Nos. 17-1618 & 17-1623

IN THE
Supreme Court of the United States

GERALD LYNN BOSTOCK,
Petitioner,
v.
CLAYTON COUNTY, GEORGIA,
Respondent.

ALTITUDE EXPRESS, INC., AND RAY MAYNARD,
Petitioners,
v.
MELISSA ZARDA AND WILLIAM MOORE, JR.,
CO-INDEPENDENT EXECUTORS OF THE ESTATE OF
DONALD ZARDA,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second & Eleventh Circuits

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR MORAL LAW IN SUPPORT OF EMPLOYERS

JOHN A. EIDSMOE
FOUNDATION FOR MORAL LAW
One Dexter Avenue
Montgomery, AL 36104
(334) 262-1245
eidsmoeja@juno.com

Counsel for *Amicus Curiae*

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STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Foundation for Moral Law ("the Foundation") is a national public-interest organization based in Montgomery, Alabama, dedicated to the strict interpretation of the Constitution and laws of the United States as written and as intended by their framers. The Foundation has a special interest in this case because we believe Petitioner Bostock and Respondent Zarda are trying to give the term "sex" in the Civil Rights Act of 1964 an interpretation that is contrary to the plain meaning of the word and the understanding of those who drafted the Act.

SUMMARY OF ARGUMENT

The basic issue in this case is whether the term "sex" in the Title VII of the Civil Rights Act of 1964 can be stretched to mean something the framers never intended, never envisioned, and would have considered repulsive and horrifying. In 1964, homosexual conduct was a crime in all fifty states. It was widely considered to be immoral, unnatural, and a danger to national security. The idea that the Framers of the Civil Rights Act of 1964 intended that

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[1] Pursuant to Rule 37.3, *Amicus* has notified all parties of intent to submit this Brief and has requested consent from all parties. All parties have consented. Pursuant to Rule 37.6, no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amicus curiae,* its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

the term "sex" should be defined in a way that their respective states and constituents would have considered abhorrent, is absurd.

The question, then, is whether, half a century later, we can twist the words of the 1964 Act to mean something its framers would have considered abhorrent. This is not just giving statutory language an "expanded interpretation;" it is turning the word "sex" on its head.

If judges have the power to do this, their powers are limited only by their own imaginations. And if legislators must always fear that, when they vote for a statute, sometime in the future a judge will give it a bizarre and unanticipated interpretation, lawmakers will be hesitant to adopt any statutes at all.

ARGUMENT

I. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, should be interpreted and applied as written in accordance with the intent of its Framers.

The rule of strict construction applies to our Constitution, and it applies even more to statutes.

A. The Constitution

The Framers created an enduring document that would set the tone for law and government for ages to come. As they said in the Preamble, one of their purposes in framing the Constitution was to "secure the Blessings of Liberty to ourselves and our Posterity."

George Washington, who served as President of the Constitutional Convention and as President while the Bill of Rights was adopted and ratified, warned in his Farewell Address (1796):

> If, in the opinion of the people, the distribution or modification of the Constitutional powers be at any particular wrong, let it be corrected by an amendment in the way the Constitution designates. But let there be no change by usurpation: though this may in one instance be the instrument of good, it is the customary weapon by which free governments are destroyed.[2]

James Madison wrote:

> [If] the sense in which the Constitution was accepted and ratified by the Nation ... be not the guide in expounding it, there can be no security for a faithful exercise of its powers.[3]

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[2] George Washington, *American Historical Documents* (New York: Barnes and Noble, Inc., 1960), p. 144.

[3] James Madison, *The Writings of James Madison,* ed. G. Hunt (1899-1910), p. 191.

Thomas Jefferson echoed the same theme:

> The Constitution on which our Union rests, shall be administered by me according to the safe and honest meaning contemplated by the people of the United States, at the time of its adoption.[4]

On another occasion he wrote:

> On every question of construction, [let us] carry ourselves back to the time when the Constitution was adopted recollect the spirit manifested in the debates, and instead of trying what meaning may be squeezed out of the text, or invented against it, confirm to the probable one in which it was passed.[5]

That has been the view of this Court as well. Justice Brewer, writing for the Court in *South Carolina v. United States,* 199 U.S. 437, 448 (1905), stated,

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[4] Thomas Jefferson, quoted in *Thomas Jefferson* (Salt Lake City, Utah: National Center for Constitution Studies, American Classic Series, 1983) p. 382.

[5] Thomas Jefferson, *id.*, at 382.

> The Constitution is a written instrument, and, as such, its meaning does not alter.

And this is even more true of statutes.

B. Statutes

If the Constitution is to be interpreted strictly as written according to the intent of its Framers, that principle applies *a fortiori* to statutes. The provisions of the Constitution tend to be broad, state general principles, apply for a long period of time, and are difficult to amend. By contrast, statutes are more narrow, address more specific situations, are less permanent, and are easier to amend. If a legislature does not like what a law says, it can easily amend that law. Accordingly, the reasons for interpreting the Constitution strictly according to its Framers' intent apply even more strongly to statutes.

Sir William Blackstone summarized the principles of statutory interpretation:

> The fairest and most rational method to interpret the will of the legislator is by exploring his intentions at the time when the law was made, by *signs* the most natural and probable. And these signs are either the words, the context, the subject matter, the effects and consequence, or the spirit and reason of the law. Let us take a short view of them all.

1. Words are generally to be understood in their usual and most known signification; not so much regarding the propriety of grammar, as their general and popular use. ...

2. If words happen to be still dubious, we may establish their meaning from the *context,* with which it may be of singular use to compare a word, or a sentence, whenever they are ambiguous, equivocal, or intricate. Thus the proeme, or preamble, is often called in to help the construction of an act of parliament. Of the same nature and use is the comparison of a law with other laws, that are made by the same legislator, that have some affinity with the subject, or that expressly relate to the same point. Thus, when the law of England declares murder to be felony without benefit of clergy, we must resort to the same law of England to learn what the benefit of clergy is; and, when the common law censures simoniacal contracts, it affords great light to the subject to consider what the canon law has adjudged to be simony.

3. As to the *subject matter,* words are always to be understood as having a regard thereto, for that is always supposed to be in the eye of the

> legislator, and all his expressions directed to that end. ...
>
> 4. As to the *effects* and *consequence,* the rule is, that where words bear either none, or a very absurd signification, if literally understood, we must a little deviate from the received sense of them. Therefore the Bolognian law, mentioned by Puffendorf, which enacted "that whoever drew blood in the streets should be punished with the utmost severity," was held after long debate not to extend to the surgeon who opened the vein of a person that fell down in the street with a fit.
>
> 5. But, lastly, the most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the *reason* and *spirit* of it; or the cause which moved the legislator to enact it....[6]

In a similar manner, the Colorado General Assembly Office of Legislative Legal Services summarized the general rules of statutory construction:

> **Plain Language**

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[6] Sir William Blackstone, *Commentaries on the Laws of England,* I:2 (Philadelphia: J.B. Lippincot Co., 1893), 59-61 (emphasis original).

The court is bound to apply the **plain language of a statute** to accomplish the intent of the General Assembly. If the language is clear and unambiguous, the court will not look to rules of construction or to legislative history; it will simply apply the language. But, if applying the plain language leads to an absurd result or a result that is contrary to the obvious intent of the General Assembly, or if the language is ambiguous, then the court will apply rules of statutory interpretation to construe the statute.

Legislative History

If a statute is ambiguous, the **court will consider the legislative history of the statute** to try to discern the legislature's intent in enacting the statute. Legislative history may include the bill file, if released by the bill sponsor, and the recorded debates and comments concerning the bill that were made in committee hearings and on second and third reading.

Constitutional Presumption

Statutes are presumed to be constitutional. If a statute can be

interpreted two ways — one of which is constitutional and the other unconstitutional — the court will choose the constitutional interpretation. The party in a lawsuit that is claiming that a law is unconstitutional has the burden of proving unconstitutionality beyond a reasonable doubt.

Contextual Reading

Statutes are to be read as a whole, in context, and, if possible, the court is to give effect to every word of the statute. The court is bound to give consistent, harmonious, and sensible effect to all of the parts of a statute, to the extent possible. ...

Harmonizing to Avoid Conflicts

To the extent possible, **statutes should be harmonized** and not read as creating a conflict. However, a conflict may exist if one statute allows what another prohibits or prohibits what another allows.[7]

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[7] Colorado State Legislature Office of Legislative Legal Services, "Commonly Applied Rules of Statutory Construction," First Regular Session, 72nd General Assembly (2019) (emphasis original), https://leg.colorado.gov/agencies/office-legislative-legal-services/comm.

Thomas Jefferson agreed that statutes are to be interpreted strictly. As he said in 1808:

> The true key for the construction of everything doubtful in a law is the intention of the lawmakers. This is most safely gathered from the words, but may be sought also in extraneous circumstances, provided they do not contradict the express words of the law.[8]

And as he said again in 1823:

> Laws are made for men of ordinary understanding, and should therefore be construed by the ordinary rules of common sense. Their meaning is not to be sought for in metaphysical subtleties which may make anything mean everything, or nothing, at pleasure.[9]

As we will demonstrate below, *Amicus* believes the meaning of the word "sex" in the Civil Rights Act of 1964 is "clear and unambiguous." But if any ambiguity exists, we need only apply the "commonly applied rules of statutory construction" to find that the term does not include sexual orientation.

II. The term "sex" in the Civil Rights Act of 1964 does not include sexual orientation.

A. The Word

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[8] Jefferson, *supra*, at 511.

[9] *Id.*

Respondent Altitude Express, on pp. 16-17 of their Petition for Certiorari, cite numerous dictionary definitions to establish that the term "sex" refers to a person's biological gender, not to orientation or identification. The Foundation will not waste the Court's time by adding to that which Altitude Express has clearly established.

B. The Legislative History

An exhaustive study of the history of the passage of the Civil Rights Act of 1965 reveals not a shred of evidence that either its supporters or its opponents were thinking about homosexual or transgender issues. By far, the subject receiving the most attention was racial discrimination. When the legislators considered sex discrimination, they were focused upon women being denied the opportunity to work at certain jobs, men being hired in preference to women for certain jobs, and women being paid less than men for the same kind of work, or, on rarer occasions, the same kind of discrimination in favor of women over men. Opponents were concerned that women might lose protections against having to work at physically difficult or dangerous jobs, and that employers might have to use quotas by which male employees could lose their jobs to less qualified women.

The term "sex" not in the original bill that became the Civil Rights Act of 1964; rather, it was added as an amendment. According to the National Archives,

> The Civil Rights Act of 1964 became a milestone for gender equality when the word “sex” was inserted into the legislation, which initially had named race, color, religion and national origin. The inclusion of women as a group protected against discrimination was an important tool in advancing social and economic progress for women.
>
> This document shows several amendments to the bill, including one proposed by Representative Howard Smith of Virginia, that added word "sex" to the categories in which the bill prohibited discrimination. Critics argued that Smith, a conservative Southern opponent of Federal civil rights, did so to kill the entire bill. Smith, however, argued that he had amended the bill in keeping with his support of Alice Paul and the National Women's Party with whom he had been working. Martha W. Griffiths (D-MI) led the effort to keep the word "sex" in the bill.[10]

The National Woman's Party mentioned above was formed to promote the Nineteenth Amendment (women's suffrage) and in the 1960s actively

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[10] "Engrossing Copy of the Civil Rights Act of 1964, June 20, 1963, https://www.docsteach.org/documents/document/engrossing-copy-civil-rights-act

promoted the addition of sex discrimination to the Civil Rights Act of 1964, but in the 1960s the Party and its leader Alice Paul never advocated protection for homosexuals or transgender persons.[11] Neither the above-mentioned Rep. Martha Griffiths (D-MI) nor Rep. Howard Smith (D-VA), key supporters of the sex discrimination amendment, ever indicated that their support for a prohibition on sex discrimination had any relation to homosexuality or transgenderism. The amendment was passed largely with the support of Republicans and southern Democrats; many of the latter may have supported the sex discrimination amendment as a means of making the Civil Rights Act so controversial as to derail its passage.[12]

The discussions and debates in Congress are devoid of reference to protection for homosexuals and transgenders. Consider this exchange on the Senate Floor between Senator Keating (R-NY) and Senator Sparkman (D-AL) on April 21, 1964:

> Mr. Sparkman: "I should like to mention another point in connection with the question of anti-discrimination.

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[11] Debra Michaels, PhD, "Alice Paul (1885-1977)", 2015, https://www.womenshistory.org/education-resources/biographies/alice-paul

[12] "Griffiths, Martha Wright 1912-2003," *History, Art & Archives, United States House of Representatives* https://history.house.gov/People/Detail/14160; see also, Louis Menand, "How Women Got In On the Civil Rights Act: Uncovering the Alternative History of Women's Rights, *The New Yorker* July 21, 2014 https://www.newyorker.com/magazine/2014/07/21/sex-amendment

The bill contains a provision with respect to sex. Employers could not discriminate on account of sex. A small company might be constructing high-voltage powerlines out through the Rocky Mountain area of Montana in the snow, ice, and blizzards. Yet a certain percentage of women would have to be employed on such a job under the terms of this bill."…

Mr. Keating: "Mr. President, will the Senator yield?"

Mr. Sparkman, "I yield for a question."

Mr. Keating: "Have not the Senator from Alabama and the Senator from Mississippi already stated that the bill does not provide in any way for quotas of any kind?"

Mr. Sparkman: "Yes. ... The bill does not provide for quotas. But most likely, as the agents of the Equal Employment Opportunity Commission contact employers, questions will arise.

Suppose there is a small business with 100 employees. The Commission may ask the employer, "How many Negroes are employed in your plant?" …There would have to be so many women employed in that plant, because in the bill there is a provision relating to sex. I really do not mean that there would have to be that number employed. I am assuming that in the application of

> the provision – and I think my assumption is proper – almost invariably there would be a movement toward a kind of quota system…"
>
> [Continued on Pg. 8619] " … Mr. Sparkman: ... The bill provides that there shall be no discrimination on account of sex. An employer would have to see that perhaps half of his employees were women. It may be said that there ought to be an equal number of women employed, regardless of the kind of job involved."[13]

The adoption of the amendment prohibiting sex discrimination must also be viewed in light of the Commission on the Status of Women established by President Kennedy in 1961. Executive Order 10980 Establishing the President's Commission on the Status of Women reads:

> Whereas prejudices and outmoded customs act as barriers to the full realization of women's basic rights, which should be respected and fostered as part of our Nation's commitment to human dignity, freedom and democracy; and

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[13] *Congressional Record,* April 21, 1964, pp. 8618-19, https://www.govinfo.gov/content/pkg/GPO-CRECB-1964-pt7/pdf/GPO-CRECB-1964-pt7-1.pdf

Whereas measures that contribute to family security and strengthen home life will advance the general welfare; and

Whereas it is in the national interest to promote the economy, security, and national defense through the most efficient and effective utilization of the skills of all persons; and

Whereas in every period of national emergency, women have served with distinction in widely varied capacities, but thereafter have been subject to treatment as a marginal group whose skills have been inadequately utilized; and

Whereas women should be assured the opportunity to develop their capacities and fulfill their aspirations on a continuing basis irrespective of national exigencies; and

Whereas a Governmental Commission should be charged with the responsibility for developing recommendations for overcoming discriminations in government and private employment on the basis of sex **and for developing recommendations for services which will enable women to continue their role as wives**

and mothers while making a maximum contribution to the world around them:

NOW, THEREFORE, by virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States, it is ordered as follows:

…

Part II –

DUTIES OF THE PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN

SEC. 201. The Commission shall review progress and make recommendations as needed for constructive action in the following areas:

(a) Employment policies and practices, including those on wages, under Federal contracts.

(b) Federal social insurance and tax laws as they affect the net earnings and other income of women.

(c) Federal and State labor laws dealing with such matters as hours, night work, and wages, to determine whether they are accomplishing the purposes for which they were established and whether they should be adapted to

changing technological, economic, and social conditions.

(d) Differences in legal treatment of men and women in regard to political and civil rights, property rights, and family relations.

(e) New and expanded services that may be required for women as wives, mothers, and workers, including education, counseling, training, home services, and arrangements for care of children during the working day.

(f) The employment policies and practices of the Government of the United States, with reference to additional affirmative steps which should be taken through legislation, executive or administrative action to assure nondiscrimination on the basis of sex and to enhance constructive employment opportunities for women.

SEC. 202. The Commission shall submit a final report of its recommendations to the President by October 1, 1963.

SEC. 203. All executive departments and agencies of the

> Federal Government are directed to cooperate with the Commission in the performance of its duties…"[14]

As the purpose of the Commission was to consider "measures that contribute to family security and strengthen home life" and to develop "recommendations for services which will enable to continue their role as wives and mothers while making a maximum contribution to the world around them" and to recommend "constructive action" concerning "[n]ew and expanded services that may be required for women as wives, mothers, and workers, including education, counseling, training, home services, and arrangements for care of children during the working day," the Commission clearly was not formed to advocate legal protection for homosexuality or transgenderism.

In response to Executive Order 10980, the Commission issued its report in 1963. Titled "American Women," the report said "Women's ancient function of providing love and nurture stands. But for entry into modern life, today's children need a preparation far more diversified than that of their predecessors." (p. 4) The report stressed the need to improve resources for women to update their skills in traditional occupations such as teaching, nursing, and social work, either to continue in those professions or to return to those professions

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[14] Executive Order 10980, December 14, 1961 https://www.docsteach.org/documents/document/executive-order-10980

after their families are grown. The report noted that "[e]xisting studies of education take too little account of sex differences" (p.11) and recommended keeping separate statistics for men and women. The report recommended "[w]idening the choices for women beyond their doorstep" but emphasized that this "does not imply neglect of their education for responsibilities in the home. Modern family life is demanding, and most of the time and attention given to it comes from women." (p. 16) It noted that "i most families the mother is the only grown person present to assume day-to-day responsibility in the home," (p. 19) and recommended that "while the husband should continue to have primary responsibility for support of his wife and minor children, the wife should be given legal responsibility for sharing in the support of herself and the children to the extent she has means to do so." (p. 48). While supportive of women's rights, the report is utterly devoid of any mention of sexual orientation or sexual identity.[15]

To establish a legislative intent to include "sexual orientation" within the term "sex," one searches the testimony and debates in Congress, in the media, and in the public in vain. The best Petitioner Bostock can come up with is a statement by Senator Everett Dirksen (R-IL) that the Civil Rights Act of 1964 must be enacted into law because "It is essentially moral in character." (Bostock Cert Brief p. 34). But that twists Senator Dirksen's words beyond recognition. Coming from the "land of Lincoln," Senator Dirksen

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[15] *American Women: Report of the President's Commission on the Status of Women,* 1963, https://www.dol.gov/wb/American%20Women%20Report.pdf

definitely saw racial discrimination as a great moral concern. Ending sex discrimination may have been a secondary consideration with him,[16] but he would have considered a sexual orientation provision to be utterly abhorrent. In the 1950s and afterward, Senator Dirksen led the drive in Congress to remove homosexuals from the State Department because of the common perception that they were security risks who could be blackmailed by Communists and others into betraying government secrets by the threat of exposing their homosexuality. A conservative Republican, Senator Dirksen was heavily involved in public hearings related to this purge of homosexuals, whom he regularly referred to as "lavender lads," and he declared that a Republican victory in 1952 would remove the "lavender lads" from the State Department.[17] Given Senator Dirksen's beliefs about homosexuals and homosexuality, Bostock's misuse of the Senator's "moral in character" statement is highly misleading. Clearly, Senator Dirksen was

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[16] Jo Freeman, "How Sex Got into Title VII: Persistent Opportunism as a Maker of Public Policy," *Law & Equality: A Journal of Theory and Practice* IX:2 1991, 179 fn 100. Freeman says Senator Dirksen at first wanted to remove the sex discrimination amendment, but relented under pressure and supported it. However, Freeman also observes in fn. 100 that Dirksen had been a supporter of the Equal Rights Amendment.

[17] Erin Blakemore, "How LGBT Civil Servants Became Public Enemy No. 1 in the 1950s," *This Day in History,* https://www.history.com/news/state-department-gay-employees-outed-fired-lavender-scare; see also, David K. Johnson, *The Lavender Scare: The Cold War Persecution of Gays and Lesbians in the Federal Government* (2004); Randy Shilts, *Conduct Unbecoming: Gays & Lesbians in the U.S. Military* (St. Martin's, Macmillan 2005) 106.

referring to racial discrimination and possibly sex discrimination, and Bostock has twisted the Senator's words to imply sexual orientation.

Furthermore, at the time the Civil Rights Act of 1964 was adopted, homosexuality and transgenderism were widely regarded as mental disorder. In 1968, the American Psychiatric Association (APA) published its Diagnostic and Statistical Manual of Mental Disorders (DSM), and DSM-11 listed homosexuality as a mental disorder. In 1973 the APA replaced the term homosexuality with "sexual orientation disturbance," but it was not completely removed from the DSM until 1987[18] but did not eliminate all associations of sexual orientation with mental illness until 2013.[19] The World Health Organization (WHO) in its 1948 International Classification of Diseases (ICD-6) classified homosexuality as a "sexual deviation that was presumed to reflect an underlying personality disorder;"[20] this was modified in ICD-10 (1990) and may be modified further in ICD-11.[21] In 1964

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[18] Neel Burton, "When Homosexuality Stopped Being a Mental Disorder," *Psychology Today* September 18, 2015 https://www.psychologytoday.com/us/blog/hide-and-seek/201509/when-homosexuality-stopped-being-mental-disorder

[19] John Gever, "Groups Want Gay Diagnoses Out of ICD-11," *Medpage Today* June 25, 2014, https://www.medpagetoday.com/psychiatry/generalpsychiatry/46502

[20] Bulletin of the World Health Organization Vol. 92 (2014), https://www.who.int/bulletin/volumes/92/9/14-135541/en/

[21] Jack Drescher, "Out of DSM:Depathologizing Homosexuality," *Behavioral Sciences,* December 4, 2015 https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4695779/

homosexuality was regarded as sinful by the religious community and as pathological by the mental health community. It is therefore inconceivable that Congress could have intended to protect homosexuality by its prohibition of sex discrimination in the Civil Rights Act of 1964.

The plain fact is, when Congress passed, and Americans supported, the Civil Rights Act of 1964, the primary issue on their minds concerning the Act was its prohibition of racial discrimination. Sex discrimination was an issue as well, and it would become a more significant issue with time, but in 1964 the issue of racial discrimination was primary. To the extent that discussion and debate on the bill focused on sex discrimination in the sense of hiring men rather than women, promoting men rather than women, or paying men higher salaries than women, solely because they were men. The thought that sex discrimination might have included sexual orientation never crossed people's minds, and if it had, it would have been thought absurd and abhorrent.

In 1964, homosexual conduct was a felony in all fifty states except Illinois which had removed criminal penalties only two years earlier.[22] Homosexual conduct was generally considered immoral, disgraceful, and distasteful. The idea that Congresspersons and Senators would vote for legal protection for homosexuality knowing that homosexual conduct was a felony in their home states

[22] Margot Canaday, "We Colonials: Sodomy Laws in America," *The Nation,* January 26, 2014

and considered abhorrent by their constituents, is preposterous.

C. The Proposed Equality Act of 2019

The so-called Equality Act of 2019 (HR5), introduced in Congress in 2019 and passed by the House of Representatives but not by the Senate, is further evidence that the Civil Rights Act of 1964 does not include sexual orientation.

The Act would amend the Civil Rights Act of 1964 by adding sexual orientation and gender identity as protected classes. This naturally raises the question, why add these categories as protected classes if, as LGBT advocates insist, they are already included in the term "sex" in the Civil Rights Act of 1964?

This demonstrates the duplicity of the LGBT position. They argue to the courts that sexual orientation is already protected, and they simultaneously argue to the Congress and the public that sexual orientation is not protected. However, they can't have it both ways. The intensity of their push for the Equality Act is strong evidence that they know the Civil Rights Act of 1964 does not contain those protections, because those who drafted and passed the Civil Rights Act of 1964 did not intend it to apply to homosexual and transgender conduct.

D. The Courts

Although there is been some division of the courts on this question, by far the majority have remained

faithful to the text of the Act and have defined "sex" discrimination as discrimination against men or women because of their biological sex and not because of their orientation. As Petitioner Altitudes Express has demonstrated more fully in its Petition for Certiorari, pp. 12-13, these include *Higgins v. New Balance Athletic Shoe, Inc.,* 194 F.3d 252 (1st Cir. 1999); *Simonton v. Runyon,* 232 F.3d (2nd Cir,. 2000); *Bibby v. Philadelphia Coca Cola Bottling Co.,* 260 F.3d 257 (3d Cir. 2001); *Wrightson v. Pizza Hut of America,* 99 F.3d 138 (4th Cir. 1996), *abrogated on other grounds by Oncole v. Sundowner Offshore Servs.,* 523 U.S. 75 (1998); *Vickers v. Fairfield Medical Center,* 453 F.3d 757 (6th Cir. 2006); *Hamner v. St. Vincent Hospital & Health Care Center, Inc.,* 224 F.3d 701 (7th Cir. 2000); *Williamson v. A.G. Edwards& Sons, Inc.,* 876 F. 2d. 69 (8th Cir. 1989); *Rene v. MGM Grand Hotel, Inc.,* 305 F.3d 1061 (9th Cir. 2002); *Medina v. Income Support Div.,* 413 F.3d 1131 (10th Cir. 2005); *Evans v. Georgia Regional Hospital,* 850 F.3d 1248 (11th Cir. 2017), *cert. den.,* 135 S.Ct. 557 (2017). To these may be added one of the two cases under consideration in this appeal, *Bostock v. Clayton County, GA,* No. 17-13801 (11th Cir. 2018); *cert granted* by this Court.

In contrast to these decisions from eleven circuits, we have the *Zarda* decision of the Second Circuit, the appeal of which has been consolidated for this case, the *Hively v. Ivy Tech. Community College,* 853 F.3d 339 (7th Cir. 2017), and *Baldwin v. Foxx,* EEOC Decision No. 0120133080, 2015 WL 4397641 (July 15, 2015). But decisions of administrative agencies and administrative courts, being under the executive

branch rather than the judicial branch of government, are not given the same precedential value as the decisions of Article III courts:

> Nonjudicial decisions -- those rendered by special tribunals or quasi-judicial bodies -- may offer interpretations of constitutions, statutes, and treaties. But American courts don't consider them legal precedents, and in no sense are the recognized to be controlling authority of the same character as binding judicial decisions. Even so, courts from many jurisdictions cite them as persuasive authority and treat them respectfully.[23]

We note, further, that the Attorney General of the United States Department of Justice has taken the opposite position from that of the EEOC court; Brief for the United States as *Amicus Curiae* Supporting Defendants-Appellees, *Zarda v. Altitude Express, Inc.,* No. 15-3775 (2nd Cir. July 26, 2017), 207 WL 3277292. However, attorney general opinions have a precedential value comparable to that of administrative courts; they are respected for their

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[23] Bryan A. Garner, *et al., The Law of Judicial Precedent* (Thomson Reuters 2016), Sec. 33 Executive Opinions and Decisions, p. 277. This volume is a composite work of thirteen legal scholars including then-Judges (now Supreme Court Justices) Gorsuch and Kavanaugh), along with a foreword by Justice Stephen Breyer.

persuasive force but do not constitute binding precedent.[24]

Bostock argues that *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989) requires a more expansive definition of sex discrimination. But *Price Waterhouse* said nothing about sexual orientation. Hopkins claimed that Price Waterhouse had not granted her a partnership because of her sex, because some of those who had recommended against giving her a partnership described her as abrasive or brusque in ways that suggested that they objected to those qualities in a woman but would not object to similar qualities in a man. This Court concluded that if Price Waterhouse denied Hopkins a partnership because of qualities that would not have been decisive factors if Hopkins had been male, that could constitute sex discrimination under the Civil Rights Act of 1964. If homosexuality were the decisive factor in Bostock's or Zarda's termination (which is questionable), that would not violate the Civil Rights Act of 1964 because such a policy would apply to homosexual males and females alike.

Likewise, *Oncale v. Sundowner Offshore Services, Inc.,* 523 U.S. 75 (1998), provides no support to Bostock's and Zarda's position. Holding that sexual harassment by a person of the same sex as the victim could constitute sex discrimination under the Civil Rights Act of 1964, Justice Scalia held the harassment was sexual in nature and that it was offensive to the victim regardless of the sex of the

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[24] Garner, 33:277-99.

perpetrator.[25] By way of analogy, Justice Scalia noted that if an employer promoted a female employee over a male employee because she was female, the male employee suffered sex discrimination even if the employer was also male. This in no way suggests that the Civil Rights Act of 1965 made homosexuality a protected class.

CONCLUSION

> *"When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less." "The question is," said Alice, "whether you can make words mean so many different things." "The question is," said Humpty Dumpty, "which is to be master—that's all."*[26]

Stretching "sex discrimination" to include sexual orientation and sexual identification has no support whatsoever in the dictionary definitions, in the congressional debates, or in the discussions of the subject at the time, and very little support in the courts. It is simply a power-grab by those who are attempting to do by judicial fiat what they have been unable to do by legislation, either in the Civil Rights

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[25] This does not mean people must be "gender-neutral" concerning physical touching. A woman might find offensive a certain kind of touch by a man but might welcome the same kind of touch by a woman. Likewise, a man might welcome a kiss by a woman but be offended at a kiss by a man. The variations are infinite.

[26] Lewis Carroll, *Through the Looking Glass* (Raleigh, NC: Hayes Barton Press, 1872), p. 72.

Act of 1964 or in the failed so-called Equality Act of 2019.

The Civil Rights Act of 1964 was a landmark legislative achievement, as was the amendment to the Act banning sex discrimination. That amendment would have been rejected out of hand, had anyone seriously suggested that it carried the meaning Petitioner Bostock and Respondent Zarda are giving it today. Lawmakers strive to make their legislation clear, but they will be hesitant to pass any bill if they have to worry that, half a century later, a court might give their bill an interpretation they would never have imagined and would have vehemently opposed.

Changing the law is the function of the Legislature, not the Judiciary. In the interest of allowing each branch of government to perform its function properly and not usurping the functions of the other branches, the Foundation urges this Court to interpret the Civil Rights Act of 1964 as its framers intended it and as the people of the United States understood it at the time.

Respectfully submitted,

JOHN A. EIDSMOE
FOUNDATION FOR MORAL LAW
One Dexter Avenue
Montgomery, AL 36104
(334) 262-1245
eidsmoeja@juno.com
Counsel for *Amicus Curiae*