No. 17-1623

IN THE
In the Supreme Court of the United States

Altitude Express, Inc., *et al.*,
Petitioners,

v.

Melissa Zarda, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* PROFESSOR W. BURLETTE CARTER IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the prohibition in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (l), against employment discrimination "because of . . . sex" encompasses discrimination based on an individual's sexual orientation

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THE INTERESTS OF *AMICUS CURIAE*

Amicus Curiae, W. Burlette Carter, is Professor Emerita of Law at the George Washington University Law School in Washington, D.C. ("the University"). She is a legal scholar with expertise in the history of sex and gender discrimination[1] and files this brief on her own behalf. Any reference to the University is for identification only.

Amicus is filing a companion brief in the related case of *R.G. & G.R. Harris Funeral Homes v. EEOC*, 139 S. Ct. 1599 (2019) (No. 18-107) ("*Funeral Homes* Companion Brief" or "Companion Brief"). Recognizing the related nature of these two cases, and *Bostock v. Clayton Cty*, 139 S. Ct. 1599 (2019) (No. 17-1618),

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[1]Petitioners filed a blanket consent for all *amicus briefs* pursuant to Rule 37. Respondents have granted consent for the filing of this brief and such consent is filed herewith. *Amicus* serves and files this brief at her own cost. No counsel for a party authored the brief in whole or in part; no counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief; no person or entity, other than *amicus curiae,* made any monetary contribution intended to fund the preparation or submission of this brief.

Amicus retired from her position as a tenured full Professor in July of 2018 and was awarded emeritus status. In that role, she continues to write and engage in other scholarly endeavors. Any general support that *Amicus* has received is of the type the University or its law school regularly provides to all Professors Emeriti.

Amicus has served courtesy copies of *both* briefs upon those appearing in all *three* cases.

Amicus has several interests. First, she has an interest in ensuring that the Court rests its decisions upon a sound legal, historical and scholarly basis.

Second, she has an interest in protecting free speech and academic freedom. These briefs are based, in substantial part, upon a law review article that was scheduled for publication in the fall of 2018. *Amicus* withdrew the article, when, late into the editing process, a small group of student executive editors conditioned publication upon the deletion of specific content that discussed conflicts of interest between women and trans women, criticism of the EEOC, and other issues. These content cuts were not based on length or concerns about support for the arguments. The cuts targeted arguments at very heart of the article. [2] The conditions followed other actions that *Amicus* believed were efforts to prevent the work from being published. (In future references, I will call the article the "unpublished article.") As discussed further in the *Funeral Homes* Companion Brief, *Amicus* has faced censorship efforts with respect to other articles touching upon LGBT+ litigation. She believes that the suppression of academic scholarship (including that by women and minorities), and of other writings and opinions is a political tactic used

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[2] The article was entitled "*Sexism in in the Bathroom Debates II: How the Merger of Sex and Gender Violates Title VII.*" It was a companion to another article on which *Amicus* was working contemporaneously that same fall: W. Burlette Carter, *Sexism in the Bathroom Debates: How Bathrooms Really Became Separated by Sex*, 37 Yale 227 (2018). For further discussion of censorship efforts and deanship responses, *see* the *Funeral Homes* Companion Brief at § II(B)(2).

in the U.S. and abroad.[3] *Amicus* believes that the EEOC's interpretations—and those of the government at large once adopted in tandem—as well as its close connections to partisan advocacy groups—encouraged and provided justification for such censorship.

Third, *Amicus* is interested in ensuring that governmental processes are well-considered and that citizens have input into them. On March 7, 2019, *Amicus* filed a Freedom of Information Act request with the EEOC. The request sought information about communications related to the interpretations at issue here. It also sought information about the EEOC's refusal to assert a *disparate impact* claim in *EEOC v. Catastrophe Mgt. Sol's.*, 11 F. Supp. 3d 1139 (2014), *aff'd,* 837.F.3d 1176 (11th Cir.. 2016), *opinion withdrawn, and substitute inserted,* 852 F.3d 1018 (11th Cir. 2016)*, reh'g en banc denied*, 876 F.3d 1273 (2017), *motion to intervene to file cert. petition denied*, 138 S. Ct. 2015 (2018). On April 11, 1991, the EEOC denied *Amicus*' request for an educational fee waiver, claiming that granting it "has been found not to be in the public interest." Letter from Stephanie D. Garner, EEOC Office of Legal Counsel, to Professor Emerita W. B. Carter, Geo. Wash. U. L. Sch., April 11, 2019. For the same alleged reason, the EEOC claimed *Amicus* was not entitled to a reduced fee rate. *Id. Amicus* appealed. On July 3, 1991, an EEOC appeals panel reversed the waiver denial. *Amicus* now is in

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[3] For further discussion of censorship, see the *Funeral Homes* Companion Brief.

discussions regarding compliance. *Amicus* did not coordinate with anyone in making her FOIA request.

SUMMARY OF THE ARGUMENT

The Second Circuit erred in adopting the EEOC's interpretation of Title VII. The interpretation is contrary to the plain language of the statute, the original public meaning, Congressional intent and public policy.

Claims of sexual orientation and gender identity discrimination are "derivative" in nature, that is, they are of the type Congress did not intend to include, but are claimed to be within the statute. The appropriate test is the unanimously adopted standard in *Oncale v. Sundowner Offshore Serv's*, 523 U.S. 75 (1998). *Oncale* requires a Court to find that the derivative claims are reasonably comparable to the evils that were Congress' principal concern. Stereotyping evidence can be compelling, but it must relate to claims that meet this standard.

The faults in the EEOC's interpretation demonstrate why *Oncale* is the test. The EEOC bundles disparate claims together making them impenetrable to claim-specific review, thus eliminating the required inquiry into "motive." The interpretation ignores conflicts of interest between stakeholders and creates a *superminority* of Title VII plaintiffs, making the rights of more vulnerable Title VII stakeholders dependent upon the needs and litigation preferences of that superminority. It lacks mutuality of responsibility. It attempts to use Title

VII to settle Constitutional issues. And, it merely seeks to replace one social norm with another.

Title VII requires that a court examine the motives behind conduct, not merely assume them by slapping on a label. History reveals four motivations behind the disparate treatment of sexual minorities that are consistent with motivations that courts have deemed inappropriate with respect to discrimination because of sex under Title VII. They are (1) sexual assault; (2) motivations relating to appropriate appearances and behavior of the sexes, (3) motivations about the appropriateness of certain jobs for the sexes, and (4) motivations related to the morality of legal sex-related conduct.

In addition, we find five motivations that *might* exempt distinctions, even if they fit categories 1-4 above: (a) religion, (b) safety (including avoiding employee conflict); (c) privacy, (d) ensuring opportunities for underrepresented classes; and (e) biology/procreation. But whether these categories, if applicable, are exempted depends upon a balancing of factors. And finally, Title VII expressly provides that discrimination motivated by bona fide occupational qualification ("BFOQ") is exempt from its prohibitions. 42 U.S.C. § 2000e-2(e)(1).

The policies behind Title VII and *Oncale* also require that the Court examine whether the derivative claim raises conflicts of interest that would

argue against its recognition, or its full recognition. This case presents such a conflict.

Applying this framework to *Altitude Express, Zarda*[4] should not prevail. He claims a violation because, in firing him, his employer relied upon the false allegations of an allegedly homophobic customer who claimed Zarda sexual harassed her. But applying the mixed-motive test to an employer's *reasonable* response to an allegation of sexual harassment would be contrary to the goals of Title VII. Thus, when a jury finds that an employer reasonably based its action on a credible allegation of sexual harassment, either toward a coworker or a customer, the more restrictive test of *McDonald Douglas v. Green,* 411 U.S. 792 (1973) should apply, not the mixed-motive test. In this case, the jury verdict against *Zarda* included such a finding. As the jury apparently followed an instruction comparable to *McDonald Douglas*, the *Altititude Express* verdict should stand. But even if a mixed-motive theory applies to some claims, then recovery is limited to injunctive relief and the

[4] Zarda died in an accident before these proceedings. By "Zarda" this brief refers him or, where the context suggests, to his representatives.

recovery of certain attorney's fees and costs, as indicated in 42 U.S.C. § 2000e-5(g)(2)(B).

THE ARGUMENT

I. Under the "Plain Language" of the Statute, Male-bodied and Female-bodied is the Proper Framework from which to Center the Analysis of Title VII

Title VII prohibits discrimination in employment "because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a). When Congress used the phrase "because of . . ." in 1964, it was borrowing from a very old term: "on account of . . . ."[5]

Thus, in 1964, Rep. Poff, described Title VII as banning discrimination "on account of … race." 110 *Cong. Rec.*. 2575 (1964) (Feb. 8). Rep. Griffiths, who offered the amendment to add "sex," used the phrase "on account of sex." *Id.* at 2579, 2580. Rep. Kelly bemoaned, "It is unfortunate that there is not equal opportunity on account of economic status." *Id.* at 2583.

The terms "because of" and "on account of" were used interchangeably in prior legislative actions. "On account of" was used in the Equal Pay Act of 1963, 29 U.S.C. 206(d). *See also To Prohibit Discrimination in Employment Because of Race, Creed, Color, National Origin or Ancestry, Hearings on H. R. 2232 Before the Comm. on Rules, H. R.*, 79th Cong., 1st Sess., 95 (1945) (discussion between Reps. Fisher and Brown

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[5] The Pregnancy Act of 1978, an amendment to Title VII, uses "on the basis of . . . ." 42 U.S.C. § 2000e(k).

where Rep. Fisher uses "because of" and Rep. Brown uses "on account of"). The Nineteenth Amendment, ratified in 1920, says the right to vote "shall not be denied or abridged . . . on account of sex." U.S. Const. am. XIX.

States used "on account of." In 1872, Illinois legislators provided that no person could be barred from "any occupation, profession or employment . . . on account of sex." An Act to Secure All Persons Freedom in the Selection of an Occupation, Profession or Employment, Mar. 22, 1872, 27th Gen. Assembly, Reg., Special Sess. and 1st & 2nd Adjourned Sess. *in Public Laws Passed By the State of Illinois* (1872) ("Illinois Act"). The action was taken as this court was deciding *Bradwell v. Illinois*, 83 U.S. 130 (1873) (states can ban married women from law practice). (Still, the Illinois Act did not permit women to serve in the military, to be elected to office, to serve on juries or to work on streets or roads.)

Thus, the "because of . . . sex" language Congress used in Title VII is framed by a larger, centuries-old movement for women's rights. Indeed, Rep. Catherine May noted, in speaking of adding "sex" to the Act in 1964, "since 1923 more and more members have offered this amendment, but we have never gotten the bill out of the Committee on the Judiciary." 110 *Cong. Rec.*. H2582 (Feb. 8, 1964) (Rep. May).

The language "because of . . . sex" is indisputably broad enough to encompass discrimination against males because of sex. But throughout history, *because they were male-bodied* gay men and transwomen—like men generally –*already had* many of the rights women were seeking. Their economic opportunities were made broader by the deprivations that the

female-bodied experienced, even as they experienced their own discrimination. On the other hand, bans on discrimination "on account of . . . sex" aided trans*men* and women *because* they were female-bodied. This framework – male-bodied and female-bodied—is the proper framework from which to center Title VII's concerns.

Using the Corpus of Historical American English ("COHA"), the respondents' linguistic scholars *amici* make several claims. Br. of *Amici Curiae* Corpus-Linguistics Scholars Professors Brian Slocum, Stefan Th. Gries, and Lawrence Solan . . . , *Altitude Express v. Zarda*, 139 S. Ct. 1599 (2019) (No. 17-1618), at 14. But as the linguists did not provide the sample used for their analyses, they have denied the Court, parties and *amici* a fair opportunity to assess their claims. Given COHA's heavy emphasis on literature, one can debate whether, in the racially segregated, sex and economically stratified world of the 1960s, one can find "ordinary" meaning there. Moreover, there is likely not a word in the English language that has only one meaning. To extend statutory interpretation to embrace every meaning would hobble both that enterprise and law.

II. Congress Clearly Understood Title VII as *Not* Covering Sexual Orientation or Gender Identity

Respondents and their *amici* now concede that Congress knew about the existence of gay men and lesbians at the time Congress passed the 1964 act. I will add here two sources to frame that knowledge

and also the treatment of gay men, at least, in the era.

In 1963 and 1964 some Congressmembers protested efforts of the Mattachine Society to gain charitable status in the District of Columbia and to seek donations to protect the rights of gay men and lesbians. Opponents sought to alter the DC solicitations act to ban the Society from seeking donations on "morality" grounds (because it supported "homosexuals") and to force the Society's members to apply for a license in their real names, thus subjecting them to more discrimination. *See, e.g.,* John M. Goshko, *House Group Continues Homosexuality Hearing*, Wash. Post, Aug. 10, 1963; 109 *Cong. Rec.*. A211-A212 (July 8 1963); 109 *Cong. Rec.*. 14616-17 (Aug. 8 1963). *But see id.* at 14596 (unsigned statement saying group has right to solicit). In the midst of such harsh opposition, the Mattachine Society withdrew its application. 110 *Cong. Rec.*. 18864, 18943 (Aug. 11, 1964).

On May 19, 1964, the *New York Times* ran a front-page article reporting on the progress of the Title VII bill. E. W. Kenworthy, *Senators Receive Rights Revisions, Amendments Said to Retain Key Parts of House Bill*, N.Y. Times, May 19, 1964, 1. On the same page, next to that story, the *Times* ran another article: Robert Trumbull, *Homosexuals Proud of Deviancy Medical Academy Study Finds*, N.Y. Times, May 19, 1964, 1, 75.

These two sources alone provide sad documentation of a history of discrimination against sexual minorities. They also establish indisputably that, when it passed Title VII, Congressmembers

knew at least about gay men's agitation, for recognition of basic human rights.

Congress did not formally begin to address the issue of federal protections against sexual orientation discrimination until the 1970s. From 1974 forward, in every year except one, Congress has passed on bills to include sexual orientation within Title VII. The court below declined to read much into this silence or to assume that Congress' 1991 amendments "were in any way premised on or made assumptions about whether sexual orientation was protected by Title VII." *Zarda,* 833 F.3d at 128-129.

A closer look undercuts the Court's interpretation. In March of 1991, Representative Theodore Weiss (D-NY) and Senator Alan Cranston (D-CA) each introduced bills to add sexual orientation as a protected class under Title VII. Weiss' bill was H. R. 1430, the Civil Rights Amendments Act of 1991. The bill had more than 90 cosponsors and sought to amend Title VII *and* the Fair Housing Act. *See* H. R. 1490, 102nd Cong. (1991). In introducing it, Representative Weiss, said, "To this day, there exist no Federal laws and no legal recourse to protect this minority when they encounter discrimination based on their private lifestyle or their public comportment." *See* 137 *Cong. Rec.* 6161 (Mar. 13, 1991) (statement of Rep. Weiss). Senator Cranston's bill was S. 574 and sought to amend only Title VII. It was also called the "Civil Rights Amendments Act of 1991." S. 574, 102nd Cong. (1991). Eight other Senators joined Cranston in introducing the bill. Upon introduction, Cranston said, "This legislation is needed to bring an end to that discrimination, to provide a clear remedy to redress violations of

individual rights, and to make it clear that this type of discrimination is wrong and unlawful." 137 *Cong. Rec.* S5261-62 (March 6, 1991) (comments of Sen. Cranston). Surely, in looking for additional co-sponsors, Cranston and Weiss, discussed their concern that Title VII did not offer legal protections for sexual orientation discrimination

The Court should also note the timing and purpose of these proposed amendments. Some Congress members wanted to reverse the recently decided *Price Waterhouse* case (holding that an employer could escape liability for a violation if it showed it would have been fired the complainant anyway for a nondiscriminatory reason. *Price Waterhouse*, 490 U.S. at 228. At least four other holdings also were challenged as inconsistent with the goals of Title VII.

One effort to overcome these precedents was H. R. 1, introduced in January of 1991. H. R. 1, 102nd Cong. (1991). A subcommittee of the House Judiciary Committee held hearings on the bill on February 7, 28 and March 7. That last date was only a week before Weiss introduced his bill and a day before Cranston introduced his. *See* Civil Rights Act of 1991 [H. R. 1], *Hearings Before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, House of Representatives*, 102nd Cong. (1991) (Feb. 7, 28, & Mar. 7). One has to believe that Cranston and Weiss argued to include provisions of their bills in this effort.

Eventually on Sept. 24, 1991, an alternative, S. 1745, was introduced. That bill became the Civil Rights Act of 1991, an amendment to Title VII. S. 1745, 102nd Cong. (1991). Thus, reversing *Price Waterhouse*, Congress adopted the "mixed-motive"

burdens test, providing that a claim of discrimination could not be defeated entirely by an employer offering an alternative, legitimate, reason for its action. The Weiss and Cranston bills died in committee.

Later evidence more clearly indicates Congress' understanding. In 1994, Chai Feldblum (an EEOC Commissioner during the time of the interpretations at issue here), then with the Leadership Conference and a consultant to the LGBT+ rights group, the Human Rights Campaign, testified at hearings on a bill to include sexual orientation under Title VII. As an appendix to her presentation, Feldblum presented to the eighteen Senators on that Committee, an extensive list of cases, demonstrating how Courts had ruled. *The Employment Nondiscrimination Act of 1994: Hearing of the Committee on Labor and Human Resources*, *U.S. Senate, 103rd Congress, 2d Session, on S. 2238 to Prohibit Employment Discrimination on the Basis of Sexual Orientation*, July 29, 1994, at 94-116.

The Congressional Research Service ("CRS") also told Congress several times that courts had overwhelmingly ruled sexual orientation discrimination or gender identity was not covered by Title VII. *See, e.g.,* Charles V. Dale, et al. (CRS), *Sexual Orientation Discrimination in Employment: Legal Analysis of Title VII of S. 16, the Employment Nondiscrimination Act of 2003*, April 15, 2003, at 2-3, 6; Jody Feder (CRS), *Sexual Orientation and Gender Identity Discrimination in Employment: A Legal Analysis of the Employment NonDiscrimination Act*, Jan. 6, 2011, at 3-5; Jody Feder & Cynthia Brougher, *Sexual Orientation and Gender Identity Discrimination in Employment: A Legal Analysis of*

the Employment NonDiscrimination Act, June 8, 2012, at *3-6;* Jody Feder & Cynthia Brougher*, Sexual Orientation and Gender Identity Discrimination in Employment: A Legal Analysis of the Employment NonDiscrimination Act,* July 15, 2013*, at 3-5* .

Over time, the number of cosponsors of bills to add protections for sexual minorities under Title VII grew. The bills were generally called Employment Nondiscrimination Acts (ENDA).

In 2007, Congress considered a bill that included both gender identity and sexual orientation. In the face of a sure Presidential veto in any event, advocacy groups fought to defeat the bill after transgender persons were cut out of it. *See Funeral Homes* Companion Brief, at § II.

A core set of concerns and controversies are reflected in bills to incorporate sexual orientation and gender identity into Title VII. These controversies included (1) whether quotas or affirmative action would be required (given the view of some that male sexual minorities, at least, were already well-represented in numbers and economically; (2) application to the armed forces & veterans preferences; (3) the extent of religious exemptions, (4) banning or allowing disparate impact theory, (5) whether an employer could discriminate against *harassers* by sexual orientation in responding to sexual harassment charges or penalties (6) whether domestic partner benefits were to be required; (7) how to define marriage (pre *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015)) including the effect of the Defense of Marriage Act; (8) whether the statute should incorporate or replace state laws allowing marriage etc., where applicable; (9) whether benefits could be

conditioned on marriage (given that same sex couples could then not marry); (10) whether the EEOC could keep employment statistics on sexual orientation or require employers to do so; (11) punitive damages against the government; (12) in 2013, application to gender identity and sexual orientation of the Title VII recovery limit in a mixed-motive case; and, particularly as to bills including transgender persons (13) whether persons could groom and present according to gender identity despite a BFOQ, and (14) whether they could access intimate spaces based on gender identity. One can see these recurring issues by comparing the language in bills considered between 2009-2013. [6] Of course, bias, although less and less prevalently expressed on the surface, remained.

In 2014, advocates abandoned the approach of pursuing ENDAs. Bills from that point on, were called "Equality Acts," and sought protections across a broad

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[6] *See, e.g.*, H. R. 3017, 111th Cong. (2009); H. R. 2981, 111th Cong. (2009); S. 1584, 111th Cong. (2009); H. R. 3017, 111th Cong. (2009) ; S. 811, 112th Cong. (2011); H. R. 1755, 113th Cong. (2013); S. 815, 113th Cong. (2013), Congress.gov, https://www.congress.gov/bill/113th-congress/senate-bill/815. *See also* S. 815, S. Rep. No. 113-105, at 24 (2013) (Minority complaints bill had not proceeded through regular order); S. Rep. No. 107-341 (2002) (on earlier S. 1284, Act of 2001). For an earlier view, *se, e.g. Hearing Before the Subcommittee on Employment Opportunities of the Committee on Education and Labor H.R., 96th Cong., 2d Sess., H.R. 2074* (1980) (Oct. 10).

range of statutes, without limitations. That is the modern approach. Congress still has not passed a bill

III. The *Price Waterhouse* Plurality Opinion Does Not Support the EEOC's Interpretation or the View that Stereotyping Theory is Distinct from Title VII; *Manhart* and Prior Cases Affirm the Strong Value of Stereotyping Evidence, Irrespective of Intent

To support their freestanding stereotyping theory, the EEOC and Respondents rely heavily upon the plurality opinion in *Price Waterhouse*. In the case, a female passed over for a corporate partnership, alleged sex discrimination. In response, the company claimed she had a difficult personality in dealing with staff and others. Work evaluations indicated that some of those judging the plaintiff embraced stereotypes about how women were to behave. A plurality of the Court specifically noted the importance of such sex stereotyping evidence in disparate treatment cases saying "[W[e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group" and that "'Congress intended strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'" *Price Waterhouse*, 490 U.S. at 251, citing *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707, n. 13 (1978), quoting *Sprogis v. United Air Lines, Inc.*, 444 F. 2d 1194, 1198 (7th Cir. 1971)."

In the years afterward, however, advocates fought to expand the meaning of the plurality's language into

a new and freestanding "sex stereotyping" theory of sex discrimination.

But close examination shows that the plurality merely reaffirmed the definite relevance of sex-stereotyping evidence in disparate treatment cases, against its concern that *Price Waterhouse's* counsel was waffling too much. First, this Court did not grant certiorari on stereotyping—and petitioners did not ask them to. The petition sought review on "whether the court of appeals was in error in shifting the burden of persuasion . . . and in defining that burden in accordance with the 'clear and convincing' standard . . . ." *See* Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, No. 87-1167, 1988 U.S. S. Ct. Briefs LEXIS 1260, *2 (Jan 12, 1988). The Court's grant stated, "The petition . . . is granted." *Price Waterhouse v. Hopkins*, 485 U.S. 933 (1988) At the start of the opinion, the plurality acknowledged this limited grant. *Price Waterhouse*, 490 U.S. at 232. At the time, Rule 21, the predecessor to Rule 14, stated "Only the questions set forth in the petition or fairly included therein will be considered by the Court." Sup. Ct. R. 21 (approved June 4 1980). The Respondent 's merits brief permissibly asserted three questions. Two dealt with burdens. The third was: "Whether it was clearly erroneous for the district court below to find that petitioner's denial of partnership to respondent was caused, in part, by her sex." Respondent's Br., *Price Waterhouse*, 490 U.S. at 228 1988 U.S. S. Ct. Briefs LEXIS 1253 * . *6-7 (June 17, 1988). It's brief did discuss stereotypes, *e.g., id.* at *16-22, *35-36; *55.

and accused petitioner of trying to downplay it. *Id.* at 16.

The plurality tells us *why* it reached out to address sex stereotyping. It says it noticed that *Price Waterhouse* repeatedly placed "sex stereotyping" in quotation marks in its briefs which it took to suggest that "such stereotyping was not present in this case or that it lacks legal relevance." *Id.* at 250. This reading is confirmed by oral argument. Justice O'Conner (who did not join the plurality) specifically asked whether *Price Waterhouse's* counsel viewed such comments as relevant both generally and to disparate treatment cases (given that they require intent). Justice Marshall also asked questions apparently to confirm the relevance of sex stereotyping evidence, irrespective of intent. *See* Transcript, No. 87-1167, *Price Waterhouse*, 490 U.S. 228 (1989), ("*PW* Transcript") at 16; 21-23; 38.[7] Price Waterhouse's counsel tactically chose to minimize the significance of the stereotyping comments and to suggest such evidence was most appropriate in disparate impact cases. But some members of the Court viewed this trial tactic as waffling on a key issue.[8]

This background tells us that the *Price Waterhouse* plurality meant to affirm strongly that

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[7] The Official Transcript does not identify the questioners by name. However, audio of oral argument appearing on Oyez.org does indicate that Justices O'Connor and Marshall were the key questioners. *See Price Waterhouse v. Hopkins*, Oyez.org, https://www.oyez.org/cases/1988/87-1167.

[8] *See PW* Transcript at 16 ("a few sex-based comments" that "were probably inappropriate.") *Price Waterhouse* argued that such evidence was more relevant to a claim under Section 703(a)(2) (disparate impact). *Id.* at 21-23; counsel eventually

decisions cannot be based on sex stereotypes, even if there is no subjective intent to harm. However, it did not intend to create a free-standing theory. Further support for this reading is indicated by the plurality's *Manhart* citation, which properly noted that *Manhart* was quoting a 1971 case, *Sprogis v. United Air Lines, Inc.*, 444 F. 2d 1194, 1198 (7th Cir. 1971), *cert. denied*, 404 U.S. 991 (1971). *Price Waterhouse,* 490 U.S. at 251. *Sprogis* invalidated a United Airline's rule that female flight attendants were fired if they married. United claimed the rule was not discrimination based on sex. The *Sprogis* court would have none of it. The full quote is worth considering:

> The scope of Section 703(a)(1) is not confined to explicit discriminations based "solely" on sex. In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes. Section 703 (a)(1) subjects to scrutiny and eliminates such irrational impediments to job opportunities and enjoyment which have plagued women in the past.

Sprogis, 444 F. 2d at1198.

The *Price Waterhouse* plurality also made clear that sex stereotyping is but "evidence" of an unfair employment practice. The plaintiff must prove the

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conceded their relevance with reservations. *Id.* at 23 ("It's relevant, but . . . "). *See also* Pet. Reply Br., *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1988), U.S. S. Ct. Briefs LEXIS, 1250, at *21-23.

employer relied upon it in taking negative employment action. *Price Waterhouse,* 490 U.S. at 251. In *Sprogis,* the stereotype was embedded in the reason for the policy itself. In *Price Waterhouse,* the company didn't deny the statements were made, they denied that they should be attributable to *Price Waterhouse* or were the basis for action (*PW* Transcript at 18-19).

IV. This Court Rejected the Opportunity to Adopt the Extended *Price Waterhouse* Theory in *Oncale*

The EEOC seeks to fit sexual orientation (and gender identity) claims into *stereotyping* not sometimes but *always*. For sexual orientation, it claims (1) it necessarily entails treating an employee less favorably because of the employee's sex; (2) it "necessarily involves discrimination based on gender stereotypes;" and (3) it "is associational discrimination on the basis of sex" because it references the sex of the person with whom one would associate. *See also Baldwin v. Foxx*, No. 0120133080, 2015 EEOPUB LEXIS 1905, (E.E.O.C July 16, 2015), at 17-23. But this theory does not answer the statutory question. Even if one wished to call the numerous types of actions the EEOC would sanction "stereotypes," the question remains *whether it is the type of stereotype Congress intended to target by passing Title VII.*

The types of claims the EEOC presses are best deemed "derivative," that is, they are not the core claims about which Congress was concerned, but are nevertheless claimed to be covered under Title VII. So too was the claim in *Oncale,* raising a male victim's

claims of same-sex sexual harassment. But in *Oncale*, the Court rejected pleas to apply an extended *Price Waterhouse* stereotyping theory. *See* Brief of Lambda Legal Defense and Education Fund, et al. as *Amicus Curiae* in Support of Petitioner, *Oncale v. Sundowner Offshore Serv's*, 523 U.S. 75 (1998), 1997 U.S. S. Ct. Briefs LEXIS 529, at *16 ("The use of gender stereotypes is a violation of Title VII"); *Id.* at 17 ("statute does not always require showing that another group was better treated); Brief of Law Professors as *Amici Curiae* . . . , *Oncale v. Sundowner Offshore Serv's*, 523 U.S. 75 (1998), 1997 U.S. S. Ct. Briefs LEXIS 470 (1997) at *9 (citing *Price Waterhouse* for proposition "when an employer acts on the basis of sex stereotyping" the employer has acted on the basis of gender"); *id.* at 37-38 (using *Price Waterhouse* and "referring to Hopkins' sex as her "gender identity"). The EEOC, while continuing to differentiate between sexual orientation discrimination and gender identity discrimination on the one hand and discrimination because of "sex" on the other, was a bit more muted. *See* Br. of the United States and the Equal Opportunity Employment Commission as *Amici Curiae* Supporting Petitioner, *Oncale v. Sundowner Offshore Serv's*, 523 U.S. 75 (1998), 1997 U.S. S. Ct. Briefs LEXIS 546, at *34, n. 9 (not arguing stereotyping expressly but in a footnote, describing *Price Waterhouse* as "prima facie case of sex discrimination is shown by evidence that officials involved in decision submitted comments that "stemmed from sex stereotypes"). *But see Brief* for Respondents, *Oncale v. Sundowner Offshore Serv's*, 523 U.S. 75 (1998), 1997 U.S. S. Ct. Briefs 628, (1997) at *66 (noting *amici* and courts have

misconstrued *Price Waterhouse* as holding that gender stereotyping is per se discrimination; gender stereotyping comments "would swallow whole the oft-rejected congressional proposal to prohibit sexual orientation discrimination under Title VI")). Instead, the *Oncale* Court chose a different standard, asking whether evil alleged was "reasonably comparable" to the principal evils Congress was concerned about in passing Title VII. *Oncale*, 525 U.S. at 79.

V. Errors in the EEOC's Approach Demonstrate and the Wisdom of *Oncale*

One can appreciate the wisdom of the *Oncale* test, by considering the wrong-headedness of the EEOC's approach. (In the *Funeral Homes* Companion Brief, I will deal with other concerns including the EEOC's sad failure to consider the needs of core Title VII claimants (women and girls), its mowing down of the First Amendment, and the extra sharp clippers it used to take out religious freedom.)

A. Bundling Disparate Claims Together Making them Impenetrable to Claim-Specific Review and Using the Mixed-Motive Test and Stereotyping Claims to Eliminate Legitimate Motives

The EEOC's approach bundles disparate claims together to make them impenetrable to claim-specific review. In labeling everything a "stereotype," it eliminates the requirement that a court consider the motive behind challenged actions as disparate treatment requires. It also uses the mixed-motive test

to destroy the relevance of any assertion of legitimate counter-motive. The result deprives the employer (and in some cases coworkers and supervisors) of the opportunity to show the context for the actions that is necessary in order to assess them under Title VII. Using the mixed-motive test, then, it can obtain injunctive relief to stop any legitimate public goals not favored by the EEOC's superminority. It rips Title VII from its historical moorings—the experiences of women and girls with discrimination—and creates "stereotyping in the air."

B. Ignoring Conflicts of Interest Between Stakeholders and Subjugating Claims That were Congress' Principal Concern to Claims that are Derivative

When new plaintiffs are added to a class they are able to affect the law that defines the processes and remedies for that class. Because of our country's history of sex and race discrimination, a *segment* of LGBT+ persons belong to classes that have historically promoted and substantially benefitted from discrimination against women and racial minorities. Litigation over "sex" in Title VII should not be controlled by such derivative stakeholders. Any stakeholder with conflicting interest will minimize more vulnerable stakeholders' injuries for their own causes. Consider, for example, that *Zarda* answered a female customer's charge of sexual harassment by saying he was gay. The claim trots out old tropes: that sexual harassment is about sex (not power) and that only straight men would harass a woman. *See, e.g.,*

Pltf's Second Amend. Complt., Zarda, 883 F.3d 100 (2018), ¶¶38, 43.

Conflicts between stakeholder interests have appeared in other, related, litigation. In the marriage cases, advocates decided that they needed to show that gay men lacked political power to argue for the heightened scrutiny Equal Protection standard of *City of Cleburne v. Cleburne Living Ctr*, 473 U.S. 432 (1985). Thus, they repeatedly misrepresented the history of black Americans and of women. Consider the Segura Affidavit filed (in only slightly varying forms) in cases all across this country,[9] including before this Court in *Obergefell*. Aff. of Gary M. Segura, *Obergefell v. Wymyslo*, S.D. Ohio, 962 F. Supp. 968 (S. D. Ohio 2013) (No. 1:-13-cv-501) (executed Oct. 9, 2013) (on motion for prelim. injunction, etc.), *in* 1 Joint Appendix, *Obergefell v. Hodges,* 135 S. Ct. at 2584, at p. 321. Purporting to compare white gay men's political power with that of women generally, the affidavit stated: "While sexism certainly existed (and still exists), and political activism could be costly, identity as a woman was not socially controversial, did not attract familial scorn, and did not bar one from such a large range of social institutions, *though some institutions were exclusively male*." [Emphasis added] It continued, "Women could freely identify one another, gather, coordinate, and act largely free of fear of repressive

[9] The affidavit was first filed as early as 2009, submitted by Gay and Lesbian Advocates and Defenders ("GLAD") and also three private law firms. *See* Aff. of Gary M. Segura, *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 397 (D. Mass. 2010) (No. 09-10309-JLT) (executed Nov. 17, 2009) (accompanying motion for summary judgment).

tactics"; and that "Women are and were a majority of the population and, if they so choose, could theoretically determine most political outcomes." *Id.* at ¶ 89.

The affidavit reduced the "exclusively male" venues women faced to simply a sideshow in the fight against sex discrimination. It ignored that it included: educational institutions, politics and political positions, juries, voting, male-only business clubs that were major venues for client-access. It ignored economic discrimination against women through marriage and procreation policies. The white and male-bodied were *allowed* to be members of these clubs, if they could afford it; albeit, sexual minorities, often had to be closeted.

The same offense was committed under the guise of presenting "expertise," with respect to race. The affidavit stated, "in the 1940s and 1950s, African Americans and other racial and ethnic minorities had similar disadvantages to gays in terms of resources and social sanction . . . ." *Id.* at ¶ 91. But in fact, at no time in history was this statement true. And while the affidavit attempted to narrow its reach by claiming a focused on comparing "resources and social sanctions," it still failed miserably. Racial violence and segregation (in every aspect of life) were governmental and social sanctions. Lynching was also a social sanction. *See, e.g., Lynching Trial: Accused Freed, Sequel to Death of Negro on Lonely Hillside*, The Lancashire Daily Post, May 22, 1947 (lynching of a black man on a hillside after acquittal of charges he killed a white taxi driver). Racially restrictive covenants blocking blacks from purchasing property were social sanctions. *See Shelly v. Kramer*,

334 U.S. 1 (1948). These restrictions cost blacks huge losses in economic value that could have contributed to their political power. Meanwhile, the majority of LGBT+ persons were relatively privileged—white and approximately half were male-bodied.

Amicus recently chronicled how LGBT+ advocates (including professors) peddled false stories claiming that bathroom sex separation emerged as a norm in the 19th to as a patronizing extension of Victorian oppression. These approaches put a dagger in the heart of women's history, suppressing a long relationship between sex separation in intimate spaces and women's struggles for safety and privacy. *See* W. Burlette Carter, *Sexism in the Bathroom Debates: How Bathrooms Really Became Separated By Sex*. 37 Y.J. L. Pub. Pol'y 227 (2018).

Nor do the histories of oppression of male-bodied persons, gay men and trans women, justify complete merger.[10] Consider William Ragley, put on trial in 1732 in Rochester, New York. Ragley apparently carried on an affair with his male servant in his marital home. He asked his wife to make up "his" bed (the one in which he and his partner had apparently slept). The wife refused, saying that she would not do it for him or for his "dog of a boy." She called him a "Sodomitical Dog." Ragley took his long gun, filled with buckshot, and blasted her in the chest. She languished for a week and died. He was found guilty

[10] Trans men share much of women's history of oppression.

of murder. *Rochester, Mar. 18*, New-England Weekly Journal , June 19, 1732.[11]

Who was William Ragley? Was he gay? Was he bisexual? Was s/he a transwoman oriented toward men? We will never know. What we do know is that, in that era, a male body gave Ragley privilege over those who were female-bodied. With limited access to economic capital limited *because of their sex*, women often could not find relief from domestic violence—until it was too late.

Most male-bodied persons were and are not violent, irrespective of their orientation or gender identity. But gay and bisexual men and trans women did not have less power than other men *over women* because they were gay, or bisexual, or a closeted transwoman.

The EEOC's merger of disparate claimant interests is also inconsistent with basic joinder principles. Fed. R. Civ. Proc. 23 allows certification of a class only if there are questions of law and fact common to the class, the claims or defenses of the representative parties are typical of the claims and defenses of the class and the representative parties will fairly and adequately protect the class. Rule 20 allows permissive joinder *inter alia* when there are

[11] I came across Ragley's case in research on a multi-volume work in progress cataloging the lives of sexual minorities in earlier eras. While his male-body would have granted privilege on any account, I am among the historians who reject widely disseminated claims that gender identity or sexual orientation did not emerge until the nineteenth century.

"question of law or fact common to all plaintiffs." Fed. R. Civ. Proc. 20.

C. Creating New Rights

The EEOC's interpretation also creates *new* rights. Consider the EEOC's claim that Title VII, "discrimination" against gay or lesbian persons is necessarily associational. Most courts so holding have done so in cases alleging claims under *both* Title VII and §1981. *See* Respondents' Br., *Altitude Express v. Zarda*, 139 S. Ct. 1599 (2019), 32 & n. 9. But Respondents focus instead on two that do not involve §1981. In one, involving a lesbian plaintiff, the Seventh Circuit adopted wholesale the EEOC's position. *Hively v. Ivy Tech Comm. College of Ind.*, 853 F.3d 339, 348-49 (7th Cir. 2017) (en banc). The other involved an interracial marriage. *Holcomb v. Iona College*, 521 F.3d 130, 138 (2d Cir. 2008). *See* of Respondent's Br. at 32. Both of these cases relied heavily on cases asserting §1981. *Id.* at 139; Hively, 853 F.3d at 347-48.

But also note that the EEOC's "association" theory does not require *actual* relationships. It asks courts to *impute* a relationship whenever a gay or lesbian person faces discrimination (or differentiation). (It also skips over the tricky question of whether the associational right is in Title VII or the Constitution.) *Obergefell v. Hodges*, 135 S. Ct. at 2584; *Lawrence v. Texas*, 539 U.S. 558 (2003))

As applied to *Zarda*, the EEOC's theory also claims that Title VII guarantees a right to talk about oneself in the workplace. Zarda was openly gay at work. Plt'fs Second Am. Complt., *Zarda*, 883 F.3d at 100, ¶25. He

claimed that he was fired for speaking about his sexual orientation with an allegedly homophobic customer. 883 F.3d at 111. (By contrast, the customer "alleged that Zarda inappropriately touched her and disclosed his sexual orientation to excuse his behavior." *Zarda,* 883 F.3d at 108).

Now imagine a religious person who seeks to proselytize to coworkers (or customers) who feel threatened by that religion, but don't mind listening to other religious talk they deem more "inclusive." Does Title VII require an employer to force other employees (or customers) to listen? Social water cooler banter alone is simply not a term, condition or privilege of employment, nor does Title VII assure every employee a "Places in the Heart" Oscar moment.[12]

This Court has urged that the way to avoid making Title VII "a general civility code" is to pay "careful attention to the requirements of the statute." *Oncale*, 523 U.S. at 80. Racial minority groups or women are always "out" in the workplace. Social groups formed there regularly exclude them (and sometimes those groups include white, gay, men who have joined with the white, straight, ones). What Title VII requires is that those social groups not become de facto

[12] In 1985, accepting her "Best Actress" Oscar for her movie, *Places in the Heart*, Sally Field ended her speech by saying, "The first time I didn't feel it, but this time I feel it. And I can't deny the fact that you like me. Right now, you like me!" Sally Field, Oscars.org, Academy Award Acceptance Speech Database. http://aaspeechesdb.oscars.org/link/057-3/.

workgroups that categorically exclude protected classes from benefits secured by that statute.

D. Ignoring the Need for Mutuality

"Title VII's prohibition of discrimination "because of . . . sex" protects men as well as women, *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682, 77 L. Ed. *2d 89, 103 S. Ct. 2622 (1983)*." *Oncale*, 523 U.S. at 78. Its prohibition on discrimination "because of . . . race" operates similarly. *McDonald v. Santa Fe Trail Transp. Co*, 427 U.S. 273 (1976). By contrast, the EEOC's theory lacks such mutuality.

Consider, for example, a boss who will not hire anyone he suspects (1) is LGB or T+, or (2) sympathizes with LGBT+ persons, (3) speaks about being LGBT. The EEOC says the boss has violated the Title VII by discriminating "because of . . . sex." Now turn the tables. Instead, the boss refuses to hire anyone who is he suspects (1) is *not* LGBT, or (2) suspects sympathizes with persons or groups that are *contrary* to the interests of LGBT+ persons or (3) talks about being associated with groups that are "anti-LGBT+." This boss's exclusion list has people from a wide array of groups: whites, women, men, religious people, black or Latino people or even a few LGBT+ people who criticize the movement. Faced with a sex discrimination charge, he will say that he is only making sure his company stands for certain "values." Using "values," he can wipe out wide swaths of people whose "values" are directly derived from their experience—just as much of the EEOC's theory is

derived from the experiences of LGBT+ --and particularly male-bodied persons.

The EEOC's claim that mutuality is present isn't credible. *Baldwin*, *supra* p. 20, at *17 It says, "Similarly, a heterosexual man who alleges a gay supervisor denied him a promotion because he dates women instead of men states an actionable Title VII claim of discrimination because of his sex." As did the Segura Affidavit, *supra* at p.24, the EEOC makes a the experiences of male-bodied, white gay or trans persons the standard and filters everyone else's rights through that lens. No other category of protected persons under Title VII receives such a benefit.

E. Attempting to Use Title VII To Answer Constitutional Questions

The EEOC has also asserted that Title VII requires that same sex and opposite sex couples must have the same benefits associated with marriage. Examples of LGBT-Related Sex Discrimination Claims, eeoc.gov, https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm (using example of spousal health insurance). In some cases, Title VII does not answer the question; it is a Constitutional one. This Court recently left standing a Texas Supreme Court holding that *Obergefell* did not resolve the question of whether a government can provide different benefits to same-sex and opposite sex coupled employees. *Pidgeon v. Turner*, 538 S.W.3d 73 (2017), *cert. denied*, 138 S. Ct. 505 (2017). As a statutory matter, what Title VII requires in a given case likely depends, upon what the benefit is, why it

is given, and why the distinction made—and not on a blanket rule such as that the EEOC urges.

F. Replacing One Set of Social Norms With Another

In the end, the EEOC merely seeks to replace one set of social norms (or stereotypes) with another. The standard that emerges is that norms based on the experiences and preferences of sexual minorities (mainly white and male-bodied) are fine; those based on the experiences of others are not. The EEOC's theory does for example, address cases in which persons are considered *too masculine,* a common trope that assumes black men can only be security guards, lift heavy boxes and or engage in sports.

VI. *Oncale* Provides the Proper Standard for Derivative Claims

A. Under *Oncale* and Title VII, the Court Must Ask Whether Each Claim Concerns an "Evil" that is "Reasonably Comparable" to the "Principle Evil Congress was Concerned With."

In short, *Oncale* asks not what *name* is given to a practice, but whether the practice is of the kind about which Congress was principally concerned or

reasonably comparable to its concerns. I suggest here a way to apply the standard.

B. Under *Oncale* and Title VII, Courts Must Inquire into the Motives for the Actions

Stereotyping theory eliminates inquiry into motive. While for core claims that may make sense, the Court should reject it in these cases. History reveals four overlapping motives involving discrimination because of sex. They are (1) sexual assault; (2) motivations relating to appropriate appearances or behavior for the sexes; (3) motivations about the appropriateness of certain jobs for the sexes, and (4) motivations related to the morality of legal sex-related conduct.

In addition, Title VII, reflects that five motivations *might* exempt distinctions even if they fit into categories 1-4 above. These possible exemptions are (a) accommodation of religion, (b) ensuring safety (including avoiding employee conflict); (c) ensuring privacy and (d) ensuring opportunities for underrepresented classes; (e) in limited cases, policies related to biology/procreation. Whether these categories, if applicable, are exempted should depend

upon a balancing of various factors. I discuss this scheme also in the Companion Brief.

Finally, Title VII exempts discriminatory or differentiating behavior if it satisfies a BFOQ.

C. Under *Oncale* and Title VII, Courts Must Consider Whether Recognizing the Derivative Claim Would Be Inconsistent With Title VII Goals; If So, the Claim Should Be Denied or the *McDonald Douglas* Burdens Test Should Apply

I believe that both *Oncale* and Title VII also require that a derivative claim do no harm to Title VII's overall objectives. It is telling that, in its *amicus* brief below, the EEOC did not mention that a customer had made an allegation of sexual harassment against Zarda. It stated only that "Following one jump, a customer complained that Zarda had disclosed his homosexuality and other personal details during the jump. Zarda was fired soon thereafter." EEOC 2d Cir. Zarda En Banc Brief at 8.

The omission shows that the EEOC gave short shrift to conflicts of interest that might arise under its new theory—(or to how the sexual harassment allegation affects the employer's duty). While here the accuser was a customer, in another case, she might be a coworker. The mixed-motive test was intended to *remove* roadblocks to the claims about which Congress was principally concerned, not add more. Congress likely did not imagine a situation in which males would have a claim for discrimination because of sex that would enable them to take advantage of the mixed-motive test and offset a

woman's claim of discrimination because of sex. While Congress *did* limit recovery in mixed-motive cases, *see, e.g., Mayorga v. Merdon* 928 F.3d 84 (D.C. Cir. 2019); Morris v. Wheeler, 2019 U.S. Dist. LEXIS 23245, *11-12 (D.D.C. 2019), it was considering motives *other than* sexually harassing another coworker or a customer. 42 U.S.C. §2000-e5(g)(2)(B).

Thus, I believe that in *all* cases in which there is credible evidence that an employer acted in response to allegations of sexual harassment within the workplace or while on duty, courts should apply the *McDonald Douglas* test. *McDonald Douglas Corp. v. Green,* 411 U.S. at 792. Applying the mixed motive test in such situations, would be inconsistent with Title VII's core goals.[13]

D. The Verdict in *Altitude Express* Should Stand

In *Altitude Express*, because there is a conflict, *McDonald Douglas* should apply to the Title VII

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[13] An employer had a common law duty to take care in hiring his workers and could be held responsible for intentional torts they committed. *Bomba v. Borowicz*, 265 A.D. 198, 199 (1942) (holding employer liable for intentional tort of employee wife causing harm to another employee and saying, "He was plainly guilty of a breach of the "non-delegable duty of care to select and retain in his employ only servants from whose conduct there is not an unreasonable risk of harm to other servants.") *Id.* at 199 citing Restatement, Law of Agency, §§ 505. See. e.g., 2 Restatement, Law of Agency, § 505 (Am. Law Inst. 1933) (noting "non-delegable duty of care to select and retain in his employ only servants from whose conduct there is not an unreasonable risk of harm . . . .") The court also relied upon the duty to provide a safe place to work, *id.* at 199. 13 and the duty not to maintain

claim.[14] This was apparently the standard the jury used, and the verdict should stand.

However, there is no such conflict evident in the case in *Bostock v. Clayton County Bd. of Commiss'rs*, 723 Fed. Appx. 964 (11th Cir. 2018), *reh'g en banc denied*, 894 F.3d 1335 (11th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019). Thus, the plaintiff's recovery should depend on demonstrating that the employer's motive fit under one of the impermissible motives under Title VII. And the mixed-motive test should

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a nuisance. *Id.* Finally, the court said that in theory no distinction can be made between a customer who is injured by a nuisance and a fellow employee. *Id.* See also 1 William Blackstone, Commentaries, *417 (Master & Servant), (master may be responsible for acts of servants; failure to employ good servants who harmed others leading to master responsibility). (The "fellow servant" rule, which sometimes barred claims applied to negligence cases, not intentional torts.)

[14] I also believe *Zarda* had the burden of proving that the *customer's* motivation was impermissible *before* he could argue that the employer's reliance upon it was impermissible.

apply, although, relief might be limited by 42 U.S.C. § 2000e-5(g)(2)(B).

CONCLUSION

The judgment of the U.S. Court of Appeals for the Second Circuit should be reversed.

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