No. 17-1618

In The
Supreme Court of the United States

GERALD LYNN BOSTOCK,

Petitioner,

v.

CLAYTON COUNTY, GEORGIA,

Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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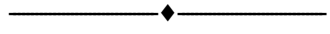
INTRODUCTION

This case is not about whether Congress should enact a statute prohibiting employment discrimination on the basis of sexual orientation as a matter of desirable public policy. Instead, the issue presented in this Petition is whether Congress did so more than 50 years ago when it enacted Title VII of the Civil Rights Act of 1964 that prohibited employment discrimination on the basis of "sex" and other protected classes, including race, color, religion and national origin. The United States Court of Appeals for the Eleventh Circuit, following established circuit precedent, correctly answered "no" to this question.

The inconvenient reality for Petitioner is that the text of Title VII does not include sexual orientation as a protected class. Undeterred, Petitioner advances various novel legal theories in hopes of persuading the Court to grant certiorari to extend discrimination on the basis of "sex" under Title VII to also prohibit discrimination on the basis of sexual orientation. The novel legal theories advanced by Petitioner, however, are solely intended to entice the Court to seize legislative power from Congress and do what Congress has declined to do for more than 50 years: amend Title VII by adding sexual orientation as a protected class.

The Court should decline Petitioner's invitation and deny certiorari in this case.



STATEMENT OF THE CASE

Statement of the Facts

Petitioner alleges that he is a gay male who worked for Clayton County as the Child Welfare Services Coordinator assigned to the Juvenile Court of Clayton County. App. 6-7. Petitioner asserts that he was responsible for the Clayton County Court Appointed Special Advocate. *Id*. at 7.

Petitioner claims that, beginning in January 2013, he began playing in a gay recreational softball league. App. 7. Petitioner alleges "on information and belief" that his participation in the league and his sexual orientation were criticized by one or more (unnamed) persons who had significant influence on the County's decision making, and that the County subjected him to an internal audit of the funds he managed. *Id*. Petitioner claims that the audit was a pretext for discrimination against him based on his sexual orientation and his failure to conform to a gender stereotype. *Id*. at 7-8. On or about June 3, 2013, the County terminated Petitioner's employment. *Id*. at 8. The stated reason for Petitioner's termination was conduct unbecoming of a County employee. *Id*. Petitioner contends that the real reason for his termination was discrimination on the basis of his sexual orientation and gender nonconformity, rather than due to the findings of the audit. *Id.* Based solely upon these allegations, Petitioner alleges that he was discriminated against due to his "sex" in violation of Title VII of the Civil Rights Act of 1964. *Id*. at 8-9.

The County denies that Petitioner's sexual orientation was a motivating factor in its decision to conduct an audit of the program he managed or its decision to terminate his employment after the audit was completed. App. 7-8. The County contends that it terminated Petitioner for legitimate, non-discriminatory reasons based on the results of the audit. *Id.* at 8.

Course of Proceedings

After filing a charge with the Equal Employment Opportunity Commission ("EEOC") and receiving a right to sue letter from the EEOC, Petitioner filed this action *pro se* on May 5, 2016 in the United States District Court for the Northern District of Georgia. App. 28. After retaining counsel and filing a First Amended Complaint, Petitioner filed his Second Amended Complaint ("SAC") on September 12, 2016. *Id*. In his SAC, Petitioner asserted that he was terminated in violation of Title VII because of his sexual orientation and because he did not conform with gender stereotypes. *Id*.

Clayton County ("the County") filed a Motion to Dismiss the SAC on September 26, 2016, arguing that Petitioner's claim that he was terminated because he is gay should be dismissed because Title VII does not prohibit discrimination on the basis of sexual orientation. App. 9-17. The County also argued that Petitioner's claim that he was terminated because he did not conform with gender stereotypes should be dismissed because (among other reasons) the SAC did not

sufficiently allege a gender stereotyping claim. *Id*. at 17-22.

After receiving briefs from the parties, the magistrate judge issued a Report and Recommendation ("R&R") on November 3, 2016 recommending dismissal of the SAC. App. 5-25. With respect to Petitioner's claim that he was terminated because of his sexual orientation, the magistrate judge wrote that Title VII does not encompass claims of discrimination on the basis of sexual orientation. *Id*. at 9-17. The R&R determined that Petitioner's contention to the contrary was precluded by binding circuit precedent in *Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979) (per curiam), which held that Title VII does not prohibit discrimination on the basis of sexual orientation. App. 12-13. The R&R recognized that the EEOC changed its position in 2015 in *Baldwin v. Foxx*, EEOC Decision No. 0120133080, 2015 EEOPUB LEXIS 1905, 2015 WL 4397641 (July 15, 2015) and interpreted Title VII as encompassing sexual orientation, but the magistrate judge explained that the district court should not defer to the EEOC's new position in light of the binding precedent set forth in *Blum*. *Id*. at 15-17. The R&R also recommended dismissal of Petitioner's gender stereotyping claim. *Id*. at 17-24.

Petitioner filed Objections to the R&R on November 17, 2016, asserting that Title VII encompasses discrimination on the basis of sexual orientation and that the SAC adequately pled a gender stereotyping claim. App. 26. After considering briefs by the parties, the district court issued an Order on February 2, 2017

deferring consideration of the R&R until after the Eleventh Circuit issued its decision in *Evans v. Ga. Reg'l Hosp. Id*. at 29.

On March 10, 2017, the Eleventh Circuit issued its decision in *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248 (11th Cir. 2017), which held that *Blum* remained binding precedent in the Eleventh Circuit and that Title VII therefore does not prohibit discrimination on the basis of sexual orientation. Relying on *Evans*, the district court entered an Order on July 21, 2017 adopting the R&R and dismissing Petitioner's Title VII claim that he was terminated because of his sexual orientation. App. at 31. *Bostock v. Clayton Cty.*, 2017 U.S. Dist. LEXIS 217815, at *6-7 (N.D. Ga. July 21, 2017). The district court also adopted the R&R and dismissed Petitioner's gender stereotyping claim on the ground that the SAC did not plead any facts supporting this claim. App. 32. Accordingly, the district court entered judgment in favor of the County on July 21, 2017. *Id*. at 34-35.

Petitioner appealed the district court's judgment in favor of the County to the Eleventh Circuit. Petitioner, however, did not appeal the district court's dismissal of his gender stereotyping claim. App. 41 n.1. Instead, Petitioner argued that Title VII encompasses sexual orientation and that the Eleventh Circuit's rulings to the contrary in *Evans* and *Blum* conflicted with this Court's decisions in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) and *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998), as well as the Eleventh Circuit's decision in *Glenn v. Brumby*, 663 F.3d 1312

(11th Cir. 2011). App. 36-59. Petitioner also filed a preliminary petition for rehearing en banc on November 13, 2017 asserting similar arguments. *Id*. at 60-77. The Eleventh Circuit denied Petitioner's preliminary petition for rehearing en banc on May 3, 2018. *Id*. at 4.

On May 10, 2018, the Eleventh Circuit issued an opinion affirming the district court's dismissal of Petitioner's Title VII claim on the ground that, under binding Eleventh Circuit precedent, Title VII does not prohibit discrimination on the basis of sexual orientation. App. 1-3; *Bostock v. Clayton Cty. Bd. of Comm'rs*, 723 F. App'x 964 (11th Cir. 2018).

The Eleventh Circuit stated as follows:

> Title VII prohibits employers from discriminating against employees on the basis of their sex. 42 U.S.C. § 2000e-2(a). This circuit has previously held that "[d]ischarge for homosexuality is *not* prohibited by Title VII." *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979) (per curiam) (emphasis added). And we recently confirmed that *Blum* remains binding precedent in this circuit. *See Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1256 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 557 (2017). In *Evans*, we specifically rejected the argument that Supreme Court precedent in *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998), and *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989), supported a cause of action for sexual orientation discrimination under Title VII.

App. 2-3 (footnote omitted). Accordingly, the Eleventh Circuit held as follows:

> [T]he district court did not err in dismissing Bostock's complaint for sexual orientation discrimination under Title VII because our holding in *Evans* forecloses Bostock's claim. And under our prior panel precedent rule, we cannot overrule a prior panel's holding, regardless of whether we think it was wrong, unless an intervening Supreme Court or Eleventh Circuit en banc decision is issued. *United States v. Kaley*, 579 F.3d 1246, 1255-56 (11th Cir. 2009); *United States v. Steele*, 147 F.3d 1316, 1317-18 (11th Cir. 1998) (en banc).

App. 3.

Petitioner filed his Petition for Writ of Certiorari on June 1, 2018.

REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

As discussed in more detail below, Petitioner contends that certiorari should be granted because the United States Courts of Appeals for the Second Circuit and Seventh Circuit recently have held that Title VII prohibits discrimination on the basis of sexual orientation, thereby creating a split from the nine other circuits that have held for decades that Title VII does not prohibit discrimination on the basis of sexual orientation. However, the Court has declined certiorari on

many occasions despite a circuit split, and the Court should do so in this instance as well in order to give the circuit courts an opportunity to address the arguments made in the recent Second Circuit and Seventh Circuit decisions. Moreover, the Court recently denied certiorari in *Evans v. Ga. Reg'l Hosp.*, 138 S. Ct. 557 (2017), which presented the identical issue that Petitioner seeks to present to the Court in this case.

In addition, the legal theories asserted by Petitioner in support of his contention that Title VII prohibits discrimination on the basis of sexual orientation, even though sexual orientation is not included as a protected class in the text of Title VII, are meritless and thus do not warrant granting certiorari. Contrary to Petitioner's assertions, discrimination on the basis of "sexual orientation" is not equivalent to or a subset of discrimination on the basis of "sex." Furthermore, neither *Price Waterhouse*, 490 U.S. 228 (1989) nor *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) hold or suggest that Title VII prohibits discrimination on the basis of sexual orientation.

In an attempt to buttress his Petition, Petitioner also asserts additional grounds for granting certiorari that have nothing to do with the claims asserted in this case or the arguments raised by Petitioner in his appeal to the Eleventh Circuit. These additional grounds therefore do not provide any basis for granting certiorari.

Finally, this is not an appropriate case in any event for the Court to address whether or not Title VII

applies to discrimination because of sexual orientation. The County denies that sexual orientation was a motivating factor in its decision to conduct the audit or its decision to terminate Petitioner, and the County contends that it terminated him because of the results of the audit. App. 8. For these and additional reasons discussed below, certiorari should be denied in this case.

I. THE COURT SHOULD DENY CERTIORARI AND AWAIT FURTHER DEVELOPMENT IN THE CIRCUIT COURTS CONCERNING A RECENT CIRCUIT SPLIT AS TO WHETHER OR NOT TITLE VII PROHIBITS DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION

A. The Circuit Courts Have Held For Decades That Title VII Does Not Prohibit Discrimination On The Basis Of Sexual Orientation

As Petitioner acknowledges (Pet. 13), most of the circuit courts have held that Title VII does not prohibit discrimination on the basis of sexual orientation, and this has been the consensus of the circuit courts for decades. *See*, *e.g.*, *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999) ("Title VII does not proscribe harassment simply because of sexual orientation."); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261, 263-65 (3d Cir. 2001) ("Title VII does not prohibit discrimination based on sexual orientation."), *cert. denied*, 534 U.S. 1155 (2002); *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 751-52 (4th

Cir.) ("Title VII does not prohibit conduct based on the employee's sexual orientation" as opposed to "the fact that the employee is a man or a woman."), *cert. denied*, 519 U.S. 818 (1996); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979) ("Discharge for homosexuality is not prohibited by Title VII or Section 1981."); *Brandon v. Sage Corp.*, 808 F.3d 266, 270 n.2 (5th Cir. 2015) ("Title VII in plain terms does not cover 'sexual orientation.'"); *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 763-66 (6th Cir. 2006), *cert. denied*, 551 U.S. 1104 (2007); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) (per curiam) ("Title VII does not prohibit discrimination against homosexuals."); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1063-64 (9th Cir. 2002) (en banc) ("[A]n employee's sexual orientation is irrelevant for purposes of Title VII. It neither provides nor precludes a cause of action for sexual orientation."), *cert. denied*, 538 U.S. 922 (2003); *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005) (holding that "Title VII's protections . . . do not extend to harassment due to a person's sexuality"); *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1255 (11th Cir.) (re-affirming *Blum* as binding circuit precedent and holding that allegations of discrimination on the basis of sexual orientation do not state a claim under Title VII), *cert. denied*, 138 S. Ct. 557 (2017). *See also Williams v. Dist. of Columbia*, 2018 U.S. Dist. LEXIS 109515, at *8 n.1, 2018 WL 3213319 (D.D.C.

June 30, 2018) (noting that D.C. Circuit "has not yet confronted this question").[1]

B. A very Recent Circuit Split Does Not Warrant Granting Certiorari In This Case

Petitioner points out that the Second Circuit and the Seventh Circuit recently have reversed their own circuit precedents and have held that Title VII prohibits discrimination on the basis of sexual orientation. (Pet. 4) (citing *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (en banc), *cert. petition filed*, Case No. 17-1623 (May 29, 2018) and *Hively v. Ivy Tech. Comm. Coll. of Indiana*, 853 F.3d 339 (7th Cir. 2017) (en banc)). Petitioner contends that *Zarda* and *Hively* create a circuit split as to whether Title VII prohibits discrimination on the basis of sexual orientation, and that this Court should grant his Petition to resolve this circuit split. (Pet. 12-13).

However, the existence of a split among the circuits – especially a recent split involving only two circuits – is not itself a reason to grant petitions for certiorari. Indeed, just a few months ago, the Court declined to grant certiorari as to whether an agency may

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[1] *U.S. Dep't of Hous. & Urban Dev., Washington, D.C. v. Fed. Labor Relations Auth.*, 964 F.2d 1, 2 (D.C. Cir. 1992), cited by Petitioner (Pet. 13) did not address this issue. The passage cited by Petitioner simply recited the arguments made before an agency by the Department of Housing and Urban Development ("HUD") before it filed a petition for review with the D.C. Circuit. The court declined to consider new arguments raised by HUD in the petition for review and denied the petition on that basis. *Id*. at 3-5.

"advance an interpretation of a statute for the first time in litigation and then demand deference for its view" even though "[t]here is a well-defined circuit split on the question" and "[t]he issue surely qualifies as an important one." *E.I. Dupont de Nemours & Co. v. Smiley*, 138 S. Ct. 2563, 2564 (2018) (Gorsuch, J., Roberts, C.J., and Thomas, J., concurring in denial of certiorari).

Smiley is just one of countless examples of cases where the Court has declined to grant certiorari in spite of a circuit split on an important question. *See*, *e.g.*, *McCarthan v. Collins*, 138 S. Ct. 502 (2017) (denying certiorari as to whether prisoner may file otherwise unauthorized habeas petition challenging his sentence when case law changes, in spite of circuit split); *AT&T, Inc. v. U.S. ex rel. Heath*, 136 S. Ct. 2505 (2016) (denying certiorari in spite of circuit split as to whether False Claim Act's first-to-file bar is jurisdictional); *Crawford v. LVNV Funding, LLC*, 135 S. Ct. 1844 (2015) (denying certiorari in spite of circuit split as to whether filing proof of claim in bankruptcy court for time-barred debt violates Fair Debt Collection Practices Act); *Metheny v. Hamby*, 488 U.S. 913, 913-14 (1988) (White, J., dissenting from denial of certiorari and urging that circuit split be resolved as to whether violations of Interstate Agreement on Detainers warrants relief in federal habeas corpus proceedings); *Cooper v. U.S. Postal Service*, 471 U.S. 1022, 1024 (1985) (White, J., dissenting from denial of certiorari and urging that circuit split be resolved as to whether

30-day filing deadline set forth in 42 U.S.C. § 2000e-16(c) is a jurisdictional deadline); *Stuckett v. U.S. Postal Service*, 469 U.S. 898, 899 (1984) (same); *McKethen v. United States*, 439 U.S. 936 (1978) (Stewart, J., and Marshall, J., dissenting from denial of certiorari and urging that circuit split be resolved as to interpretation of "specifically covered" language in catch-all hearsay rule).

In addition, this Court denied certiorari on December 11, 2017 on the same question Petitioner presents here: whether Title VII prohibits discrimination on the basis of sexual orientation, even though a circuit split existed at the time by virtue of the *Hively* decision. *Evans v. Ga. Reg'l Hosp.*, 138 S. Ct. 557 (2017). Although the Second Circuit subsequently issued its decision in *Zarda*, Petitioner otherwise has not demonstrated that circumstances have materially changed during the approximately eight months that have elapsed since the Court denied certiorari in *Evans*.

Moreover, as set forth above, there has been a strong and unanimous consensus among all of the circuit courts (except for the D.C. Circuit, which has not considered the issue) for decades that Title VII does not encompass sexual orientation. No circuit court deviated from this long-standing and unanimous consensus until the Seventh Circuit issued its decision in *Hively* last year. Accordingly, the Court should await further development as to whether other circuit courts adopt or reject *Hively* and *Zarda* and the novel legal theories articulated in those cases as to why Title VII prohibits discrimination on the basis of sexual

orientation even though "sexual orientation" is not included among the protected classes contained in the text of Title VII. *See Lackey v. Texas*, 514 U.S. 1046, 1047 (1995) (Stephens, J., noting with respect to denial of certiorari on an otherwise important and novel issue, that "[o]ften, a denial of certiorari on a novel issue will permit the state and federal courts to 'serve as laboratories in which the issue receives further study before it is addressed by the Court' ") (quoting *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., respecting denial of certiorari)). *See also* Samuel Estreicher & John E. Sexon, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. Rev. 681, 716 (1984) (suggesting that Supreme Court sometimes will allow a circuit split to continue because "independent evaluation of a legal issue by different courts . . . allows a period of exploratory consideration and experimentation by lower courts before the Supreme Court ends the process with a nationally binding rule"); Daniel J. Meador, *A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Court of Appeals*, 56 U. Chi. L. Rev. 603, 633 (1989) ("It is important that the Supreme Court have the benefit of as much thinking on the question as is feasible before it makes this final resolution.").

Accordingly, the very recent development of a circuit split as to whether or not Title VII prohibits discrimination on the basis of sexual orientation[2] does not

[2] Petitioner also points out (Pet. 14) that the EEOC has concluded that Title VII prohibits discrimination on the basis of sexual orientation, whereas the Department of Justice took the

in and of itself warrant certiorari review. Instead, the Court should allow further development of this issue in the circuit courts in light of *Hively* and *Zarda*.[3]

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contrary position as amicus curiae in *Zarda*. *Compare Baldwin v. Foxx*, EEOC Decision No. 0120133080, 2015 EEOPUB LEXIS 1905, 2015 WL 4397641 (July 15, 2015) *with* Brief for the United States as Amicus Curiae filed in *Zarda v. Altitude Express, Inc.*, 2017 U.S. 2nd Cir. Briefs LEXIS 5, 2017 WL 3277292. The County notes that the EEOC (correctly) took the position that Title VII does not encompass sexual orientation for decades, until it reversed course and took the opposite position in 2015 during the Obama administration; the DOJ took the position that it took in *Zarda* after President Trump took office. In any event, the EEOC's interpretations of Title VII are not binding on this Court and are entitled to deference "only to the extent that [they have] the power to persuade." *Christiansen v. Harris Cty.*, 529 U.S. 576, 587 (2000). *See also Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944). Moreover, the EEOC remains under the control of President Obama's appointees because of a political impasse concerning the slate of nominees submitted by President Trump to the U.S. Senate for confirmation that would give Republicans a 3-2 majority on the EEOC. *See* http://www.atlantic.com/politics/archive/2018/04/chai-feldblum/558593/Why-Is-A-Liberal-LGBT-Activist-One-of-Trump's-Nominees? (The Atlantic, April 24, 2018) (last viewed on July 28, 2018). If and when this political impasse is resolved, control of the EEOC will shift from President Obama's appointees to President Trump's appointees, which could result in another change in the EEOC's position. Thus, the conflicting positions of the EEOC and the DOJ, while irrelevant to this case, may ultimately be resolved by the normal political processes.

[3] In a similar vein, Petitioner argues that the existence of conflicting district court decisions on this issue support his request for certiorari. (Pet. 14-15). However, any such conflicts may be resolved by the relevant circuit courts in the same manner as any other issue. For example, Petitioner's citation (Pet. 14) to *Winstead v. Lafayette Cty. Bd. of Cty. Comm'rs*, 197 F.Supp.3d 1334, 1346-47 (N.D. Fla. 2016) is inapposite because *Winstead* is no longer good law after the Eleventh Circuit re-affirmed in *Evans*

II. THE COURT SHOULD DENY CERTIORARI BECAUSE PETITIONER HAS FAILED TO DEMONSTRATE THAT THE ELEVENTH CIRCUIT ERRED IN RULING THAT TITLE VII DOES NOT PROHIBIT DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION

A. Petitioner's Contention That Discrimination Because Of "Sex" Includes Discrimination Because Of "Sexual Orientation" Is Meritless

The provision of Title VII at issue states as follows:

> Employer practices. It shall be an unlawful employment practice for an employer –
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any

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(and again in this case) that, under binding circuit precedent, Title VII does not prohibit discrimination on the basis of sexual orientation. Additional district court decisions cited by Petitioner (Pet. 15) such as *Hinton v. Virginia Union Univ.*, 185 F.Supp.3d 807, 816 (E.D. Va. 2016), and *Clemons v. City of Memphis, Tn.*, 2016 U.S. Dist. LEXIS 179037, at *7, 2016 WL 7471412, at *3 (W.D. Tenn. Dec. 28, 2016) likewise are inapposite because they properly followed circuit precedent and held that Title VII does not prohibit discrimination on the basis of sexual orientation.

> way which would tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a).

The text of Title VII does not include sexual orientation as a protected class. The fact that Title VII does not include sexual orientation as a protected class is particularly glaring in light of the fact that Congress repeatedly has included sexual orientation as a protected class in numerous other statutes. *See*, *e.g*., 34 U.S.C. § 12291(b)(13)(A) (prohibiting funded programs and activities from discriminating on numerous grounds, including sexual orientation, under Violence Against Women Act); 18 U.S.C. § 249(a)(2)(A) (imposing heightened punishment for causing or attempting to cause bodily injury to any person because of (among other traits) the person's sexual orientation); 34 U.S.C. § 30503(a)(1)(C) (providing federal assistance to local law enforcement for investigation of certain crimes motivated by (among other traits) sexual orientation); 20 U.S.C. § 1092(f)(1)(F)(ii) (requiring colleges and universities to collect and report information regarding crimes on campus, including crimes where victim is selected because of (among other traits) sexual orientation).

These deliberate decisions by Congress are hardly "hypertechnical distinctions" as Petitioner dismissively suggests (Pet. 32), in order to argue that, by

prohibiting discrimination against an employee because of "sex," Title VII also prohibits discrimination against an employee because of "sexual orientation" as follows:

> In discriminating against an employee on the basis of his sexual orientation, the employer has "taken gender into account," because "'[s]exual orientation' as a concept cannot be defined or understood without reference to sex." *Id*. That is, "sexual orientation is inseparable from and inescapably linked to sex and, therefore . . . allegations of sexual orientation discrimination [necessarily] involve sex-based considerations." *Id*. at *5.

(Pet. 29-30) (quoting *Baldwin*, 2015 WL 4397641, at *4, 5 and citing *Zarda*). Petitioner's assertions are meritless.

As this Court has recognized, "[i]t is a fundamental canon of statutory construction that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)). The term "contemporary" refers to the time frame when the statute at issue was enacted, not when a court is interpreting it years later in litigation. *Id*. (identifying and applying relevant dictionary definitions in use at time statute at issue was enacted).

The term "sex" as commonly understood in 1964 when Title VII was enacted and today "means biologically male or female; it does not also refer to sexual

orientation." *Hively*, 853 F.3d at 362-63 (Sykes, J., dissenting) (surveying various dictionary definitions). The term "sexual orientation" on the other hand, means, "Originally: (the process of) orientation with respect to a sexual goal, potential mate, partner, etc. Later chiefly: a person's sexual identity in relation to the gender to who he or she is usually attracted; (broadly) the fact of being heterosexual, bisexual, or homosexual." Oxford English Dictionary (2009 ed.). *Accord* Dictionary.com (defining "sexual orientation" as "one's natural preference in sexual partners; predilection for homosexuality, heterosexuality, or bisexuality") (last viewed August 4, 2018).

Thus, Petitioner's assertion that an allegation of discrimination on the basis of sexual orientation is necessarily an allegation of sex discrimination is incorrect. Indeed, this Court has not treated sexual orientation discrimination as synonymous with or a subset of sex discrimination, and thereby subject to intermediate scrutiny. *Romer v. Evans*, 517 U.S. 620, 632-34 (1996) (invalidating state constitutional amendment targeting local laws prohibiting sexual orientation discrimination, on ground that amendment did not survive rational basis review); *Lawrence v. Texas*, 539 U.S. 558, 564-78 (2003) (invalidating state statute criminalizing same-sex sexual intimacy as violation of liberty and privacy interest in due process clause); *id*. at 579-85 (concluding that statute did not survive rational basis review under equal protection clause) (O'Connor, J., concurring). *See also Obergefell v. Hodges*, 135 S. Ct.

2584, 2597-2605 (2015) (holding that excluding same-sex couples from marriage violates fundamental right to marry in due process clause and equal protection clause).

Moreover, in the context of Title VII, sexual orientation discrimination is separate and distinct from sex discrimination. *Hopkins*, 77 F.3d at 751-52 ("Title VII does not prohibit conduct based on the employee's sexual orientation, whether homosexual, bisexual or heterosexual. Such conduct is aimed at the employee's sexual orientation and not at the fact that the employee is a man or a woman."); *Hively*, 853 F.3d at 363 ("Classifying people by sexual orientation is different than classifying them by sex. The two traits are categorically distinct and widely recognized as such.") (Sykes, J., dissenting). Accordingly, the fact that Title VII prohibits discrimination because of "sex" does not establish that Title VII also prohibits discrimination on the basis of sexual orientation.

Simply put, the novel legal theory presented by Petitioner is nothing more than a thinly-veiled invitation for the Court to re-write Title VII to add a protected class that Congress did not include and did not intend to include. This inescapable reality is further demonstrated by the fact that numerous members of Congress have introduced legislation to amend Title VII to add sexual orientation as a protected class almost every year since 1974.[4] These legislative efforts

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[4] *See, e.g.*, Equality Act of 1974, H.R. 14752, 93d Cong. (1974), Civil Rights Amendments Act of 1975, H.R. 166, 94th Cong.

(1975), A Bill to Prohibit Discrimination on the Basis of Sex, Marital Status, Affectional or Sexual Preference, H.R. 2667, 94th Cong. (1975), Civil Rights Amendments of 1975, H.R. 5452, 94th Cong. (1975), Civil Rights Amendments of 1975, H.R. 10389, 94th Cong. (1975), Civil Rights Amendments of 1976, H.R. 13019, 94th Cong. (1976), Civil Rights Amendments of 1975, H.R. 451, 95th Cong. (1977), Civil Rights Amendments of 1977, H.R. 2998, 95th Cong. (1977), Civil Rights Amendments of 1977, H.R. 4794, 95th Cong. (1977), Civil Rights Amendments of 1977, H.R. 5239, 95th Cong. (1977), Civil Rights Amendments Act of 1977, H.R. 7775, 95th Cong. (1977), Civil Rights Amendments Act of 1977, H.R. 8268, 95th Cong. (1977), Civil Rights Amendments Act of 1977, H.R. 8269, 95th Cong. (1977), Civil Rights Amendments Act of 1979, H.R. 2074, 95th Cong. (1979), A Bill to Prohibit Employment Discrimination on the Basis of Sexual Orientation, S. 2081, 96th Cong. (1979), Civil Rights Amendments Act of 1981, H.R. 1454, 97th Cong. (1981), Civil Rights Amendments Act of 1981, H.R. 3371, 97th Cong. (1981), A Bill to Prohibit Employment Discrimination on the Basis of Sexual Orientation, S. 1708, 97th Cong. (1981), A Bill to Prohibit Employment Discrimination on the Basis of Sexual Orientation, S. 430, 98th Cong. (1983), Civil Rights Amendments Act of 1983, H.R. 427, 98th Cong. (1983), Civil Rights Amendments Act of 1983, H.R. 2624, 98th Cong. (1983), Civil Rights Amendments Act of 1985, H.R. 230, 99th Cong. (1985), Civil Rights Amendments Act of 1985, S. 1432, Amendments Act of 1987, S. 464, 100th Cong. (1987), Civil Rights Amendments Act of 1991, S. 574, 102d Cong. (1991), Civil Rights Amendments Act of 1991, H.R. 1430, 102d Cong. (1991), Civil Rights Amendments Act of 1993, H.R. 423, 103d Cong. (1993), Civil Rights Act of 1993, H.R. 431, 103d Cong.(1993), Employment Non-Discrimination Act of 1994, H.R. 4636, 103d Cong. (1994), Employment Non-Discrimination Act of 1994, S. 2238, 103d Cong. (1994), Civil Rights Amendments Act of 1995, H.R. 382, 104th Cong. (1995), Employment Non-Discrimination Act of 1995, H.R. 1863, 104th Cong. (1995), Employment Non-Discrimination Act of 1995, S. 932, 104th Cong. (1995), Employment Non-Discrimination Act of 1996, S. 2056, 105th Cong. (1996), Employment Non-Discrimination Act of 1997, H.R. 1858, 105th Cong. (1997), Employment Non-Discrimination Act of 1997, S. 869, 105th Cong. (1997), Civil Rights Amendments Act of 1998, H.R. 365, 105th

have not succeeded, as Congress has not passed any legislation amending Title VII to add sexual orientation as a protected class. Distilled to its essence, therefore, Petitioner is asking this Court to grant certiorari and amend Title VII to add sexual orientation as a protected class because Congress thus far has not seen fit to do so.

Petitioner nevertheless contends that Congress's repeated decisions not to amend Title VII to add sexual orientation as a protected class does not undermine his position that the current version of Title VII already

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Cong. (1998), Civil Rights Amendments Act of 1999, H.R. 311, 106th Cong. (1999), Employment Non-Discrimination Act of 1999, H.R. 2355, 106th Cong. (1999), Employment Non-Discrimination Ad of 1999, S. 1276, 106th Cong. (1999), Civil Rights Amendments Act of 2001, H.R. 217, 107th Cong. (2001), Employment Non-Discrimination Act of 2001, H.R. 2692, 107th Cong. (2001), Employment Non-Discrimination Act of 2002, S. 1284, 107th Cong. (2001), Civil Rights Amendments Act of 2003, H.R. 214, 108th Cong. (2003), Employment Non-Discrimination Act of 2003, S. 1705, 108th Cong. (2003), Employment Non-Discrimination Act of 2003, H.R. 3285, 108th Cong. (2003), Civil Rights Amendments Act of 2005, H.R. 288, 109th Cong. (2005), Employment Non-Discrimination Act of 2007, H.R. 2015, 110th Cong. (2007), Employment Non-Discrimination Act of 2007, H.R. 3685, 110th Cong. (2007), Employment Non-Discrimination Act of 2009, H.R. 3017, 111th Cong. (2009), Employment Non-Discrimination Act of 2009, S. 1584, 111th Cong. (2009), Employment Non-Discrimination Act of 2011, H.R. 1397, 112th Cong. (2011), Employment Non-Discrimination Act of 2011, S. 811, 112th Cong. (2011), Employment Non-Discrimination Act of 2013, S. 815 113th Cong. (2013), Employment Non-Discrimination Act of 2013, H.R. 1755, 113th Cong. (2013), Equality Act, H.R. 3185, 114th Cong. (2015), Equality Act, S. 1858, 114th Cong. (2015), Equality Act, H.R. 2282, 115th Cong. (2017), Equality Act, S. 1006, 115th Cong. (2017).

prohibits discrimination on the basis of sexual orientation. In support, Petitioner cites various Supreme Court decisions for the proposition that courts should not read too much into a legislature's failure to act or failure to amend previous legislation. (Pet. 30-31) (citing *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990); *Zuber v. Allen*, 396 U.S. 168, 185 n.21 (1969); *Girouard v. United States*, 328 U.S. 61, 69 (1946); and *United States v. Price*, 361 U.S. 304, 310-11 (1960)). Petitioner argues that this is so because "Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, *including the inference that the existing legislation already incorporates the offered change*. (*Pension Ben. Guar. Corp.*, 496 U.S. at 650 (internal quotations omitted) (emphasis supplied)." (Pet. 31).

Petitioner's suggestion that Congress has not amended Title VII at any point during the last 50 years to add sexual orientation as a protected class because Congress thought that Title VII in its existing form already includes sexual orientation as a protected class is utter nonsense. As discussed in Section I above, the circuit courts *unanimously* held for decades that Title VII does not encompass sexual orientation, and the EEOC's position for decades likewise was that Title VII does not encompass sexual orientation. App. 11-12 (citing EEOC Dec. No. 76-75 (Dec. 4, 1975), 1975 WL 342769, at *2). The absence of an amendment by Congress in light of this unanimity of rulings confirms that it did not intend Title VII to include sexual orientation

discrimination. Stated otherwise, had Congress intended it to so include, it would have amended the statute to legislate its intent.[5] Notably, even after the EEOC took the position that Title VII encompasses sexual orientation in 2015, no circuit court read the statute in that manner until the Seventh Circuit issued its en banc decision in *Hively* in 2017.

Thus, Petitioner has not and cannot demonstrate that Congress's failure to amend Title VII to add sexual orientation as a protected class was because Congress thought that sexual orientation already was included as a protected class. Nor can Petitioner demonstrate that Congress's failure to amend Title VII to add sexual orientation as a protected class during the past 50 years was the result of "unawareness, preoccupation, or paralysis." (Pet. 31 n.7) (quoting *Zuber*, 396 U.S. at 185 n.21). The sheer number of acts of legislation introduced over the course of more than 50 years seeking to amend Title VII to add sexual orientation as a protected class alone demonstrates that Congress has not been unaware of this issue or preoccupied with other issues. The simple reality is that "[t]here may be many reasons why each proposal ultimately failed, but it cannot reasonably be claimed that the basic reason that Congress did not pass such an amendment year in and year out was anything other

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[5] Indeed, Congress repeatedly and expressly included sexual orientation as a protected class in numerous other statutes when it has intended to do so. *See*, *e.g.*, 18 U.S.C. § 249(a)(2)(A); 20 U.S.C. § 1092(f)(1)(F)(ii); 34 U.S.C. §§ 12291(b)(13)(A), 30503(a)(1)(C).

than that there was not yet the political will to do so." *Zarda*, 883 F.3d at 152 (Lynch, J., dissenting).

The Court therefore should deny certiorari because sexual orientation discrimination is not a subset of sex discrimination. Moreover, Petitioner has not and cannot demonstrate that Congress declined to amend Title VII to include sexual orientation as a protected class because it thought that sexual orientation already was included as a protected class.

B. *Price Waterhouse* Did Not Abrogate Circuit Case Law Holding That Title VII Does Not Prohibit Discrimination On The Basis Of Sexual Orientation

Petitioner also argues that *Price Waterhouse*, 490 U.S. 228 (1989), "sounded the death knell for [the] myopic interpretation" that Title VII does not prohibit sexual orientation discrimination. (Pet. 3). Petitioner contends that *Price Waterhouse* "forbid[s] discrimination against a gay person for failing to conform to a stereotype about how he should act in terms of who he should be attracted to or romantically involved with." (Pet. 27-28). *Price Waterhouse*, however, does no such thing.

In *Price Waterhouse*, a female senior manager, was not invited to become a partner with an accounting firm. The plaintiff introduced evidence that various male partners made stereotypical comments about her when considering her candidacy. These comments included that the plaintiff was "macho," that she

"overcompensated for being a woman," that she should take "a course at charm school," that certain partners objected to her swearing only "because it's a lady using foul language" and similar comments. *Id*. at 235. The partner who informed the plaintiff of the decision to place her candidacy on hold told her that, if she wanted to improve her chances for partnership in the future, she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled and wear jewelry." *Id*. at 235.

A plurality of four justices, joined by two concurring justices, held that such evidence that an employer took adverse action against an employee for failure to conform to a stereotype associated with the employee's protected class was sufficient to establish a violation under Title VII. *Price Waterhouse*, 490 U.S. at 251; *id*. at 258-61 (White, J., concurring); *id*. at 302 (O'Connor, J., concurring). The Court explained that "[a]n employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind." *Id*. at 251.

Contrary to Petitioner's assertions, *Price Waterhouse*'s holding that an employer violates Title VII by making employment decisions because of gender stereotypes such as how a female should dress or wear her hair, what personality traits (such as "aggressiveness") a female should have, or how a female should talk, does not remotely suggest that Title VII prohibits discrimination on the basis of sexual orientation. *See*,

e.g., *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 290 (3d Cir. 2009) (observing that *Price Waterhouse* prohibits discrimination against women "for failing to conform to a traditionally feminine demeanor and appearance" and observing that employer "argues persuasively that every case of sexual orientation cannot translate into a triable case of gender stereotyping discrimination, which would contradict Congress's decision not to make sexual orientation discrimination cognizable under Title VII"); *Vickers*, 453 F.3d at 763 (rejecting plaintiff's claim that his sexual practices as a homosexual did not conform to gender stereotype because "the theory of sex stereotyping in *Price Waterhouse* is not broad enough to encompass such a theory" and limiting *Price Waterhouse* to the plaintiff's appearance or behavior in the workplace); *Medina*, 413 F.3d at 1135 (rejecting plaintiff's claim that she was harassed for failing to conform with gender stereotypes and holding that plaintiff alleged harassment because of her sexual orientation, which is not actionable under Title VII). *Accord Hively*, 853 F.3d at 370 (gender stereotyping theory does not apply to sexual orientation claim because sexual orientation is not a sex-specific stereotype) (Sykes, J., dissenting); *Zarda*, 883 F.3d at 158 (sexual orientation discrimination does not rest on a belief "about what men or women ought to be or do; it is a belief about what *all* people ought to be or do") (Lynch, J., dissenting) (emphasis in original).

Accordingly, *Price Waterhouse* does not provide any basis for Petitioner's contention that Title VII

prohibits discrimination on the basis of sexual orientation. The instant Petition therefore should be denied.[6]

C. *Oncale* Did Not Abrogate Circuit Case Law Holding That Title VII Does Not Prohibit Discrimination On The Basis Of Sexual Orientation

Petitioner also contends that *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998), was "[t]he nail in the coffin" demonstrating that Title VII prohibits discrimination on the basis of sexual orientation. (Pet. 3, 28). This contention is incorrect, as *Oncale* simply held that same-sex sexual harassment is actionable under Title VII and extended the Court's previous rejection of any conclusive presumption that an

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[6] Petitioner also argues that the Court has held that an employer engages in prohibited sex discrimination when it takes adverse action "simply on the basis of that employee *being* one gender or another." (Pet. 30 n.6) (emphasis in original) (citing *Newport News Shipbuilding and Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669, 683-85 (1983) (exclusion of pregnant spouses from employer's health insurance plan constituted unlawful sex discrimination) and *City of Los Angeles, Dep't of Water and Power v. Manhart*, 435 U.S. 702, 710-11 (1978) (requiring female employees to contribute more than male employees to pension fund based on longer life expectancy of women constituted unlawful sex discrimination under Title VII)). These decisions, however, are inapposite because, unlike pregnancy or life expectancy, sexual orientation is not a "proxy" for either being male or female. In other words, same-sex attraction is not a trait that is present solely or primarily in one sex or the other. *See Zarda*, 883 F.3d at 152 ("[S]ame-sex attraction is not 'a function of sex' or 'associated with sex' in the sense that life expectancy or childbearing capacity are.") (Lynch, J., dissenting).

employer will not discriminate against members of the same protected class. *Oncale*, 523 U.S. at 78-79.

As the Court explained in *Oncale*, "'[t]he critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.'" *Oncale*, 523 U.S. at 80 (quoting *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)). In the male-female harassment context, the inference of discrimination is easy to draw because "the challenged conduct typically involves explicit or implicit proposals of sexual activity; it is reasonable to assume those proposals would not have been made to someone of the same sex." *Id*. Thus, if the harasser is a heterosexual male, it is safe to assume that women, but not men, are exposed to disadvantageous terms and conditions of employment.

As the Court explained in *Oncale*, essentially the same analysis may apply if the alleged harasser is a homosexual male. *Oncale*, 523 U.S. at 80. In that circumstance, it is reasonable to assume that proposals for sexual activity would be made to someone of the same sex, and thus that men, but not women, are exposed to disadvantageous terms and conditions of employment. *Id*. The Court in *Oncale* also emphasized that a claim for same-sex harassment does not require a showing that the harassing conduct was motivated by sexual desire, but also may be established by proving (for example), that a female employee is harassed by another woman because of her "general hostility to the presence of women in the workplace." *Id*.

In other words, if the alleged harasser is a heterosexual male, women are subjected to disadvantageous terms and conditions of employment and men are not. If the alleged harasser is a homosexual male, men are subjected to disadvantageous terms and conditions of employment and women are not. In both situations, the target of the harassment is selected because of the employee's biological sex and thus easily falls within Title VII's prohibition of discrimination because of "sex."

Thus, "[n]othing in *Oncale* eroded the distinction between sex discrimination and sexual-orientation discrimination or opened the door to a new interpretation of Title VII." *Hively*, 853 F.3d at 372 (Sykes, J., dissenting). Accordingly, Petitioner's request for certiorari on this ground should be denied.

III. PETITIONER'S ADDITIONAL REASONS AS TO WHY CERTIORARI SHOULD BE GRANTED ARE IRRELEVANT TO THIS CASE

Petitioner advances a number of additional reasons why certiorari should be granted in this case. None of them have any bearing on this case, the claims he has asserted in this case or the Eleventh Circuit's ruling in this case.

For example, Petitioner argues that certiorari should be granted in this case because the scope of Title VII's anti-retaliation provisions (more specifically, the opposition clause thereto) may be unclear to the

extent that it is unclear whether Title VII prohibits sexual orientation discrimination. (Pet. 16). Petitioner, however, has not asserted a retaliation claim in this case. Moreover, Petitioner cites to one published district court decision and two unpublished district court decisions in support of his contention that the alleged lack of clarity as to the scope of Title VII's prohibition against retaliation for opposing an employment practice made unlawful by Title VII is a critical issue that requires resolution by this Court. (Pet. 16-17 n.3). Therefore, the Court should decline Petitioner's invitation to grant certiorari in this case to rectify any alleged lack of clarity with respect to the scope of Title VII's opposition clause.

Petitioner also contends that the Court should grant certiorari in this case to clarify whether an employee may be subjected to employment discrimination under Title VII because of his or her "association" with gay or lesbian individuals as "friends, family, or even members of the same church." (Pet. 17-18). Petitioner, however, did not assert any such "association" argument on appeal to the Eleventh Circuit. App. 36-59. Therefore, the Court should not grant certiorari on the basis of a legal theory that Petitioner did not deem to have sufficient potential merit to include in his legal arguments in the Eleventh Circuit.

Petitioner next asserts that the Court should grant certiorari because of exhaustion issues that may arise when a plaintiff seeks to assert a gender stereotyping claim. (Pet. 18 n.4). As Petitioner acknowledges, however, Petitioner abandoned his gender stereotyping

claim on appeal to the Eleventh Circuit. *Id*. Thus, there is no exhaustion issue presented by this case. In any event, a charging party who intends to assert a gender stereotyping claim may properly be required to include sufficient facts and/or allegations in the particulars section of the charge to inform the EEOC that he seeks to assert a gender stereotyping claim, and Petitioner has failed to cite any authority to the contrary. Accordingly, the Court should not grant certiorari on this ground.

In addition, Petitioner contends that the Court should grant certiorari in this case because of alleged confusion in the lower courts as to whether a hostile work environment claim is based on sexual orientation (and thus not unlawful under Title VII) or based on a gender stereotype or same-sex harassment (and thus unlawful under Title VII). (Pet. 19-23). Petitioner, however, has not asserted a claim in this case that he was subjected to a hostile work environment. Moreover, as previously stated, Petitioner did not appeal the district court's dismissal of his claim that he was terminated because of his failure to conform to a gender stereotype. Thus, Petitioner once again seeks to invoke issues that have nothing to do with this case.

Petitioner also asserts that certiorari should be granted because certain lower court decisions have erroneously dismissed cases where an employer's decision may have been motivated by both lawful reason (sexual orientation) and an unlawful reason (failure to conform to a sex-based stereotype). (Pet. 25-26). Petitioner, however, did not assert any such "mixed motive"

claim in his pleadings in the district court and did not present any "mixed motive" arguments either in the district court or on appeal in the Eleventh Circuit. App. 5-33, 36-59. Moreover, because Petitioner has abandoned his gender stereotyping claim (Pet. 10 n.2; App. 41 n.1), the "mixed motive" issue Petitioner contends needs to be addressed by this Court is not present in this case. Petitioner's request for certiorari on this basis thus should be denied.

IV. THIS COURT SHOULD DECLINE PETITIONER'S INVITATION TO GRANT CERTIORARI, SEIZE LEGISLATIVE POWER FROM CONGRESS AND RE-WRITE TITLE VII

Petitioner also contends that the Court should grant certiorari because "justice demands" that the Court rule that sexual orientation discrimination is prohibited under Title VII. (Pet. 27). Petitioner then contends as follows:

> Because a person's sexual orientation is immutable, *Obergefell*, 135 S. Ct. at 2596, discrimination against an employee on that basis is at least as "reasonably comparable [an] evil" as discrimination on the basis of biological sex alone, *Oncale*, 523 U.S. at 79. Accordingly, this Court must act to fulfill the congressional intent behind Title VII "to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Oncale*, 523 U.S. at 78

> (emphasis supplied) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)).

(Pet. 27).[7]

This argument vividly illustrates the stark reality that Petitioner is urging the Court to grant certiorari, seize legislative power from Congress and re-write Title VII to prohibit discrimination on the basis of sexual orientation – because, in Petitioner's view, discriminating on the basis of sexual orientation is "at least as reasonably comparable an evil" as discrimination on the basis of sex. This Court should decline Petitioner's invitation.

V. THIS CASE IS NOT THE APPROPRIATE VEHICLE TO RESOLVE WHETHER OR NOT TITLE VII PROHIBITS DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION

Lastly, this would not be the appropriate case to evaluate whether or not Title VII prohibits discrimination because of sexual orientation. The County denies that Petitioner's sexual orientation was a motivating factor in its decision to conduct an audit of the program he managed or its decision to terminate his employment after the audit was completed. App. 7-8. The

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[7] This passage misquotes *Oncale*, which actually states that Title VII " 'evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women *in employment*.' " *Oncale*, 523 U.S. at 78 (emphasis added) (quoting *Meritor*, 477 U.S. at 64)).

County contends that it terminated Petitioner for legitimate, non-discriminatory reasons based on the results of the audit. *Id.* at 8. In this regard, the SAC does not include any allegation that the audit did not conclude that Petitioner engaged in misconduct with respect to the program he managed. *Id*. at 7-8.

Thus, at the very least, the reasons for Petitioner's termination are disputed by the parties. In other words, this is *not* a case where the record is undisputed that the employee was terminated because of his sexual orientation, and the only issue to be resolved is whether termination on the basis of sexual orientation violates Title VII. Moreover, neither the district court nor the Eleventh Circuit addressed the legal theories Petitioner advances in support of his contention that Title VII prohibits discrimination on the basis of sexual orientation. App. 1-3, 26-31.

Accordingly, this case is not the appropriate or desirable vehicle for the Court to address whether or not Title VII prohibits discrimination on the basis of sexual orientation. The instant Petition therefore should be denied.[8]

[8] On August 2, 2018, Petitioner filed a Supplemental Petition for Writ of Certiorari. In his Supplemental Petition, Petitioner contends that the dissent from the Eleventh Circuit's decision not to rehear this case en banc, *Bostock v. Clayton Cty. Bd. of Comm'rs*, 2018 U.S. App. LEXIS 19835, at *2-7, 2018 WL 3455013 (11th Cir. July 18, 2018) (Rosenbaum, J., dissenting from the denial of rehearing en banc), provides further support for his Petition. The

CONCLUSION

For the reasons discussed herein, the Court should reject Petitioner's request that the Court grant certiorari, assume the role of a super-legislature and rewrite Title VII to prohibit discrimination on the basis of sexual orientation. Instead, Petitioner and like-minded individuals should mobilize political support for *Congress* to amend Title VII or enact other legislation prohibiting employment discrimination on the basis of sexual orientation.

Respectfully submitted,

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County notes that nine of Judge Rosenbaum's colleagues on the Eleventh Circuit bench disagreed with her position that the case should be re-heard en banc and/or her conclusion that Title VII prohibits discrimination on the basis of sexual orientation.