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

In The Supreme Court of the United States

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

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

R.G. & G.R. HARRIS FUNERAL HOMES, INC.,
Petitioner,
v.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND AIMEE STEPHENS,
Respondents.

On Writs Of Certiorari To The United States Courts Of Appeals For The Eleventh, Second And Sixth Circuits

BRIEF OF ADVOCATES FOR FAITH AND FREEDOM AS *AMICUS CURIAE* SUPPORTING EMPLOYERS

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

STATUTES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATEMENT OF INTEREST[1]

Amicus curiae Advocates for Faith and Freedom ("Advocates") submits this brief in support of Respondent Clayton County in Docket 17-1618, Petitioners Altitude Express, Inc. and Ray Maynard in Docket 17-1623 and Petitioner R.G. & G.R. Harris Funeral Homes, Inc. in Docket 18-107 (collectively the "Employers").

Advocates is a public interest law firm that was established in 2005 and has litigated numerous cases in federal courts concerning the protection of religious liberty and free speech of individuals, entities and nonprofit organizations. Advocates has filed other important *amicus* briefs in this Court when the outcome of the case was relevant to the purposes of the organization. Advocates has recently filed an *amicus* brief in *National Institute of Family Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018). The cases presently before the Court are of particular importance to Advocates because an overly broad interpretation of Title VII would inevitably create an array of conflict between the rights of religiously-based organizations and employees claiming protection under a judicially created classification. Hence, the First Amendment protections for the free exercise of religion and religiously-based

[1] All Petitioners and Respondents have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person or entity other than the *amicus* or their counsel contributed monetarily to the preparation or submission of this brief.

speech will be under newfound scrutiny and create uncertainty for many of our clients.

SUMMARY OF ARGUMENT

The three cases before this Court are not complicated. The Plaintiffs,[2] former employees of the Employers, allege that they were discharged "because of sex" in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1). To prevail, Respondent Stephens must demonstrate that Title VII prohibits discrimination "because of gender identity" while Petitioner Bostock and Respondent Zarda must show that Title VII bars discrimination "because of sexual orientation." But, the plain meaning of the words of Title VII shows that it only prohibits discrimination "because of" five enumerated classifications. Neither gender identity nor sexual orientation is included in this narrow list, as the Circuit Courts almost universally recognized until a few years ago.

This conclusion is confirmed by the statutory history of Title VII. The omission of both gender identity and sexual orientation from Title VII's list of enumerated protected classifications means that Title VII does not prohibit discrimination on either basis. This conclusion is supported by the fact that Congress has not amended Title VII to add either gender identity or

[2] The three former employees, Petitioner Bostock, Respondent Zarda and Respondent Stephens will be collectively referenced as the "Employees."

sexual orientation, but has included protections for persons on the basis of both gender identity and sexual orientation in other statutes. Moreover, Congress decided not to amend Title VII to include either classification as a protected category even after the Circuit Courts consistently held for four decades that the word "sex" does not include either "gender identity" or "sexual orientation."

To try to avoid the result mandated by the plain language of Title VII and its statutory history, the Employees argue that this Court has applied a broad reading of Title VII to prohibit sexual harassment and other forms of discrimination not contemplated when Congress passed Title VII. The broad reading offered by the Employees misconstrues the basis for this Court's prior holdings, which are firmly grounded in the plain text of Title VII. Moreover, the statutory history of Title VII confirms that the word "sex" should be given its traditional and plain meaning. Therefore, this Court should find that Title VII's definition of "sex" does not encompass either gender identity or sexual orientation.

Finally, the current text of all statutes results from a series of legislative compromises. There are certainly principled arguments favoring statutory prohibition of discrimination because of gender identity and sexual orientation. But, there are also competing principled concerns against including either classification in Title VII. This Court should not usurp the proper role of

Congress and undo the compromises that have created the current version of Title VII.

ARGUMENT

A. This Court should find that the Employees do not have a viable claim under Title VII because the plain and ordinary meaning of the word "sex" does not include either "gender identity" or "sexual orientation," a conclusion confirmed by the statutory history of Title VII.

All three Employees contend that they were discharged "because of sex" in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1). Respondent Stephens argues that the phrase "discrimination . . . because of sex" necessarily includes discrimination because of gender identity. (*See*, *e.g.*, Stephens Merits Brief, pp. 16-17, 24-26). Petitioner Bostock believes that "discrimination . . . on the basis of sexual orientation falls within the statutory prohibition of discrimination 'because of sex'. . . ." (Bostock Merits Brief, p. 3). Respondents Zarda contend that "Title VII's [ensuring] employment opportunities without regard to their sex requires protecting people against discrimination for being lesbian, gay, or bisexual." (Zarda Merits Brief, p. 10). Therefore, the primary question in all three cases before this Court is whether the word "sex" includes either "gender identity" or "sexual orientation" or whether "sex" simply means "sex."

1. The most fundamental rule of statutory interpretation is that this Court applies the plain and ordinary meaning of the words in a statute.

The starting point for determining what a federal statute means is the actual text of the statute. *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1759 (2018) (determining the meaning of the phrase "statement respecting the debtor's financial condition"). "The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means." Antonin Scalia and Bryan Gardner, *Reading Law: The Interpretation of Legal Texts*, p. 56, § 2 (2012) ("*Reading Law*").

Absent a statutory definition, this Court generally applies the ordinary meaning canon: "[w]ords are to be understood in their ordinary, everyday meaning—unless the context indicates they bear a technical sense." *Reading Law*, p. 69, § 6. Under this canon, "'if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.'" *Stokeling v. United States*, 139 S. Ct. 544, 551 (2019).[3] If the words are neither expressly defined nor an obvious incorporation of language from other legal authorities, then "a 'fundamental canon of statutory construction' [is] that words generally should be 'interpreted as taking their ordinary . . . meaning . . . at the time Congress enacted the

[3] A good example of a word with an extensive common law history is the word "reasonable," which has been the subject of common law decisions spanning centuries.

statute.'" *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 538 (2019) (ellipsis in original). In either case, "'the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881, 1888 (2019) (citation omitted).

The most relevant part of Title VII for this case provides that:

> It shall be an unlawful employment practice for an employer—
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]

42 U.S.C. § 2000e-2(a)(1). Therefore, Title VII applies to three types of employment practices. The first two, hiring and firing, are discrete employment decisions. *Id.* The third, "otherwise to discriminate . . . with respect to . . . compensation, terms, conditions or privileges of employment" is much more open-ended and prohibits discriminatory employment practices during the course of an individual's employment. *Id.* Most importantly for this case, Title VII applies to only five of the numerous classifications[4] that can be used to distinguish human beings: "race, color, religion, sex or national origin." *Id.* The phrase "because of" provides the

[4] *See infra* at 12-13, n.7.

causal connection between the prohibited conduct and the five human characteristics enumerated by Title VII. *See*, *e.g.*, *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2032 (2015).

2. The plain and ordinary meaning of the word "sex" has not included either "gender identity" or "sexual orientation."

The plain and ordinary meaning of the word "sex" when Title VII was enacted in 1964 did not include either "gender identity" or "sexual orientation." *See*, *e.g.*, *Webster's New World Dictionary of the American Language* (College ed. 1962) (defining "sex" as "either of the two divisions of organisms defined as male and female"); *the American Heritage Dictionary of the English Language* (1st ed. 1969) (defining "sex" as "[t]he property or quality by which organisms are classified according to their reproductive function"). These two basic definitions have continued in use. *See*, *e.g.*, *American Heritage Dictionary*, p. 1123 (2d College ed. 1982) (defining "sex" as "a. The property or quality by which organisms are classified by according to their reproductive functions. b. Either of two divisions, designated male and female, of this classification").

Until recently, all federal Circuit Courts considering the issue had concluded that the word "sex" did not include "sexual orientation." *See* Brief for the Federal Respondent in Opposition to Petition by Harris Funeral Homes, pp. 13-14 (collecting cases). Most of these Courts found this conclusion to be so obvious from the

text of Title VII that they resolved the issue in a few sentences. *See*, *e.g.*, *Medina v. Income Support Division*, 413 F.3d 1131, 1135 (10th Cir. 2005) ("Title VII's protections, however, do not extend to harassment due to a person's sexuality."); *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 261 (2d Cir. 2001) ("It is clear, however, that Title VII does not prohibit discrimination based upon sexual orientation."); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1999) ("we regard it as settled law that, as drafted and authoritatively construed, Title VII does not proscribe harassment simply because of sexual orientation."); and *Williamson v. A.G. Edwards and Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) ("Title VII does not prohibit discrimination against homosexuals.").

Between 1975 and 1984, three Circuit Courts considered whether Title VII barred discrimination because of gender identity. These three Courts analyzed this issue in more detail than most Circuit Courts that have found that Title VII does not apply to discrimination because of sexual orientation. All three cases based their decision rejecting this argument upon the plain and common meaning of the word "sex." In the first case, *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977),[5] the Ninth Circuit held that "[g]iving the statute its plain meaning, this

[5] A panel of the Ninth Circuit suggests in *dicta* that *Holloway* "has been overruled by the logic and language of *Price Waterhouse* [*v. Hopkins*, 490 U.S. 228 (1989)]." *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000). *Price Waterhouse* is discussed *infra* at 25-26.

court concludes that Congress had only the traditional notions of 'sex' in mind." In reaching this conclusion, the Ninth Circuit relied upon the definitions of "sex" and "gender" found in the Webster's Seventh New College Dictionary (1970).[6] *Id.*, n.4. In the second case, *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748, 750 (8th Cir. 1982), the Eighth Circuit similarly concluded that "for purposes of Title VII the plain meaning must be ascribed to the term 'sex' in the absence of clear congressional intent to do otherwise."

In the third case, *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), the Seventh Circuit reached the same conclusion. *Ulane* determined that "[t]he phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that **it is unlawful to discriminate against women because they are women and against men because they are men**." 742 F.2d at 1085 (emphasis added). Based upon the plain meaning of the word "sex," *Ulane* held that "[t]he words of Title VII do not outlaw [gender identity] discrimination, . . . [because] a prohibition against discrimination based on an individual's sex is not synonymous with a prohibition against discrimination based on an individual's [gender identity]." *Id.*

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[6] This dictionary defined "sex" as: "1 : either of two divisions of organisms distinguished respectively as male or female 2 : the sum of the structural, functional, and behavioral peculiarities of living beings that subserve reproduction by two interacting parents and distinguish males and females 3a : sexually motivated phenomena or behavior." *Holloway*, 466 F.2d at 662 n.4.

More recently, the Tenth Circuit considered this issue in *Etsitty v. Utah Transit Authority*, 502 F.3d 1215 (10th Cir. 2007). Following "*Ulane* and the vast majority of federal cases to have addressed this issue," *Etsitty* found that:

> [D]iscrimination against a transsexual based on the person's status as a transsexual is not discrimination because of sex under Title VII. In reaching this conclusion, this court recognizes it is the plain language of the statute and not the primary intent of Congress that guides our interpretation of Title VII. . . . In light of the traditional binary conception of sex, transsexuals may not claim protection under Title VII from discrimination based solely on their status as a transsexual. Rather, like all other employees, such protection extends to transsexual employees only if they are discriminated against because they are male or because they are female.

Id. at 1221–22 (citation omitted).

After reviewing the plain text of Title VII, this Court should agree that Title VII does not prohibit discrimination because of a person's gender identity or sexual orientation, but that it does protect individuals with either trait that are unlawfully discriminated against "because they are male or because they are female."

3. Not including the terms "gender identity" or "sexual orientation" within Title VII's list of enumerated classifications confirms that Title VII does not prohibit discrimination on either basis.

This Court "do[es] not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest." *Jama v. Immigration & Customs Enf't*, 543 U.S. 335, 341 (2005). *See also Kimbrough v. United States*, 552 U.S. 85, 103 (2007) ("Drawing meaning from silence is particularly inappropriate here, because Congress knows how to direct sentencing practices in express terms."). In other words, "the limitations of a text—what the text chooses not to do—are as much a part of its purpose as its affirmative dispositions." *Reading Law*, p. 57, § 2 (supremacy of text canon). Explained differently, "a matter not covered is to be treated as not covered." *Id.*, p. 93, § 8 (omitted case canon).

Title VII does not include either "gender identity" or "sexual orientation" in its list of five enumerated classifications. *See* 42 U.S.C. § 2000e-2(a)(1). By itself, this omission means that Title VII does not cover discrimination because of either characteristic. This conclusion is confirmed by the fact that Congress has enacted statutes that do expressly prohibit various actions or omissions because of "sexual orientation" or "gender identity." For example, it is a federal crime

to "willfully cause[ ] bodily injury to any person or . . . attempt[ ] to cause bodily injury to any person, because of the[ir] actual or perceived . . . sexual orientation [or] gender identity." 18 U.S.C. § 249(a)(2)(A). This statute specifically defines "gender identity" as "actual or perceived gender-related characteristics." 18 U.S.C. § 249(c)(4). The federal Violence Against Women Act prohibits discrimination "on the basis of actual or perceived . . . gender identity [or] sexual orientation . . . " in programs receiving federal funding. 34 U.S.C. § 12291(b)(13)(A). This provision specifically incorporates the definition of "gender identity" found in 18 U.S.C. §249(c)(4).

Moreover, it is not just Congress that has enacted statutes that expressly use the words "gender identity" and "sexual orientation." One of the *amici* that has filed a brief supporting the Employees is a collection of state governments. Most of this brief is dedicated to explaining policy reasons for their beliefs as to why discrimination should be prohibited on the basis of gender identity and sexual orientation. In their brief, these *amici* identify 21 states that have enacted statutes expressly prohibiting employment discrimination on the basis of sexual orientation and gender identity. (Brief for States of Illinois et al., p. 14 and n.43). So has the District of Columbia. *Id.* Some of these jurisdictions also prohibit discrimination "because of" other classifications that are not included within Title VII.[7]

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[7] Because the three cases before this Court arise in the states of New York, Georgia and Michigan, their statutes will be used

Therefore, this Court should conclude that neither "gender identity" nor "sexual orientation" is a protected classification under Title VII because neither classification is included within Title's VII's enumeration of protected classifications.

4. The statutory history of Title VII and other statutes confirms that Title VII does not prohibit discrimination because of sexual identity or sexual orientation.

Reading Law distinguishes "legislature history," which it strongly disfavors, from "statutory history," which it defines as "[t]he enacted lineage of a statute, including prior laws, amendments, codifications and repeals." *Reading Law*, p. 440. Statutory history provides part of the context for reading a statute. *Id.*, p. 256, § 40. Under the Reenactment Canon, a substantive change to a statute is presumed to change its meaning. *Id.* On the other hand, reenacting the statute without changes is presumed not to change its meaning. *Id.*

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as examples. In New York, employment discrimination is also expressly prohibited on the basis of gender expression, disability, predisposing genetic characteristics, familial status, marital status, or domestic violence victim status. N.Y. Exec. Law § 296 (McKinney). Georgia expressly prohibits discrimination because of disability. Ga. Code § 45-19-29 while the Michigan Elliott Larsen Civil Rights Act prohibits employment discrimination "because of height, weight, or marital status." Mich. Comp. Laws Ann. § 37.2202(1)(a), (b). Title VII does not enumerate these traits although some, such as disability, are the subject of another federal statute.

This brief began by explaining the plain meaning of the words in Title VII. Similarly, in *Lamar*, *supra*, this Court began its interpretation of the relevant section of Bankruptcy Code by reviewing several dictionaries to determine the "ordinary meaning" of "the words 'statement,' 'financial condition,' or 'respecting,'" because the Bankruptcy Code did not define these words. 138 S. Ct. at 1759. This Court continued by finding that "the statutory history of the phrase 'statement respecting the debtor's financial condition' corroborates our reading of the text." *Id.* at 1762. This Court found that this phrase had first appeared in "a 1926 amendment to the Bankruptcy Act of 1898," been included in the 1960 amendments to the Bankruptcy Act and then included in the Bankruptcy Code enacted in 1978. *Id.* During this long history, the federal circuit courts had "consistently construed the phrase" in question. *Id*. This Court then applied the prior-construction canon, stating that: "[w]hen Congress used the materially same language in § 523(a)(2), it presumptively was aware of the longstanding judicial interpretation of the phrase and intended for it to retain its established meaning."[8] *Id*. Therefore, this Court based its decision upon both the plain meaning and statutory history of the relevant text of the Bankruptcy Code.

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[8] *See also Reading Law*, p. 322, § 54 ("[i]f a statute uses words or phrases that have already received authoritative construction by the jurisdiction's court of last resort, or even uniform construction by inferior courts, . . . they are to be understood according to that construction.").

In this case, the statutory history confirms the plain meaning of the relevant words in Title VII. Most importantly, there have been repeated attempts to amend Title VII to prohibit discrimination because of either sexual orientation or gender identity. *Holloway* found that its interpretation based upon the plain language was confirmed by the fact that Congress had not passed any of the "bills introduced to amend the Civil Rights Act to prohibit discrimination against 'sexual preference.' " *Holloway*, 566 F.2d at 662 and n.6 (listing 10 bills that had been introduced, but not passed, between 1975 and 1977). Subsequent case law reaching the same conclusion as *Holloway* has also relied upon the fact that Congress had not amended Title VII to include either "sexual orientation" or "gender identity." *See*, *e.g.*, *Medina*, 413 F.3d at 1135 (collecting cases finding that Congress had not passed legislation extending Title VII to sexual orientation after consistent judicial decisions finding that Title VII does not create a cause of action based upon sexual orientation); and *Bibby*, 260 F.3d at 261 (listing proposed legislation that Congress had rejected "that would have extended Title VII to cover sexual orientation").

Congress has continued to consider whether to add gender identity or sexual orientation to the list of five enumerated characteristics protected by Title VII. At least one bill seeking to add one or both of these traits has been introduced in every Congress over the

past 12 years.[9] Nonetheless, Congress has never decided to amend Title VII to include either classification in its enumeration of protected characteristics. Congressional silence does not always mean approval of prior court decisions. But, the repeated rejection of proposed amendments that would reverse a fairly consistent judicial interpretation of a statute should be significant. *Bob Jones University v. United States*, 461 U.S. 574, 600-601 (1983).

Therefore, this Court should find that the statutory history of Title VII corroborates the conclusion from the plain meaning of the text: Title VII does not prohibit discrimination because of gender identity or sexual orientation.

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[9] *See*, *e.g.*, Employment Non-Discrimination Act of 2007, H.R. 2015, 110th Cong. (2007); To Prohibit Employment Discrimination Based on Gender Identity, H.R. 3686, 110th Cong. (2007); Employment Non-Discrimination Act of 2009, H.R. 2981, 111th Cong. (2009); Employment Non-Discrimination Act of 2009, H.R. 3017, 111th Cong. (2009); Employment Non-Discrimination Act of 2009, S. 1584, 111th Cong. (2009); Employment Non-Discrimination Act of 2011, H.R. 1397, 112th Cong. (2011); Employment Non-Discrimination Act of 2011, S. 811, 112th Cong. (2011); Employment Non-Discrimination Act of 2013, H.R. 1755, 113th Cong. (2013); Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (2013); Equality Act, H.R. 3185, 114th Cong. (2015); Equality Act, S. 1858, 114th Cong. (2015); Equality Act, H.R. 2282, 115th Cong. (2017); Equality Act, S. 1006, 115th Cong. (2017); Equality Act, H.R. 5, 116th Cong. (2019).

B. Both the text of Title VII and its statutory history confirm that the word "sex" does not have a broad meaning that encompasses all characteristics that are related in some manner to "sex."

The Employees and their *amici* argue that Title VII has been applied broadly to encompass types of discrimination that were not contemplated when Congress passed the Civil Rights Act of 1964. In their view, this Court should now read Title VII broadly to include discrimination because of gender identity and sexual orientation even though they were not contemplated in 1964. This Court should reject this argument because the word "sex" has never been read broadly, and all of the decisions barring "unanticipated discrimination" follow the plain language of Title VII.

1. Title VII's definition of "sex" should not be read broadly to include all activities, beliefs or practices that have something to do with sex.

The Employees and many of their *amici* rely upon *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1995) for the proposition that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which [this Court is] governed." They further contend that discrimination because of gender identity or sexual orientation is a comparable evil to discrimination because of sex.

Therefore, they argue, this Court should read Title VII's prohibition upon discrimination because of sex broadly to find that Title VII also prohibits discrimination because of gender identity or sexual orientation. This argument is flawed because *Oncale* and the cases on which it relied were clearly governed by "the provisions of our laws," but their proposed extension of the Title VII definition of "sex" is not.

In *Oncale*, this Court held that Title VII's prohibition upon sexual harassment applied when the harasser and the harassed employee were both of the same sex. 523 U.S. at 78-80, 82. The Employees and their *amici* state that Congress did not anticipate that Title VII would prohibit either sexual harassment in general or same sex harassment in particular when it passed. This is probably true. But, what Congress did expressly outlaw was "discriminat[ion] . . . against any individual with respect to . . . terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]" 42 U.S.C. § 2000e-2(a)(1).

The phrase "otherwise to discriminate against any individual with respect to . . . [the] terms, conditions or privileges of employment [in Title VII] is an expansive concept. . . ." *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986) (citing *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971). The other two categories of outlawed discrimination (hiring and firing decisions) are easily defined. The alternative to the more open-ended phrasing of the third category of "otherwise to discriminate" would be a statute that attempted to define

specific decisions and conditions that constituted unlawful discrimination. Given all of the types of employment available in America, this seems impossible. The choice that Congress made was to prohibit discrimination "in the terms, conditions, or privileges of employment" and then allow the courts to resolve cases alleging this type of discrimination on the facts of each particular case.

Almost 25 years before this Court decided *Oncale*, the Fifth Circuit recognized in *Rogers* that it was possible for a "discriminatory atmosphere . . . [to] constitute an unlawful employment practice" and for working environments to be so "heavily charged with ethnic or racial discrimination" toward the employer's clientele that it improperly affected the "conditions . . . of employment" of an ethnic minority. 454 F.2d at 238 (per Judges Goldberg and Godbold).[10] The holding in *Rogers* was limited to the scope of discovery permitted to the EEOC. *Id.* at 236. The principle enunciated by *Rogers*, however, that a hostile work environment could constitute actionable discrimination, was then applied in cases involving harassment on the basis of race, religion and national origin. *See Meritor*, 477 U.S. at 66 (citing cases finding that Title VII prohibited harassment ["with respect to . . . conditions . . . of employment"] because of race, religion and national origin).

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[10] The lead opinion in *Rogers* was authored by Judge Goldberg, and Judge Godbold concurred in this section of Judge Goldberg's opinion. The other Judge dissented.

Therefore, the text-based legal principle that significant enough harassment can constitute "discriminat[ion] with respect to . . . conditions . . . of employment" existed before *Meritor* was decided. In *Meritor*, this Court applied this legal principle to a case in which a woman alleged that she had been the victim of this established form of discrimination "because of . . . [her] sex." 477 U.S. at 66. This was a straightforward application of Title VII's prohibition of this type of discrimination to another one of the five enumerated traits on which discrimination is barred. Therefore, while this result may not have been anticipated when Title VII was passed, the text of Title VII clearly governed the decision.[11]

In *Oncale*, this Court applied this text-based principle to a case of same sex sexual harassment. *Oncale* first confirmed that the words "terms" and "conditions" were broad enough to apply to "the entire spectrum of disparate treatment of men and women in employment." 523 U.S. at 78. Then, it applied the text-based principle that "Title VII[ ] prohibit[s] . . . discrimination 'because of . . . sex' protects men as well as women." *Id.* This Court then noted that Title VII barred racial discrimination even if the decisionmaker was of the same race as the person alleging racial discrimination. *Id.* This finding was also text-based because Title VII did not condition liability

[11] The lead opinion in *Rogers* explains that "Congress chose neither to enumerate specific discriminatory practices, nor to elucidate in extenso the parameter of such nefarious activities." 454 F.2d at 238 (Goldberg, J.).

upon a showing that the discriminator and victim were of a different race. The logical conclusion from these earlier cases applying the plain language of Title VII is that Title VII also barred sexual harassment when the harasser and alleged victim were of the same sex. *Id.*

Both *Oncale* and *Meritor* found that the sexual harassment had to occur "because of sex," to be actionable under Title VII. Both held that the alleged conduct could fit within Title VII's prohibition of the third type of discrimination, that "with respect to . . . terms, conditions or privileges of employment." 42 U.S.C. § 2000e-2(a)(1). Consequently, while the specific conduct at issue in *Meritor* and *Oncale* might not have been contemplated, those two decisions were both governed by "the provisions of our laws," not upon a broad reading of the word "sex." Neither decision applied the word "sex" outside the plain meaning of the word. Therefore, this Court should find that neither case supports a broad reading of the term "sex" to include all traits or conduct that is related to sex.

2. The plain text of the Pregnancy Discrimination Act does not support a broad reading of the word "sex" in Title VII.

In his brief, Petitioner Bostock claims that "Congress specifically and unequivocally mandated a broad classification-based application of the ban on sex discrimination with the Pregnancy Discrimination Act of

1978, Pub. L. No. 95-555, 92 Stat. 2076 [the "PDA"]." (Bostock Merits Brief, p. 10). He then argues that the PDA "confirms that the statutory ban on sex discrimination in Title VII must be read broadly to prohibit discrimination on account of any sex-based classifications, even those not enumerated in the statute." (*Id.* at 36).

But, the text of the PDA did not provide that Title VII "must be read broadly" or otherwise provide express guidance on how Title VII should be read. Instead, the PDA added a section to the definitions of Title VII, which provided that "the terms 'because of sex and' and 'on the basis of sex' include, but are not limited to, because or on the basis of pregnancy, childbirth or related medical conditions. . . ." 42 U.S.C. § 2000e(k). This section also provided that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including the receipt of benefits under fringe benefit programs, as other persons not affected but similar in their ability or inability to work. . . ." *Id.*

Rather than including every "sex-based classification," then, the PDA added three specific sex-related issues, "pregnancy, childbirth, [and] related medical conditions" to the definition of "because of sex" and "on the basis of sex." 42 U.S.C. § 2000e(k). The PDA did not add any other sex-based classifications to the definition of either "because of sex" or "on account of sex." Indeed, Congress actually limited this new definition by specifically providing that not including insurance coverage for "benefits for abortion" would not violate

Title VII even though only women would be directly affected by whether an employer offered such a pregnancy-related insurance benefit. *Id.*

The clarity of the PDA text amending Title VII is reinforced by the fact that Congress enacted the PDA immediately after *General Electric Co. v. Gilbert*, 429 U.S. 125, 127-128 (1976), which held that General Electric had not violated Title VII by excluding pregnancy from a disability plan that covered all disabilities except pregnancy and pregnancy-related conditions. In reaching this decision, *Gilbert* followed case law applying the Equal Protection Clause, which had held that the "exclusion of pregnancy from a disability plan . . . is not a gender-based discrimination at all." *Id.* at 135 (citing *Geduldig v. Aiello*, 417 U.S. 484 (1974)). In his dissent, Justice Stevens found that the exclusion of pregnancy from the disability plan "[b]y definition . . . discriminates on account of sex; for it is the capacity to become pregnant which primarily differentiates the female from the male." 429 U.S. at 161-162. Therefore, Justice Stevens "conclude[d] that the language of the statute plainly requires the result [finding that excluding coverage for pregnancy-related disabilities alone is unlawful discrimination because of sex] which the Courts of Appeals have reached unanimously." *Id.* at 162.

Therefore, based upon the plain language of the PDA, corroborated by its statutory history, this Court should conclude that the plain text of the PDA did not replace the plain meaning of the word "sex" with an

expansive category encompassing everything related in some way to sex.

3. The statutory history of the Civil Rights Act of 1991, together with the case law decided before it was enacted, shows that the 1991 Act did not incorporate a broad definition of discrimination because of sex.

Petitioner Bostock also argues that the Civil Rights Act of 1991 incorporated a broad definition of sex discrimination because it was passed after this Court's decisions in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), *Meritor* and *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983). (Bostock Merits Brief, pp. 37-43). Bostock's argument is based upon the textual canon that "Congress is presumed to be aware of administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute with change. . . ." (Bostock Merits Brief, p. 39).

Advocates agrees with the importance of this textual canon to the outcome of this case. It is Bostock's characterization of this Court's decisions in *Price Waterhouse*, *Meritor* and *Newport News* that is simply wrong. None of these cases interpreted the phrase "because of sex" broadly to encompass all sex-related characteristics. Instead, each followed the text of Title VII to reach a result governed by the plain text of the statute.

In *Newport News*, the employer had a health insurance plan that provided a hospitalization benefit for pregnancy-related conditions for its female employees, but did not provide the same benefit for the spouses of its male employees. 462 U.S. at 670-671. This plan would have presumably passed muster under *Gilbert*, but Congress passed the PDA, and *Newport News* found that the PDA overruled *Gilbert*. *Id.* at 670, 676. Writing for the majority, Justice Stevens reached the same conclusion that he had reached in his *Gilbert* dissent: "discrimination based upon a woman's pregnancy is, on its face, discrimination because of her sex." *Id.* Similarly, discrimination against female spouses [of male employees] in the provision of fringe benefits is also discrimination against male employees." *Id.* By doing so, the "pregnancy limitation in [*Newport News*] violates Title VII by discriminating against male employees." *Id.* at 685. Therefore, rather than broadly reading Title VII, *Newport News* strictly followed the text of Title VII, as amended by the PDA.

Price Waterhouse was a plurality decision that only determined "the respective burdens of proof of a defendant and plaintiff in a suit under Title VII when it has been shown that an employment decision resulted from a mixture of legitimate and illegitimate motives." 490 U.S. at 232. The lower courts had held that Price Waterhouse had to prove its defense that it would have made the same decision regardless of the employee's sex by clear and convincing evidence. *Id.* at 258. This Court reversed the judgment against Price Waterhouse because the proper burden of proof was by

the preponderance of the evidence. *Id.* *Price Waterhouse* did consider the issue of sex stereotypes, but it never held that discrimination because of sex stereotypes was prohibited by Title VII. Instead, both the plurality and concurring opinions recognized that evidence that some Price Waterhouse decision-makers applied sex stereotypes was evidence that Price Waterhouse had discriminated "because . . . of sex."

In summary, in *Meritor* and *Newport News*, the Court determined that there was a difference between how male and female employees were treated, which thereby established discrimination "because of sex." In *Price Waterhouse*, the evidence of sex stereotyping was evidence of discrimination "because of sex" because it tended to show that Price Waterhouse treated the female plaintiff differently from males being considered for promotion. In all three cases, the discrimination at issue was "because of sex" as commonly understood. None of these three decisions was based upon reading the word "sex" outside its plain meaning to include all sex-related preferences or characteristics.

Finally, the statutory history of the Civil Rights Act of 1991 shows that it did not include "a . . . mandate that the statutory language of Title VII be interpreted broadly to prohibit forms of sex discrimination not explicitly set forth in the statute." (Bostock Merits Brief at 40, 47). The text of the 1991 Act that was enacted does not include the instruction that language of Title VII should be construed broadly. This was not an accident, but by design. In 1990, both Houses of Congress passed a bill with a provision calling for a broad

construction of Title VII. *See* Civil Rights Act of 1990, S. 2104, 101st Cong. § 11 (1991) (providing that Title VII "shall be broadly construed to effectuate the purpose of such laws to provide equal opportunity"). But, the President vetoed this bill, and his veto message specifically objected to that "rule of construction" because it "will make it extremely difficult to know how courts can be expected to apply the law." President's Message to the Senate Returning Without Approval the Civil Rights Act of 1990, 26 Weekly Comp. Pres. Doc. 1632–1634 (Oct. 22, 1990), reprinted in 136 Cong. Rec. S16418, S16420 (Oct. 22, 1990). The following year, the original House version of the bill contained similar language, which stated that Title VII "shall be broadly construed to effectuate the purpose of such laws to provide equal opportunity." Civil Rights and Women's Equality in Employment Act of 1991, H.R. 1, 102d Cong. § 11 (1991). But, this version of the House bill was not passed by the Senate or signed by the President. Instead, the enacted version of the bill omitted this language.

Therefore, this Court should find that the 1991 Act does not contain language mandating a broad reading of the phrase "because of sex." In addition, this Court should recognize that its actual holdings before the 1991 Act was passed were not based upon a broad reading of this phrase. Accordingly, it should reject Bostock's argument and instead follow the actual plain text of Title VII.

C. The Court should not usurp the role of Congress by amending the plain text of Title VII to include two of the numerous human classifications that Congress has not decided to include.

This Court has recently recognized that statutory language is the result of legislative compromises among competing interests, finding that:

> But often and by design it is "hard-fought compromise[ ]," not cold logic, that supplies the solvent needed for a bill to survive the legislative process. *Board of Governors, FRS v. Dimension Financial Corp.*, 474 U.S. 361, 374, 106 S.Ct. 681, 88 L.Ed.2d 691 (1986). If courts felt free to pave over bumpy statutory texts in the name of more expeditiously advancing a policy goal, we would risk failing to "tak[e] . . . account of" legislative compromises essential to a law's passage and, in that way, thwart rather than honor "the effectuation of congressional intent." *Ibid.*

New Prime, 139 S. Ct. at 543. "Drafters make exceptions, or leave some matters uncovered, because of competing social values (in the case of legislation). . . ." *Reading Law*, p. 57, § 2. This process of legislative compromise may continue long after a statute is initially enacted because Congress can always amend or repeal a statutory provision.

When Title VII was enacted, Congress chose to include "sex" as one of five specific classifications on which it was unlawful to discriminate. Congress has amended the statute a number of times since then.

None of the amendments enacted into law added "sexual orientation" or "gender identity" to the list of enumerated traits. Some individuals and groups want Congress to amend Title VII to add discrimination because of sexual orientation and gender identity. Some *amici* supporting the Employees passionately advocate their reasons for believing that Congress should amend Title VII in this manner. In a few other statutes, Congress has chosen to include sexual orientation or gender identity among the human classifications that are protected. *See supra* at 11-12.

But, the efforts to amend Title VII in this manner have not been successful. There are principled reasons for opposing the addition of sexual orientation or gender identity to Title VII's list of enumerated protected traits just as there are principled reasons for including them. As one example, it is extraordinarily common for businesses to have separate bathrooms for men and women, but unlawful to have different bathrooms based upon race or national origin. This Court has recognized that important concerns such as privacy and safety justify this mundane practice. *See*, *e.g., United States v. Virginia*, 518 U.S. 515, 556-558 (1996). Competing interests and concerns exist if a person desires to use a restroom designated for a person of the opposite biological sex.

Striking a fair balance between these types of competing interests is exactly the type of compromise that underlies the enactment of statutes. After *Gilbert*, Congress amended Title VII to define when pregnancy-related discrimination was discrimination "because of sex." *See* 42 U.S.C. § 2000e(k). Unless Congress

decides to amend Title VII to include gender identity or sexual orientation, this Court should follow the plain language of Title VII, which is limited to the five enumerated human characteristics. To do otherwise would be an improper judicial usurpation of the legislative function by setting aside compromises made during the enactment and amendment of Title VII over the last 55 years.

CONCLUSION

Answers to important questions do not need to be complicated. In these cases, the plain text of Title VII shows that "sex" means "sex," not gender identity or sexual orientation. The statutory history corroborates this result. Therefore, this Court should reverse the decision of the Second Circuit in *Altitude Express*, affirm the decision of the Eleventh Circuit in *Bostock*, reverse the decision of the Sixth Circuit in *Harris* and remand for further proceeding consistent with this decision.

Respectfully submitted,

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