and other trades, whether they were straight or gay, were also widely perceived to be lesbians and harassed on that basis.[43]

In sum, at the time of Title VII's enactment, an individual's LGBT status and departure from traditional sex roles were inextricably intertwined in the public consciousness.

B. When Title VII Took Effect, Some Claimants and EEOC Officials Assumed that the Bar on Sex Discrimination Could Cover LGBT Employees

Because LGBT individuals were linked so closely with gender nonconformity, and because Title VII was seen to challenge conventional gender expectations on the job, early interpretations of Title VII sometimes brought both sexual orientation and transgender status directly within the provision's ambit.

1. As soon as Title VII was enacted, some LGBT people saw themselves in its provision banning discrimination

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[42] Margot Canaday, *The Straight State: Sexuality and Citizenship in Twentieth-Century America* 210 (2009) (internal quotation marks omitted).

[43] Men in the trades "baited their female workmates by calling them 'dykes.'" Nancy MacLean, *Freedom is Not Enough: The Opening of the American Workplace* 280 (2006).

because of sex. Accordingly, LGBT individuals soon began requesting assistance from the EEOC. That LGBT claimants brought such matters to a government agency at all is significant. Most gay and transgender people in these years did not seek legal redress for mistreatment, because they expected from the law not protection, but rather exposure and punishment. The purge of gays and lesbians from the federal civil service had only recently ended.[44] LGBT people were routinely harassed by police and rarely had any legal recourse.[45] "Lawyers who have represented homosexuals have told us that most homosexuals . . . will not fight their cases through the courts," the Council on Religion and the Homosexual reported in 1965.[46] That some LGBT people nevertheless sought redress from the EEOC underscores how powerfully the word "sex," and the bar on discrimination because of sex, communicated to them the possibility of protection.

2. Mirroring the agency's initial ambivalence about the sex discrimination provision generally, the EEOC's response to these early claims was uneven. In February 1966, some gay and lesbian individuals who experienced adverse employment actions reported that they were

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[44] *See generally* Johnson, *supra* note 11.

[45] Timothy Stewart-Winter, *Queer Clout: Chicago and the Rise of Gay Politics* 16–25, 41–57, 68–89 (2016).

[46] *The Council on Religion and the Homosexual: A Brief of Injustices*, ONE Inst. Q. of Homophile Stud. & ONE Mag., Oct. 1965, at 8.

"benefited" by contacting the EEOC.[47] By contrast, a cursory opinion by the EEOC's general counsel in 1966 stated that "[a]n employer does not commit an unlawful employment practice by failing to hire or by discharging an individual because the individual is a homosexual."[48] Crucially, however, the general counsel's opinion applied to the addressee only and was not considered binding for the agency as a whole.[49]

As the EEOC began to enforce the sex discrimination prohibition in earnest in the late 1960s, it also grew more receptive to LGBT individuals' discrimination claims.[50] In 1971, for example, the homophile activist Del Martin wrote to colleagues about her meeting with Stanley Haber, then EEOC general counsel. Martin reported Haber's clarification that the 1966 general counsel's letter "could not be construed as policy," and that "in effect there has been no decision as to whether Title VII's prohibition against sex discrimination does or does not apply to homosexuals."[51]

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[47] *Tangents: News and Views*, ONE Mag., Feb. 1966, at 25.

[48] EEOC Op. Gen. Couns. M108-66 (Feb. 2, 1966), Digest of EEOC Legal Interpretations: Part II, LRX 1892d.

[49] EEOC Interpretations and Opinions of the Commission, 35 Fed. Reg. 18692 (Dec. 6, 1970).

[50] Kessler-Harris, *supra* note 18, at 267; Skrentny, *supra* note 18, at 115–19.

[51] Letter from Del Martin to Council on Religion & the Homosexual (May 20, 1971) (on file with the GLBT Historical Society, San Francisco).

The EEOC did not discourage these gay rights pioneers but rather invited them to file claims with the agency. Martin wrote:

> The EEOC office took our names and addresses and said they would send us documents on policy and procedure. We were told we had at least two options: (1) to gather as much specific data as possible on job discrimination as it pertains to homosexuals and present our case directly to the commissioners for a determination, or (2) have individuals file complaints with their local offices.[52]

Some individuals followed the general counsel's advice. In 1972, for example, one man sent simultaneous queries to two regional EEOC offices asking whether Title VII covered "homosexuality." He received responses within three days of each other. One office declared that Title VII prohibited discrimination in employment based on sex, "therefore covering homosexual."[53] The second office contradicted the first, saying that homosexuality was "not within the generic classification specified in the law," and noting that there were "no Commission guidelines" specifying its inclusion.[54] The official cited what he called

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[52] *Ibid.*

[53] Letter from Miriam Mimms, EEOC to Joel Starkey (Oct. 28, 1972) (on file with Frank Kameny Papers, Library of Congress).

[54] Letter from Jose Lopez, EEOC to Joel Starkey (Oct. 25, 1972) (on file with Frank Kameny Papers, Library of Congress).

the "legislative history" of Title VII, suggesting that "sex refers to gender male/female," while homosexuality "is sexual activity."[55] In addition to contradicting the first, this second letter is striking for its resort to (an invented) legislative history rather than any available agency guidance. Evidently, the EEOC had still not established an official position, allowing some offices to see "homosexuality" as covered by the statute.

Some officials in the EEOC's national office, too, saw discrimination because of "sex" as encompassing diverse sexual meanings. Sonia Pressman Fuentes of the General Counsel's Office endorsed broad coverage at a 1971 seminar on Title VII, as reported in an activists' newsletter. Fuentes declared that the EEOC "interprets sex to mean both sexual identity and sexual orientation."[56] She added that "if a case of discrimination involving homosexuality were to come before the Commission which had gone through the proper channels and which was found to be valid, the Commission would definitely prosecute the discriminator."[57] The newsletter reported no disagreement with Fuentes's interpretation from her fellow panelists, the director of the U.S. Commission on Civil Rights and the head of Cleveland's regional EEOC office.[58]

Additional corroboration of the EEOC's sympathy toward LGBT complainants came some years later, when

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[55] *Ibid.*

[56] *Unexpected Support*, Homophile Action League Newsl. (Homophile Action League, Phila., Pa.), Jan. 26, 1971, at 2–3.

[57] *Ibid.*

[58] *Ibid.*

Frank Kameny, a gay rights pioneer and the liaison between D.C.'s homophile activists and the EEOC, reported that the General Counsel's Office still viewed discrimination against homosexual employees as within the agency's ambit. Writing to the attorneys representing an EEOC clerk fired for homosexuality by the Civil Service Commission, Kameny reported that the General Counsel's Office was "embarrassed" by the man's firing, seeing it as "a violation by the government of everything that the EEOC is trying to accomplish and for which it stands."[59]

3. The EEOC appeared to extend Title VII protection to transgender people as well. The Erickson Educational Foundation, an early advocacy organization for transsexuals, reported on cases from California and Georgia in which transgender people received guidance from the EEOC. In a 1971 pamphlet on *Legal Aspects of Transsexualism and Information on Administrative Procedures*, the Foundation provided advice on how to file complaints and assured readers that Title VII applied "to transsexuals who are seeking employment and to those whose employment is terminated following sex reassignment surgery, where the individual's work was previously

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[59] Letter from Frank Kameny to Arnold Pedowitz & Ronald Kessler (Aug. 29, 1974) (on file with Frank Kameny Papers, Library of Congress). Del Martin noted that Kameny "has been established" as the community's liaison to the EEOC. Letter from Martin to Council, *supra* note 51, at 3.

considered satisfactory."[60] A 1971 article in the *Cornell Law Review* confirmed that "[a] Georgia transsexual allegedly encountered job discrimination after reassignment surgery" and that the EEOC had "offered its assistance if the problem should arise again."[61]

Additional evidence that transgender persons brought complaints to the EEOC and, at least occasionally, received responses appears in a 1972 "Final Decision Cover Sheet" located in EEOC records at the National Archives. These records are one-page summaries that provide basic case information, including the names of the complainant and employer, the date of the decision, and the agency's finding (cause/no cause), as well as a brief notation of the type of adverse employment action involved. In one revealing case, the Commissioners rendered their final decision as:

"No Cause/sex (transsexual) – discharge."[62]

Here, the EEOC investigated a complaint by a transgender person who complained that their discharge

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[60] *Legal Aspects of Transsexualism and Information on Administrative Procedures*, Erickson Educational Foundation, rev. ed. July 1971, at 11.

[61] Comment, *Transsexualism, Sex Reassignment Surgery, and the Law*, 56 Cornell L. Rev. 963, 1003 n.265 (1971). Based on both this article and the Erickson Foundation document, *supra* note 60, it appears the Georgia complainant missed the filing deadline for a formal complaint, but at least one California case proceeded to litigation.

[62] *E.B.* v. *Twin City Milk Prods. Ass'n*, No. 72-1394 (EEOC Mar. 8, 1972) (on file with National Archives, College Park, Md.).

violated Title VII's sex discrimination prohibition. The agency's finding of "no cause" nonetheless suggests that the EEOC treated transgender status as within the law's purview. Significantly, the "no cause" decision is distinguishable from the "non-jurisdiction" decisions that appear in the contemporaneous files for complaints that were not filed within the statutory deadlines, that involved employers not covered by the law, or that were otherwise beyond the EEOC's legal authority. Instead, it is similar to other "no cause" sheets in the same file—for classifications undoubtedly covered by federal law—that read:

> "NO CAUSE/race (Negro)"[63]
>
> "No Cause/Sex (Female)"[64]

Moreover, the way the finding is written—"No Cause/sex (transsexual)"—suggests that at this moment "transsexuality" was treated by the EEOC as directly in the province of discrimination claims based on "sex."

IV. NOT UNTIL 1975, IN THE CONTEXT OF GROWING OPPOSITION TO THE GAY RIGHTS MOVEMENT AND TO WOMEN'S EQUAL RIGHTS, DID THE EEOC MOVE TO EXCLUDE POTENTIAL LGBT CLAIMANTS FROM PROTECTION UNDER TITLE VII

As LGBT Americans became increasingly visible and vocal in the early 1970s, both advocates and opponents of anti-discrimination legislation commonly linked LGBT

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[63] *V.L.* v. *Safeway Stores*, No. 72-1395 (EEOC Mar. 17, 1972) (on file with National Archives, College Park, Md.).

[64] *E.H.* v. *Nat'l Biscuit Co.*, No. 72-1447 (EEOC Mar. 23, 1972) (on file with National Archives, College Park, Md.).

rights and the women's rights movement. This linkage, alongside the growing anti-gay and anti-women's rights activism that emerged over the course of the 1970s, provided a key backdrop both for the EEOC's decision to narrow Title VII's sex discrimination provision in 1975 and for the federal courts' eventual determinations that discrimination on the basis of sexual orientation or transgender status fell outside the scope of Title VII.

A. A Newly Vocal Gay and Transgender Rights Movement in the Early 1970s Often Linked Gay and Transgender Rights with Equal Rights for Women

Although LGBT individuals were far from invisible when Congress passed the 1964 Civil Rights Act, by the early 1970s gay and transgender life had exploded into the public square. The Stonewall Riots, in which gay and transgender patrons fought back against police harassment in a New York City bar, occurred the same year as a D.C. Circuit decision protecting certain gay civil servants from being fired for conduct unrelated to job performance.[65] The following years saw not only the repeal of sodomy statutes across the country, but also burgeoning attention to LGBT issues in politics and everyday life.[66] The early 1970s ushered in the first gay pride parades; the expansion of organizations to support and serve transgender people; campaigns for local gay rights ordinances, including some modeled after the Civil Rights Act

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[65] *Norton* v. *Macy*, 417 F.2d 1161 (D.C. Cir. 1969).

[66] William N. Eskridge, Jr., *Dishonorable Passions: Sodomy Laws in America, 1861–2003* (2008).

of 1964; the organization of professional caucuses of gay librarians, social workers, academics, and many others; and the growth of openly gay businesses and neighborhoods in American cities. Meanwhile, personal "coming out" conversations among friends and family members brought LGBT issues close to home for Americans across the country.[67]

As political movements for gay rights and liberation sprang up alongside movements for women's rights, their common effort to challenge conventional sex roles became increasingly plain. As one author wrote in 1971, "Gay liberation is a struggle against sexism."[68] Another proclaimed that a "'real man' and 'real woman' are not so by their chromosomes and genitals, but by their respective degrees of 'masculinity' and 'femininity,' and by how closely they follow the sex-role script in their relationships with individuals and society."[69] A Chicago gay liberation group called for "the abolition of sex-role stereotypes."[70] Another essayist contended that "[t]he oppression of women and that of gay people are interdependent

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[67] *See* John D'Emilio & Estelle B. Freedman, *Intimate Matters: A History of Sexuality in America* ch. 13 (3d ed. 2012).

[68] Allen Young, *Out of The Closets, Into The Streets*, in *Out of the Closets: Voices of Gay Liberation* 7 (Karla Jay & Allen Young eds., 1972).

[69] *Gay Revolution and Sex Roles*, in Jay & Young, *id.* at 252.

[70] Chicago Gay Liberation, *Working Paper for the Revolutionary People's Constitutional Convention*, in Jay & Young, *id.* at 346.

and spring from the same roots," though they "take different forms."[71] Lesbian and bisexual women activists identified the connections between female and gay liberation with particular poignancy, connecting "male supremacy" with "rigid sex roles" and "enforced . . . heterosexuality."[72] Thus, by the early 1970s, the essential similarities in how sex role stereotypes operated to limit the lives of heterosexual and LGBT women and men had burst into the open.

B. Opponents of Equal Rights for Women Also Closely Linked Women's Rights with Legal Advances for LGBT People

1. Opponents of equal rights, too, appreciated how a shared struggle against enforced conformity to "sex roles" connected equal rights for women and for LGBT people. The debate over the Equal Rights Amendment (ERA), which occurred contemporaneously with the 1972 amendment of Title VII, illustrates this connection. The ERA's proposed language provided that neither states nor the federal government could abridge or deny "equality under the law . . . on account of sex."[73] That language set off alarm bells among skeptics such as Senator Sam Ervin, who immediately identified the capaciousness of

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[71] *Gay Revolution and Sex Roles*, *supra* note 69, at 254–55.

[72] Radicalesbians, *The Woman-Identified Woman*, in Jay & Young, *supra* note 68, at 172; Kate Millet, *Sexual Politics: A Manifesto for Revolution*, in *Radical Feminism* 367 (Anne Koedt, Ellen Levine & Anita Rapone eds., 1973).

[73] H.J. Res. 208, 86 Stat. 1523, 92d Cong. (1972).

the word "sex" within anti-discrimination law as the ERA's key liability. Ervin protested in 1970 that the problem with an amendment designed to stop sex discrimination on the basis of sex was that "*the word sex is imprecise in its exact meaning*."[74]

Ervin was not wrong. As with Title VII, the ERA's proposed bar on sex discrimination inspired bold visions of what that legal change might mean. "Legal distinction on the basis of sex is no longer reasonable," remarked one lawyer to the American Bar Association about the ERA in 1970, "[a]nd I am willing to apply that view to any and all sets of circumstances the mind may conceive."[75] She elaborated that "[even] the right to marry . . . cannot be premised on sex distinctions which serve to deny equal protection of the law to all persons."[76]

2. That the logic of the ERA's sex discrimination prohibition implied the abolition of all sex-based legal distinctions, including laws penalizing LGBT individuals, alarmed opponents. Ervin invoked the congressional testimony of the eminent constitutional scholar and Harvard Law Professor Paul Freund, who told Congress that "if the law must be as undiscriminating concerning sex as it is toward race, it would follow that the laws outlawing wedlock between members of the same sex would be as

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[74] Peggy Pascoe, *Sex, Gender, and Same-Sex Marriage,* in *Is Academic Feminism Dead? Theory in Practice* 46 (Social Justice Group ed. 2000) (citation omitted) (emphasis added).

[75] *Id.* at 89–90 (citation omitted).

[76] *Id.* at 90 (citation omitted).

invalid as laws forbidding miscegenation."[77] Leading ERA sponsor Senator Birch Bayh attempted to neutralize such an interpretation by specifying that sex nondiscrimination meant only that the marriage of two men must be treated the same as the marriage of two women.[78] These assurances did not satisfy Ervin. Citing Freund's testimony, Ervin introduced an amendment to the ERA specifically excluding from coverage "any law prohibiting sexual activity between persons of the same sex or the marriage of persons of the same sex."[79] The Senate defeated the Ervin amendment, and the ERA passed the Senate 84-8 on March 22, 1972.[80]

Two days later, the Equal Employment Opportunity Act of 1972, which amended Title VII, became law.[81] Embracing the position of leading women's rights organizations—and, by the early 1970s, the EEOC itself—that sex discrimination deserved significant attention and enforcement resources,[82] Congress clarified that sex discrimination was "no less serious than other prohibited forms of

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[77] *Equal Rights 1970: Hearings on S.J. Res. 61 and S.J. Res. 231 Before the S. Comm. on the Judiciary*, 91st Cong. 74–75 (1970).

[78] 118 Cong. Rec. 9331 (1972).

[79] 118 Cong. Rec. 9314 (1972).

[80] Eileen Shanahan, *Equal Rights Amendment is Approved by Congress*, N.Y. Times, Mar. 22, 1972, at 1.

[81] Pub. L. No. 92-261, 86 Stat. 103.

[82] Serena Mayeri, *Reasoning from Race: Feminism, Law, and the Civil Rights Revolution* 55–56 (2011).

discrimination" and should be "accorded the same degree of social concern" as discrimination based on race and other characteristics.[83] It also expanded the EEOC's jurisdiction to cover more private employers and to reach educational institutions and government employers.[84] But Congress took no steps to clarify the status of LGBT individuals under Title VII.

C. In the Context of Rising Anti-Gay and Anti-Sex Equality Lobbying, the EEOC in 1975 Decided that Title VII's Sex Discrimination Provision Did Not Protect LGBT Complainants

1. The greater visibility of LGBT life and of movements for women's and gay liberation during the early 1970s, so full of possibility for many, was also double-edged: It produced an immediate backlash, including in employment. The increased "visibility of the homosexual," observed a professor of business administration in 1971, "probably makes it more difficult for him to earn a living at the present time."[85]

The hostility inspired in some circles by the LGBT community's social and legal gains would resound throughout the 1970s. Its early reverberations included Phyllis Schlafly's STOP ERA campaign, commenced in

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[83] S. Rep. No. 92-415, 92d Cong., 1st Sess. 7 (1971); H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 4–5 (1972).

[84] § 2, 86 Stat. 103 (42 U.S.C. § 2000e); § 11, 86 Stat. 111 (42 U.S.C. § 2000e-16).

[85] Irving Kovarksy, *Fair Employment for the Homosexual*, 1971 Wash. U. L. Q. 527, 531 (1971).

1972, which popularized the idea that the ERA would mandate unisex restrooms, legalize same-sex marriage, and draft women into the military—with all of the connotations of lesbianism that those prospects conjured.[86] Some proponents of women's rights soon tried to disavow any linkage to LGBT rights, fearing that Schlafly's arguments would—as they eventually did—prevent the ERA's ratification.[87]

Subsequent reverberations would also take aim more directly at the gains of LGBT activists, including successes in repealing criminal laws and challenging LGBT employees' exclusion from the civil service. A loose coalition of anti-LGBT activists soon emerged, epitomized in Anita Bryant's 1977 "Save Our Children" campaign, which fought to repeal an antidiscrimination ordinance in Florida, and a California initiative that urged the termination of teachers who were gay or who condoned homosexuality.[88]

2. In that context of growing anti-gay and anti-women's rights activism, the EEOC backtracked from its more generous earlier treatment of LGBT claimants. In

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[86] For the historic association between women's military service and lesbianism, *see* Canaday, *supra* note 42, ch. 5. For the linkage between the ERA and the drafting of women into the armed forces, *see* Thomas I. Emerson et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 Yale L.J. 80 (1971).

[87] Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 Cal. L. Rev. 1323, 1393–94 (2006).

[88] D'Emilio & Freedman, *supra* note 67, at 346–47.

1975, for the first time, the EEOC issued two "non-jurisdiction" opinions declaring that homosexuality was outside of Title VII's purview.[89] "Non-jurisdiction" statements pertaining to homosexuality also began to appear in the agency's "Final Decision Cover Sheets."[90]

Even so, some EEOC offices still treated homosexuality as coming under Title VII's purview. In 1975, for example, the newsletter of an Austin lesbian organization reported on EEOC complaints filed by two Texas lesbians, one of which had gone into conciliation phase.[91] Why did the local office proceed to conciliate the case even as the agency's national office moved to exclude LGBT people from Title VII's coverage? One might surmise that the association between legal protections against sex-stereotyping and legal rights for LGBT employees remained sufficiently intuitive to some officials to justify handling these cases under Title VII's protective framework.

3. Courts also began, in 1975, to take an anti-cover-

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[89] EEOC Dec. No 76-67, 1975 WL 4475 (Nov. 21, 1975); EEOC Dec. No. 76-75, 19 Fair Empl. Prac. Cas. (BNA) 1823, 1975 WL 342769 (Dec. 4, 1975).

[90] Cover Sheets for Final Decisions (Boxes 1-5), EEOC Records, RG 403, National Archives, College Park, Md. (These are all the extant records for this period.)

[91] *Discrimination in Employment*, Goodbye to All That (Austin Lesbian Org., Austin, Tx.), vol. 1., no. 7, Aug. 1975, at 3; *EEOC Complaints*, Goodbye to All That (Austin Lesbian Org., Austin, Tx.), vol. 1, no. 11, Dec. 1975, at 7; *see also* Susan Roberts, *Mexican-American Lesbian Complains*, Hera, Summer 1975, at 33.

age position premised on speculations about Congressional intent with regard to the scope of Title VII—an intent that Congress itself never articulated.[92] This position became the so-called "common sense" interpretation that some courts have ascribed to Title VII, and one on which those wishing to deny Title VII protection to LGBT people heavily rely.[93] That "common sense" interpretation was, however, an "invented tradition"—one that did not develop until the mid-1970s, and that masked far more multifarious approaches to Title VII on the ground in the decade prior.[94] In those first, formative years following Title VII's enactment, more historical evidence suggests that Title VII included LGBT people in its prohibition on sex discrimination than that it did not.

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A close examination of the historical record reveals that, in the first decade following Title VII's passage, prevailing understandings of the bar on "discrimination because of . . . sex" and of its potential application to LGBT individuals preclude the claim that Title VII could not

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[92] *See, e.g.*, *Smith* v. *Liberty Mut. Ins.*, 395 F. Supp. 1098 (N.D. Ga. 1975), *aff'd*, 569 F.2d 325 (5th Cir. 1978); *Voyles* v. *Ralph K. Davies Medical Ctr.*, 403 F. Supp. 456 (N.D. Cal. 1975).

[93] Troublingly, this is sometimes true even where courts have concluded that Title VII's bar on sex discrimination should be understood to cover claims based on individuals' LGBT status. *See, e.g., Hively* v. *Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 353 (7th Cir. 2017) (en banc) (Posner, J., concurring).

[94] Cary Franklin, *Inventing the 'Traditional Concept' of Sex Discrimination*, 125 Harv. L. Rev. 1307 (2012).

have encompassed discrimination against LGBT employees. Legal arguments that rely on a contrary understanding of this history should, accordingly, be rejected.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgments of the Second and Sixth Circuits and reverse the judgment of the Eleventh Circuit.

Respectfully submitted.

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APPENDIX

APPENDIX: LIST OF AMICI CURIAE

Margot Canaday is Associate Professor of History at Princeton University. She is a legal and political historian who studies gender and sexuality in modern America. Her first book, *The Straight State: Sexuality and Citizenship in Twentieth Century America* (2009), won seven prizes, including the Association of American Law Schools' Order of the Coif Biennial Book Award, the American Society for Legal History's Cromwell Book Prize, the Organization of American Historians' Ellis Hawley Prize, the American Political Science Association's Gladys M. Kammerer Award, the American Studies Association's Lora Romero Prize, the Committee on LGBT History's John Boswell Prize, and the Lambda Literary Award for LGBT Studies. Canaday has won fellowships from the Social Science Research Council, the Princeton University Society of Fellows, the Radcliffe Institute for Advanced Study, the National Endowment for the Humanities, and the American Council of Learned Societies. She is currently completing a book on the history of LGBT people and employment in modern America.

George Chauncey is the DeWitt Clinton Professor of History at Columbia University. He previously taught at the University of Chicago and at Yale University, where he served as chair of the History Department and co-director of the Yale Research Initiative on the History of Sexualities. He is the author of *Gay New York: Gender, Urban Culture, and the Making of the Gay Male World, 1890-1940* (1994), which won the Merle Curti Award for the best book in American social history and the Frederick Jackson Turner Award for the best first book in any

field of American history from the Organization of American Historians. He is also the author of *Why Marriage? The History Shaping Today's Debate over Gay Equality* (2004) and the co-editor of *Hidden from History: Reclaiming the Gay and Lesbian Past* (1989), *Gender Histories and Heresies* (1992), and *Thinking Sexuality Transnationally* (1999).

Nancy F. Cott is the Jonathan Trumbull Research Professor of American History at Harvard University, where she has taught since 2002. Between 2002 and 2014 she was simultaneously the Pforzheimer Family Director of the Schlesinger Library on the History of Women in America at the Radcliffe Institute for Advanced Study. Her scholarly work centers on the history of women, gender, sexuality, citizenship, feminism, family, and marriage. She began her career as Assistant Professor of History and American Studies at Yale University and departed there in 2001 as Sterling Professor. She was elected a member of the American Academy of Arts and Sciences in 2008, and as president of the Organization of American Historians in 2016–17. She has held fellowships from the Guggenheim Foundation, the Center for Advanced Study in the Behavioral Sciences, Harvard Law School, and the National Humanities Center, among others. Her books include *The Bonds of Womanhood: 'Woman's Sphere' in New England, 1780–1835* (1977), *The Grounding of Modern Feminism* (1987), and *Public Vows: A History of Marriage and The Nation* (2000), among others, and her articles and reviews have appeared in many journals, including the *American Historical Review*, *Journal of American History*, *Journal of Social History*, *Yale Review*, *American Quarterly*, *Boston Review*, and the *New York Review of Books*. She has been invited to lecture around the nation and the world,

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