No. 17-1618

In The
Supreme Court of the United States

GERALD LYNN BOSTOCK,

Petitioner,

v.

CLAYTON COUNTY, GEORGIA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

By leading with specious arguments about the "original public meaning" of Title VII, Clayton County and Altitude Express, Inc. (the "Employers") betray the fact that the statutory text is decidedly against them. Their only hope is to convince the Court to depart from it. But the "law is the best expositor of itself," *Pennington v. Coxe*, 6 U.S. (2 Cranch) 33, 52 (1804), and "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Srvcs., Inc.*, 523 U.S. 75, 79 (1998). The Court has held that the text of Title VII created a "simple test" for sex discrimination, *City of Los Angeles, Dep't. of Water and Power v. Manhart*, 435 U.S. 702, 711-12 (1978), and a person's sexual orientation is a sex-based classification because it cannot be defined without reference to his sex. The statutory language is clear. The Employers and the Government offer no justification for departing from the text of Title VII, especially after the Court has refused to do so based on what Congress may have thought about the scope of the statutory language in 1964. *Oncale*, 523 U.S. at 79; *Newport News Shipbuilding and Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669, 679-80 (1983).

The statutory history also strongly supports the conclusion that Title VII prohibits sexual orientation discrimination. Before the 1991 amendments, the Court interpreted the sex discrimination prohibition expansively in several cases, including to reach forms of discrimination not mentioned in the statute as in

Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986), and discrimination based on sex roles and behavioral stereotypes in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality), 258-61 (White, J., concurring), 261 (O'Connor, J., concurring). In reenacting Title VII without modifying these broad interpretations, Congress ratified them. It also ratified the Court's conclusion that Title VII is not limited to forms of sex discrimination that motivated its enactment or are expressly mentioned in the statute, as well as the Court's approach to interpreting the statutory language to reach those forms. Sexual orientation discrimination is fundamentally a discriminatory insistence on traditional sex roles and behavioral stereotypes, and is therefore also encompassed by the meaning of Title VII as amended. The Employers and the Government ignore this statutory history, which disposes completely of their arguments about the "original" meaning of Title VII. Both the text and the statutory history of Title VII establish that discrimination on the basis of sexual orientation is a form of prohibited sex discrimination.

ARGUMENT

I. Presumptions about Expected Applications of Title VII in 1964 Cannot Trump the Text of the Statute Congress Enacted

The Government and the Employers argue that the original meaning of Title VII in 1964 could not have included a ban on sexual orientation. Br. of Resp.

Clayton County ("Clayton Br."), pp. 10-17; Br. of Pet. Altitude Express ("Altitude Br."), pp. 11-30; Br. of United States, pp. 12-14. But there is a fine line between looking to the "ordinary, contemporary, common meaning" of statutory terms at the time of enactment and declining to revise or update them, *Wisconsin Cent. Ltd. v. U.S.*, 138 S. Ct. 2067, 2074 (2018), and "rewrit[ing] the statute so that it covers only what we think is necessary to achieve what we think Congress really intended," *Lewis v. City of Chicago, Ill.*, 560 U.S. 205, 215-16 (2010) (citation omitted). The Government and the Employers ask the Court to cross that line because they do not want to face the text of Title VII.

The Government and the Employers never meet the fact that, in 1964 and now, a person cannot be defined as gay or "homosexual" without reference to his own sex. *Compare* Pet's. Br., pp. 13-14 *with* Clayton Br., pp. 14-15, Altitude Br., pp. 13, 17, Br. of United States, pp. 16-23. Instead, they resort to urging what is a false dichotomy for purposes of applying the sex discrimination prohibition – that "sex" is different from "sexual orientation" and Congress could not have meant to prohibit discrimination because of the latter. Clayton Br., 44-47; Altitude Br., pp. 17-21; Br. of United States, pp. 13-16. This is what they must argue to avoid a straightforward application of Title VII in accordance with the Court's decisions, but their confusion about how a person's "sex" plays a necessary role in any decision based on his sexual orientation does not create statutory ambiguity. Indeed, "the fact a statute can be

'applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'" *Pennsylvania Dep't. of Corrs. v. Yeskey*, 524 U.S. 206, 212 (1998) (citation omitted).

Because "sex" is not an ambiguous term, the cases cited by the employers to support departure from the text are inapposite. *See id.* at 212 (noting that "even assuming" Congress "could not envisio[n] that the [Americans with Disabilities Act] would be applied to state prisoners . . . in the context of an unambiguous statutory text that is irrelevant"). The statutory prohibition of discrimination "because of sex" is not a "vague term" or "ancillary provision," *cf. Whitman v. Amer. Trucking Ass'ns*, 531 U.S. 457, 458 (2001), nor is the fact that sexual orientation cannot be defined without reference to a person's own sex an "elephant," *id.*, or a "cryptic" interpretation of the statute, *cf. FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 151 (2000). Contrary to what the County says, Clayton Br., p. 20, Mr. Bostock's argument from the 1964 text is *not* for a new meaning of what "sex" is. Rather, it is for a new *application*, *cf. Wisconsin Cent. Ltd.*, 138 S. Ct. at 2074, of the statutory prohibition of disadvantageous "treatment of a person in a manner which but for that person's sex would be different," *Manhart*, 435 U.S. at 711. This is unproblematic because the Court has already held that new applications of the text of Title VII are appropriate even when Congress did not envision them. *See Oncale*, 523 U.S. at 79-80.

II. The Employers Confuse the Court's Decisions in Arguing that Title VII Permits Sexual Orientation Discrimination

The Employers and the Government argue that the simple test of *Manhart*, the *Price Waterhouse* sex stereotype theory, and the associational theory of discrimination do not show that Title VII prohibits sexual orientation discrimination. Clayton Br., pp. 26-44; Altitude Br., pp. 30-52; Br. of United States, pp. 16-28. As explained below, their reasoning is faulty because it does not correctly apply the Court's decisions.

A. Sexual Orientation Discrimination is "But For" Sex Discrimination

The Employers and the Government complain that it is a flawed application of *Manhart* to ask whether a man who is attracted to men would be treated differently if he were a woman because that hypothetical changes two variables, the employee's sex *and* sexual orientation. Clayton Br., pp. 27-28; Altitude Br., p. 35; Br. of United States, pp. 19-20. But this argument proceeds from the false assumption that *Manhart* and its progeny require the challenged treatment to be "in a manner which but for *only* that person's sex would be different." The Court has not qualified *Manhart* this way, nor would it, because doing so would confuse "but for" causation with "sole cause" causation and the Court has clearly explained the difference. *See Burrage v. United States*, 571 U.S. 204, 210-13 (2014).

A "but for" cause is a "minimum requirement" for causation, but it may not be the only factor. *Id.* at 211 (quotation omitted). Accordingly, "if poison is administered to a man debilitated by multiple diseases, it is a but-for cause of his death even if those diseases played a part in his demise, so long as, without the incremental effect of the poison, he would have lived." *Id.*; *see also id.* at 212 (explaining also that "it is beside the point that [an event] also resulted from a host of other necessary causes"). The Court in *Burrage* cited Title VII as an exemplar of this causation standard. *Id.* at 212-13.

It therefore does not matter whether an employer can identify another "variable,"[1] so long as, but for the employee's sex, she would not have been subjected to adverse action. The case law confirms this. In *Phillips v. Martin Marietta Corp.*, this Court reversed as error the Fifth Circuit's conclusion that Title VII was not violated where the employee "was not refused employment because she was a woman nor because she had pre-school age children[, but] because of the coalescence of these two elements[.]" 411 F.2d 1, 4 (5th Cir. 1969), *rev'd*, 400 U.S. 542 (1971). And in *Price Waterhouse*, the Court did not compare the treatment of the aggressive female with that of a submissive male (changing the sex of the person while holding gender

[1] Amici explain that it actually makes no sense to consider "sexual orientation" as an additional "variable" anyway, because it is a relational term dependent on the sex of the employee. *See* Br. of Amici Walter Dellinger, et al., pp. 26-27 n.11; Br. of Amici Lambda Legal, et al., p. 16.

non-conformity constant), but instead compared a female who did not conform to sex-based stereotypes with men who did and found sex discrimination against the former. 490 U.S. at 241-42, 250-51 (plurality); *id.* at 258-61 (concurrence); *id*. at 261 (concurrence). Because an employee's sex is a necessary element of his sexual orientation, a decision because of the latter is also a decision because of the former.

Espinoza v. Farah Mfg. Co. is not to the contrary. The Court in that case did not hold, as Altitude Express wrongly states, that "discrimination on the basis of citizenship does not constitute discrimination on the basis of national origin because these concepts are different and are not interchangeable." Altitude Br., p. 32 (citing 414 U.S. 86, 92-94 (1973)). In fact, the Court noted that "[c]ertainly Title VII prohibits discrimination on the basis of citizenship whenever it has the purpose or effect of discriminating on the basis of national origin." 414 U.S. at 92 (citation omitted). But the Court held that, because Title VII declared the "policy of the United States to insure equal employment opportunities for federal employees without discrimination because of . . . national origin," and for fifty years the federal government had routinely conditioned federal employment on citizenship, it was not possible to read the ban on "national origin" discrimination as prohibiting all discrimination against noncitizens. *Id.* at 88-90. Because there is no analogous statutory backdrop for Title VII or its amendments, *Espinoza* does not help the Employers.

The Employers and the Government nevertheless insist that discrimination based on sexual orientation is not motivated by "sex." Clayton Br., pp. 31-33, 37, 41; Altitude Br., pp. 9, 39, 44; Br. of United States, p. 17.[2] That is irrelevant because Title VII prohibits employers from using sex as a means for disparate treatment even when it is not strictly the "motive." *See*, *e.g.*, *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991) (noting that "discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination") (citing *Phillips*, 400 U.S. 542 (1971)); *Manhart*, 435 U.S. at 711. But it is also untrue. A distinction between two employees, one male and one female, who both date men is not based on sexual orientation but on the sex of the employees. The Employers here are like the City of Los Angeles in *Manhart*, who argued it was motivated by the longevity of employees, not their sex. 435 U.S. at 712. But whether the Employers realize it or not, "one cannot say that [a sexual orientation] distinction based entirely on sex is 'based on any factor other than sex.' Sex is exactly what it is based on." *Id.* at 712-13 (citation omitted).

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[2] The Government also argues that sexual orientation discrimination does not necessarily rest on sex stereotypes about men or women, but may instead be based on "moral or religious beliefs about sexual, marital, and familial relationships," Br. of United States, p. 25, but it never explains why those "moral or religious beliefs" are not ultimately based on the sex of the employee.

B. Sexual Orientation Discrimination is Associational Discrimination

The Government and the Employers fail to explain why sexual orientation discrimination is not associational discrimination. Br. of United States, pp. 28-30; Clayton Br., pp. 40-44; Altitude Br., pp. 47-52. The County argues that it is not associational discrimination because a gay man with whom a gay male employee is associated is not protected by Title VII as such. Clayton Br., pp. 42. This is begging the question, but it also misunderstands the basic fact that associational discrimination is not unlawful because of who the associated person is, but because of who the *employee* is in relation to that person. *See Newport News*, 462 U.S. at 684; *Holcomb v. Iona Coll.*, 521 F.3d 130, 139 (2d Cir. 2008). Because Title VII requires a classification-based approach focused on the individual, *Manhart*, 435 U.S. at 708-09, it is no answer to say that there is no associational discrimination because the associated person is not protected, even if true. A gay male employee who is discriminated against because of his association with another gay male would not be treated the same way but for the fact that the employee is male.

The County and the Government fall back on a version of the fallacious "equal application" defense, arguing that sexual orientation discrimination is not analogous to the race discrimination arising from interracial marriage bans because the former does not treat men and women differently. Clayton Br., pp. 43-44; Br. of United States, pp. 29-30. But, strictly

speaking, interracial marriage bans do not treat members of different races differently either. The Government even admits that an employer who refused to hire black and white employees in interracial marriages would discriminate against *both* on the basis of race in violation of Title VII. Br. of United States, pp. 28-29. It argues instead that because sex-based distinctions can pass constitutional muster in certain contexts, the rationale of *Loving v. Virginia*, 388 U.S. 1 (1967), cannot extend to associational discrimination on the basis of sex, Br. of United States, pp. 28-29. But the Government never explains how sex-based distinctions permissible in other contexts could be relevant in the Title VII context, where "gender must be irrelevant to employment decisions." *Price Waterhouse*, 490 U.S. at 241 (plurality). The Employers and the Government also never reckon with the fact that an employer's insistence on traditional gender roles for *anyone* imposes "mutually reinforcing stereotypes" for men *and* women that create a "self-fulling cycle of discrimination" against them. *See Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1693 (2017) (citing *Nevada Dep't. of Hum. Res. v. Hibbs*, 538 U.S. 721, 736 (2003)). Discrimination against an employee for being intimately associated with another person of the same sex only reinforces the discriminatory insistence on traditional sex roles by employers, and thus violates Title VII.

C. "Equal Application" is not a Defense to Sex Stereotyping

The County and the Government resist the sex stereotype theory by arguing that (a) it is only an evidentiary tool, not a cause of action, and (b) it does not apply because a heterosexual orientation is not a "sex-specific" stereotype because employers apply it to men *and* women. Clayton Br., pp. 36-40; Br. of United States, pp. 23-25. The first argument is half-baked because the characterization of the theory as a mere "evidentiary tool" says nothing about why it should not apply to sexual orientation. It seems to be a misunderstanding of Justice Kennedy's dissent in *Price Waterhouse*, where he said that "Title VII creates no independent cause of action for sex stereotyping," but only meant that sex stereotyping must result in an adverse action in order to be actionable, which the plurality opinion also explained. *See* 490 U.S. at 251 (plurality); *see also* Br. of Employment Discrimination Law Scholars, p. 18.

The second argument is simply the "equal application" defense redux – that there is no sex stereotype discrimination if mirror images of the stereotype are applied to both sexes. But the individualized approach to discrimination under Title VII prevents an employer from "doubling down" on discrimination to cure it. *See* Pet's. Br., pp. 14-16, 27-28.[3] The Government actually

[3] Take for example an employer who equally applies to men and women a policy requiring all employees "to observe traditional gender roles and behaviors." *See* Br. of Anti-Discrimination Scholars, p. 7. Surely this would violate Title VII.

concedes this when it admits that Title VII would be violated twice by an employer who treated macho women differently than macho men and effeminate men differently than effeminate women. Br. of United States, pp. 25-26. Given this, it is untenable to maintain that an employer can escape liability for discriminating against men for failing to conform to the male stereotype that men should partner with women so long as the employer also discriminates against women who fail to conform to the female stereotype that women should partner with men. The employer has in each case punished an employee for failing to conform to stereotypical expectations which the employer would not have for them if not for their respective sex. *See* Pet's. Br., pp. 27-29.

III. The Statutory History Requires Expansive Interpretation of Title VII to Include Sexual Orientation Discrimination

Clayton County only feints at Mr. Bostock's contention that with the 1991 amendments Congress ratified the Court's broader interpretations of the sex discrimination prohibition to include discrimination based on sex roles and behavioral stereotypes. *Compare* Pet's. Br., pp. 32-44 *with* Clayton Br., pp. 23, n.9, p. 25 n.10. It also does little to dispute that by ratifying those decisions, Congress also ratified the Court's approach to interpreting the statutory language to reach forms of sex discrimination not anticipated by Congress. The County's only argument against this is that the Senate rejected an amendment vaguely providing

that "all federal civil rights laws" should be interpreted broadly. Clayton Br., p. 25 n.10 (citation omitted). The Government likewise argues that sponsors of a failed amendment to ban sexual orientation discrimination believed there was an "absence of federal laws" prohibiting it. Br. of United States, p. 31. But for reasons already explained, *see* Pet's. Br., pp. 42-43, *infra*, pp. 16-17, these lack any persuasive significance "because several equally tenable inferences may be drawn from such inaction[.]" *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990). This is why the Court should focus not on the "sort of unenacted legislative history that is often neither truly legislative . . . nor truly historical," and instead focus on the "record of *enacted* changes Congress made to the relevant statutory text over time," *BNSF Ry. Co. v. Loos*, 139 S. Ct. 893, 906 (2019) (Gorsuch, J., concurring).

The point is that, even if the text of Title VII does not clearly apply to sexual orientation discrimination (which it does), the statutory history demonstrates that Congress ratified a broader understanding of sex discrimination to include discrimination based on sex roles and behavioral stereotypes, which as a matter of common sense include sexual orientation. And Congress intended the Court to interpret the sex discrimination provision broadly to cover forms of sex discrimination not expressly mentioned in the statute. In fact, the Court has already held that the 1991 amendments ratified its interpretation of the sex discrimination prohibition beyond the original statutory

language. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 792 (1998).

In *Faragher*, the Court determined the scope of an employer's liability for sexual harassment committed by one of its employees. *Id.* at 785-808. The Eleventh Circuit had rejected a sexual harassment claim, ruling in part that under traditional agency law principles the employer could not be liable. *Id.* at 784-85. This Court reversed, reaffirming the holding of *Meritor*, that "although [Title VII] mentions specific employment decisions with immediate consequences, the scope of the prohibition is not [so] limited" and "covers more[.]" *Id.* at 786 (citations and quotations omitted). The Court further explained that while *Meritor* rejected automatic employer liability for workplace harassment and directed lower courts to look to traditional agency law principles, it also rejected certain limitations on such liability and expressly cautioned that common law principles may not be totally applicable to Title VII. *Id.* at 791-92. The Court also held that "the force of [this] precedent [was] enhanced by Congress's amendment to the liability provisions of Title VII since the *Meritor* decision, without providing any modification of our holding." *Id.* at 792, 804 n.4 (citations omitted). The Court then set forth a new standard of vicarious liability for harassment under Title VII, including, critically, a departure from traditional agency law principles in this context. *Id.* at 784-85.

Faragher represents the Court's recognition not only that Congress ratified its expansive definition of discrimination "because of sex" under Title VII, but

also that the sex discrimination prohibition should be interpreted broadly to apply to forms of sex discrimination not anticipated. *Faragher* is thus precedent on precedent for expansive interpretation of the sex discrimination prohibition beyond any original understanding of the text in 1964. Arguments about "original public meaning" in 1964 therefore ask and answer the wrong question. Indeed, if ever the statutory ban on discrimination "because of sex" could have been called a "mousehole," it is now rather more like a grand foyer, built from the columns of congressional amendments that ratified *Manhart*, *Newport News*, *Meritor*, and *Price Waterhouse*. Sexual orientation discrimination fits easily inside.

IV. The Employers' Efforts to Resist the Statutory History are Meritless

Faced with a statutory history that is also decidedly against them, *see* Pet's. Br., pp. 32-44, *supra*, pp. 12-15, the Employers and the Government pursue three dead ends of statutory interpretation: (a) subsequent unenacted legislative history; (b) the spurious notion that Congress silently ratified sparse and unsearching lower court opinions; and (c) the inclusion of "sexual orientation" as an additional term in other later statutes. Each of these arguments is meritless.

A. The Court's Cases do not Support Drawing a Conclusion from Subsequent Unenacted Legislative History

Trying to avoid the fact that "[i]t is at best treacherous" to rely on congressional inaction to interpret a statute, *United States v. Wells*, 519 U.S. 482, 496 (1997), the Employers seek to analogize this case to a few readily distinguishable cases in which the Court gave some weight to subsequent failed legislative proposals. Clayton Br., pp. 47-50; Altitude Br., pp. 28-30. But the cases cited are all inapposite because they involved documented consideration and explained rejection of a specific proposal, often in light of a definitive ruling to the contrary. *See Heckler v. Day*, 467 U.S. 104, 114-16 (1984) (noting that the congressional committee's report showed that it considered and rejected a proposed time limit for disability adjudications for specific reasons and explained why); *Bob Jones Univ. v. United States*, 461 U.S. 574, 599-601 (1983) (considering congressional inaction to reverse a particular Internal Revenue Service decision because multiple "exhaustive hearings" were held immediately after the decision was issued and there was "prolonged and acute awareness" of the "precise issue"); *Flood v. Kuhn*, 407 U.S. 258, 269-82 (1972) (noting congressional inaction on the exemption of professional baseball from

antitrust laws because of at least three decisions by the Court on that exact issue).

By contrast, neither the Employers nor the Government offer any evidence that Congress specifically debated whether Title VII should prohibit sexual orientation discrimination in response to a decision of any court or administrative agency. They also offer no evidence that Congress ever gave any explanation for rejecting any of the bills that would have prohibited it. These unsuccessful bills therefore fall within a general rule that no weight should be given to them, because "'several equally tenable inferences' may be drawn from such inaction." *Pension Ben. Guar. Corp.*, 496 U.S. at 650 (quotation omitted); *Zuber v. Allen*, 396 U.S. 168, 185-86 n.21 (1969). *See also Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990) (Scalia, J., concurring) ("[a]rguments based on subsequent legislative history . . . should not be taken seriously, not even in a footnote"); *Solid Waste Agency of Northern Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 169-70 (2001) ("*SWANCC*") ("a bill can be proposed for any number reasons, and it can be rejected for just as many others"). This is precisely why the Court should focus not on subsequent unenacted legislative history but the statutory history of "*enacted* changes Congress made to the relevant statutory text over time . . . which everyone agrees can sometimes shed light on meaning." *Loos*, 139 S. Ct. at 906 (Gorsuch, J., concurring) (emphasis in original). *That* history shows that in 1978 and 1991 Congress ratified this Court's expansive holdings and interpretative approach to the sex discrimination prohibition. Pet's. Br., pp. 32-44.

B. Congress did not Ratify Lower Court Decisions Regarding Sexual Orientation Discrimination

The Employers and the Government also argue that, with the 1991 amendments, Congress impliedly ratified the decisions of three Circuits which had held that sexual orientation discrimination was not covered by Title VII. Clayton Br., pp. 51-54; Altitude Br., pp. 26-28; Br. of the United States, pp. 30-31. But the cases they cite merely confirm what Mr. Bostock has already said – that the ratification canon applies only to decisions of *this Court*, and not to decisions of lower courts unless there is evidence in the congressional record of specific discussion about their rulings. *See Texas Dep't. of Hous. and Comm. Affairs v. Inclusive Cmty's. Project, Inc.*, 135 S. Ct. 2507, 2520 (2015) (finding ratification only with statements by several legislators discussing the unanimous authority in *nine* circuits); *Cannon v. Univ. of Chicago*, 441 U.S. 677, 695-701 (1979) (concluding that Congress was aware of lower court decisions implying a private right of action in Title VI of the Civil Rights Act "because of [legislators'] repeated references to Title VI and its modes of enforcement"); *Lorillard v. Pons*, 434 U.S. 575, 582-83 (1978) (noting that Congress "exhibited both a detailed knowledge of the [selectively incorporated] FLSA provisions and their judicial interpretation").[4] This Court

[4] *Helsinn Healthcare S.A. v. TEVA Pharmaceuticals USA, Inc. et al.*, 139 S. Ct. 628 (2019), is not to the contrary, for that case involved asserted ratification of an interpretation of the Leahy-Smith America Invents Act, 35 U.S.C. § 102(a)(1), by the Federal Circuit, which has exclusive jurisdiction over patent appeals and therefore was the only source of authoritative interpretation other than this Court. *Helsinn*, 139 S. Ct. at 633-34.

simply has not presumed that Congress was aware of and ratified decisions of lower courts which Congress did not discuss and about which there is no evidence it was aware. *See Jones v. Liberty Glass Co.*, 332 U.S. 524, 534 (1947) ("[w]e do not expect Congress to make an affirmative move every time a lower court indulges in an erroneous interpretation").

This case is more in line with those in which the Court has refused to presume that Congress silently ratified decisions of the lower courts. *See Jama v. Immigration & Customs Enf't*, 543 U.S. 335 (2005); *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994). In *Jama*, the petitioner argued that Congress silently ratified lower court decisions interpreting a certain provision of the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(2). 543 U.S. at 349-52. The Court rejected the argument because the statute was not reenacted without change, and the "supposed judicial consensus" was not so broad and unquestioned that it could be presumed Congress was aware of it. *Id.* at 349. Only two of the Circuits had actually addressed the specific question, and one of them did so in a two-sentence per curiam decision. *Id.*

The same situation exists here. In 1991, only three Circuits had held that sexual orientation was not prohibited by Title VII. The Eleventh Circuit in *Blum v. Gulf Oil Corp.* stated in a single sentence of analysis that "discharge for homosexuality is not prohibited by Title VII[.]" 597 F.2d 936, 938 (5th Cir. 1979). It cited for the proposition only *Smith v. Liberty Mut. Ins. Co.*,

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And even there, the Federal Circuit's holding had only "made explicit what was implicit in [this Court's] precedents." *Id.* at 633.

which held that sex stereotype discrimination against an "effeminate" man was not actionable, 569 F.2d 325, 327 (5th Cir. 1978), and *Smith* was arguably overruled by *Price Waterhouse*, 490 U.S. 228 (1989). *DeSantis v. Pac. Tel. & Tel. Co., Inc.* also relied on the discredited "effeminacy" holding from *Smith* and one of its own precedents on the separate issue of discrimination based on transgender status. 608 F.2d 327, 329-30 (9th Cir. 1979). Finally, in *Williamson v. A.G. Edwards and Sons, Inc.*, the Eighth Circuit relied on *DeSantis* and one of its transgender cases for a single-sentence holding in a per curiam opinion. 876 F.2d 69, 70 (8th Cir. 1989). As in *Jama*, this "Circuit authority is too flimsy to justify presuming that Congress endorsed it when the text and structure of the statute are to the contrary." 543 U.S. at 352; *see also Fogerty*, 510 U.S. at 531 (refusing to find congressional acquiescence to the interpretation by lower courts that attorney's fees could be awarded to defendants under the Copyright Act because "at least one reported case stated no reason" and while a majority of the lower courts awarded fees, "not all courts expressly described" the standard). There were no "uniform interpretations" that Congress could be said to impliedly ratify in 1991,[5] certainly not any

[5] The Employers make a related argument that Congress ratified the "established agency interpretation" of the EEOC that sexual orientation discrimination was not covered. Clayton Br., p. 51; Altitude Br., p. 28. But as explained by amici, the EEOC originally investigated and conciliated charges of sexual orientation discrimination as discrimination because of sex, even after it began to hold that sexual orientation was not covered in approximately 1975. *See* Br. of Historians in Support of Employees, pp. 25-26, 28-30, 37. This murkiness is not enough to find congressional acquiescence by silence because the Court is "loath" to

that could outweigh the decisions of this Court that it expressly ratified.

C. Later Different Statutes Cannot Control the Meaning of Title VII

Finally, the Employers argue that the use of the term "sexual orientation" in other statutes passed after Title VII and the 1991 amendments means that the term "sex" as used in Title VII cannot be applied to include sexual orientation. Clayton Br., pp. 55-58, Altitude Br., pp. 19-20. They argue it would create surplusage in these other statutes to interpret the word "sex" as used in Title VII to include sexual orientation. Clayton Br., p. 58; Altitude Br., p. 19. Just how surplusage in another statute could control the meaning of Title VII is not clear.[6] But regardless, the surplusage canon is not absolute, *King v. Burwell*, 135 S. Ct. 2480, 2492 (2015) (quotation omitted), because redundancy in a statute is a "not uncommon sort of lawyerly iteration," *Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 635 (2012). And here, where "sex" and "sexual orientation" merely overlap, there is no superfluousness. *See Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253 (1992). Congress is free to take a "belt-and-suspenders"

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replace the text and understanding of a statute with an "amended agency interpretation." *SWANCC*, 531 U.S. at 169-70 n.5.

[6] It is "a sort of interpretive triple bank shot" that should "raise a judicial eyebrow." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1626 (2018).

approach to drafting legislation, and the Court has even recognized that "[l]egislative enactments in the area of job-related discrimination have long evinced a general intent to accord parallel or overlapping remedies." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974).

The surplusage canon also only applies, when it does, to multiple uses of a term in the same or closely related statutes. The cases cited by the employers demonstrate this. *See Azar v. Allina Health Srvcs.*, 139 S. Ct. 1804, 1808-12 (2019) (interpreting the phrase "statement of policy" to bear the same meaning in the amended Medicare Act as in the Administrative Procedures Act since the notice and comment procedures at issue in the former were specifically adapted from the latter); *United States v. Davis*, 139 S. Ct. 2319, 2329 (2019) (presuming that identical language in separate provisions of the Federal Criminal Code carried the same meaning). These authorities do not support what the Employers seek here, which is for the Court to conclude that Congress meant one thing by "sex" in Title VII because it used that term alongside a related term in entirely different later statutes. The "Constitution puts Congress in the business of writing new laws, not interpreting old ones." *United States v. Estate of Romani*, 523 U.S. 517, 536 (1998) (Scalia, J., concurring). There is no indication in any of the statutes cited by the employers that they were meant to clarify Title VII. They therefore "tell us nothing" about the meaning of that statute. *Food Mktg. Inst. v. Argus Leader Media*,

139 S. Ct. 2356, 2366 (2019); *see also Gutierrez v. Ada*, 528 U.S. 250, 257-58 (2000).

V. The Court Should Ignore the Employers' Parade of Horribles

The Government and the Employers are ultimately reduced to arguing a parade of horribles based on false equivalence. They argue that recognizing sexual orientation discrimination to be a form of sex discrimination would "require employers to be entirely blind to a person's sex," and therefore overturn sex-specific dress, grooming, physical fitness, and restroom usage policies that have been upheld by lower courts as non-discriminatory. Clayton Br., p. 35; *see also* Altitude Br., p. 14; Br. of United States, pp. 25, 29. But not only are none of these issues before the Court, they are not even necessarily implicated. Sex-specific dress, bathroom, fitness, or other policies may be justified as bona fide occupational qualifications "reasonably necessary to the normal operation of [a] particular business or enterprise" under Title VII, 42 U.S.C. § 2000e-2(e), and they may not even be discriminatory at all because they do not constitute "*disadvantageous* terms or conditions of employment," *see Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 118-19 (2d Cir. 2018) (emphasis supplied). A speculative parade of horribles is not a basis for departure from the text of Title VII in an effort to produce "the least mischief." *Cf. Lewis*, 560 U.S. at 205.

On the other hand, there are great present and continuing harms if the Court does not recognize that sexual orientation discrimination is prohibited by Title VII. These include the drain on public resources of states and local governments resulting from the provision of services to gay and lesbian people who suffer job loss and consequent financial and emotional distress at a higher documented rate, Br. of Local Governments and Mayors, p. 11; Br. of the States of Illinois, et al., pp. 9-11; the inability of large and small businesses to attract and retain a diverse and tolerant workforce that evidence shows are more competitive and productive, Br. of 206 Businesses, pp. 9-10, 17-18; the psychological harm and mental illness caused by sexual orientation discrimination, Br. of American Psychological Association, et al., pp. 18-23; the detriment to veterans, their families, and national security, Br. of Modern Military Association of America, et al., pp. 8-14, 24-30; and the harm to children in families with gay and lesbian parents who suffer discrimination, Br. of Georgia Equality, pp. 6-7, 12. These are the real – not imagined – consequences if the Court does not interpret Title VII in accordance with its plain language and statutory history.

CONCLUSION

For all the reasons set forth above and in Petitioner's Initial Brief, the judgment of the Eleventh Circuit Court of Appeals should be reversed.

Respectfully submitted,

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