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

REPLY BRIEF OF PETITIONER

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ARGUMENT

Respondent Clayton County concedes the existence of a Circuit split on the extraordinarily important question of whether discrimination because of sexual orientation falls within the ambit of the prohibition of discrimination "because of . . . sex" contained in Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e et seq. ("Title VII"). Resp. Br., pp. 9-15. Yet, the County asks the Court to ignore this conflict, *id.* at pp. 11-15, which affects millions of individuals and employers throughout the country, and means that gay and lesbian employees in South Carolina or Texas – but not those in Indiana or Connecticut – may be fired because they do not conform to gender stereotypes about to whom they, as a member of one gender or another, should be romantically inclined.

Clayton County offers no reason why the Court should leave the split unresolved. The County suggests that the Court should await further developments because the split is "very recent" in that the decisions of the Second and Seventh Circuits were only issued in the last few years. *Id.* at p. 11. But the decisions of the other Circuits to the contrary, which addressed the *same critical question* of whether *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and other decisions abrogated older Circuit precedents foreclosing such claims, are not recent at all. *See infra*, pp. 2-4. The County also offers no further analyses for this question, let alone any that have not already been considered by the dozens of Circuit Judges who have rendered their decisions. Nor does the County suggest

a single prudential or other concern to justify denial of certiorari. The argument that this Circuit split is not ripe for the Court's review in the case at bar is thus entirely without merit.

Clayton County also argues that the Court should not grant certiorari because it is the Eleventh Circuit, and not the Second or the Seventh deciding the issue en banc, which correctly answered the question of whether Title VII forbids discrimination on the basis of sexual orientation. Resp. Br., pp. 16-30. Even if that were correct, which Mr. Bostock disputes, it only underscores the need for this Court to resolve the Circuit split. However, Clayton County misapprehends the question in this case as whether Congress intended to prohibit sexual orientation discrimination when it enacted Title VII in 1964. *Id.* at pp. 1, 16-20. The real question is whether the *text* of Title VII, as it has been defined and expounded by this Court in *Price Waterhouse* and other cases, reaches sex discrimination predicated on an employee's sexual orientation. The answer to *that* question is an unqualified "yes," and it is for this Honorable Court, not the Congress, to confirm that answer, precisely because it rests on this Court's interpretations of Title VII as amended.

A. THE COURT MUST GRANT CERTIORARI BECAUSE THE CIRCUITS THAT DO NOT RECOGNIZE SEXUAL ORIENTATION DISCRIMINATION CLAIMS UNDER TITLE VII HAVE ALREADY CONSIDERED AND REJECTED THE ARGUMENT THAT THIS COURT'S DECISIONS IN *PRICE WATERHOUSE* AND *ONCALE* SUPPORT SUCH CLAIMS

Clayton County urges the Court to deny certiorari and let the lower courts be "laboratories" for further study on the question of whether Title VII prohibits discrimination because of sexual orientation. Resp. Br., p. 14 (citing *McCray v. New York*, 461 U.S. 961, 963 (1983)). Putting aside the fact that millions of individuals will continue to experience discrimination while supposed further study continues, there are no more tests to conduct, and Clayton County's own argument proves this. As the County notes in arguing that the *Price Waterhouse* gender stereotyping theory does not support a claim for sexual orientation discrimination under Title VII, the Third, Sixth, and Tenth Circuits have all specifically addressed and rejected the argument, advanced by Petitioner Bostock, that it does. *See* Resp. Br., p. 27 (citing *Prowell v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 290 (3d Cir. 2009), *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 763 (6th Cir. 2006), and *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005)). *See also Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248 (11th Cir. 2017). These decisions are not dusty relics of a pre-*Lawrence v. Texas* landscape that must be revisited before this Court can resolve the Circuit split. The

en banc decisions of the Second and Seventh Circuits recognizing sexual orientation discrimination claims under Title VII – *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018), and *Hively v. Ivy Tech Comm. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017) – may have been decided more recently, but the Circuit split is not "very recent." Resp. Br., p. 11. It stretches back more than a decade.[1]

Because Clayton County proceeds from the false premise of an insufficiently defined Circuit split, it can offer no possible legal analyses that have not already been considered by the Circuit Judges who have decided this question. Nor is there any hope that the Eleventh Circuit will ever reconsider whether Title VII prohibits sexual orientation discrimination in light of

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[1] Indeed, each of the other Circuits that refuse to recognize sexual orientation discrimination claims under Title VII have done so *after* this Court decided *Price Waterhouse* nearly thirty years ago. *See Williams v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69 (8th Cir. June 2, 1989); *U.S. Dep't of Hous. & Urban Dev., Washington, D.C. v. Fed. Labor Relations Auth.*, 964 F.2d 1 (D.C. Cir. 1992); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138 (4th Cir. 1996); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252 (1st Cir. 1999); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002).

Clayton County incorrectly states that the D.C. Circuit did not decide whether Title VII prohibits discrimination because of sexual orientation in the *Federal Labor Relations Authority* case. Resp. Br., p. 11 n.1 (citation omitted). It is true that the court did not analyze the issue in depth, but that was only because it assumed as a matter of federal law that Title VII does not prohibit sexual orientation discrimination, affirming the decision of the Federal Labor Relations Authority. *See* 964 F.2d at 2 (citation omitted).

Price Waterhouse and this Court's other decisions, given that it has refused to do so twice in two years, most recently in this case.[2] Clayton County urges the Court to "await further development" in the Circuits, *id.* at pp. 14-15, but hopes the Court will not notice that there will be no further development that will make any difference or add any clarity. The issue is as refined as it is going to get and requires this Court's intervention to be resolved.

Ultimately, the County urges the Court to deny certiorari simply because it has done so in other important cases. Resp. Br., pp. 11-13. It is very telling that the County offers no other reason when there exist several "pertinent considerations of judicial policy" that could counsel in favor of denying certiorari, such as that narrow technical reasons require denial, review was sought too late, or the record "may be cloudy." *See Singleton v. C.I.R.*, 439 U.S. 940, 942-44 (1978) (Stevens, J.) (quotation omitted).[3] Clayton County's

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[2] *Evans*, 850 F.3d 1248 (11th Cir. 2017), *reh'g and reh'g en banc denied July 10, 2017*; *Bostock v. Clayton County, Ga.*, 894 F.3d 1335 (11th Cir. 2018).

[3] Clayton County's argument that this case is not the appropriate vehicle to resolve this question, Resp. Br., pp. 34-35, is therefore meritless. Far from being "cloudy," *Singleton*, 439 U.S. at 943, the record in this case is crystal clear, since the question of whether Title VII prohibits sexual orientation discrimination was the *only* issue decided by the district court in ruling on a motion to dismiss for failure to state a claim for relief, and the Eleventh Circuit affirmed on that ground. *See Bostock v. Clayton County, Ga.*, 723 Fed. Appx. 964 (11th Cir. 2018). Indeed, there will never be a better vehicle to resolve this question than the case at bar.

failure to identify even a single such consideration warranting denial here is deafening.

B. THE ELEVENTH CIRCUIT ERRED IN REFUSING TO CONCLUDE THAT DISCRIMINATION BECAUSE OF SEXUAL ORIENTATION IS DISCRIMINATION "BECAUSE OF . . . SEX" IN VIOLATION OF TITLE VII

Clayton County's defense of the Eleventh Circuit's erroneous ruling also lacks merit as a reason for denying certiorari. Resp. Br., pp. 16-30. Clayton County argues that Title VII cannot prohibit sexual orientation discrimination because the statute does not include the phrase "sexual orientation," but it simply reiterates the losing arguments of the dissenters in *Zarda* and *Hively*. *See id.* at pp. 17-19. Clayton County also argues that, because other statutes enacted since Title VII use the phrase "sexual orientation," Title VII cannot be read to prohibit discrimination on that basis. *Id.* at p. 17. However, Clayton County forgets this Court's guidance regarding the canon of construction

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Nevertheless, Clayton County conspicuously avoids mentioning that the Court has the benefit of a full federal trial and appellate record, including a decision on rehearing en banc, in the *Zarda* case, which is also currently pending before the Court in the petition filed by Altitude Express, Inc. the week after Mr. Bostock filed his petition. *See* No. 17-1623. And Clayton County's argument that this is not an appropriate vehicle because the County asserts a non-discriminatory reason for Mr. Bostock's discharge, Resp. Br., pp. 34-35, is absurd, for that would mean the Court could never grant certiorari in a case in which a defendant could articulate some conceivable defense, which is almost every case at law or equity.

of statutes *in pari materia*. Specifically, the principle is not applicable here as between Title VII and the statutes cited by Clayton County, which deal with sexual orientation "in entirely different fields," and there is no indication that Title VII was intended to be read *in pari materia* with them. *Fort Stewart Schools v. Fed. Labor Relations Auth.*, 495 U.S. 641, 647-48 (1990) (Scalia, J.).

Clayton County also offers the argument from the dissenters in *Zarda* and *Hively* that the term "sex" meant "biologically male or female" when Title VII was passed in 1964, and therefore cannot be read to include sexual orientation. Resp. Br., pp. 18-19 (citations omitted).[4] But this is why Clayton County misapprehends the critical question in this case. The question is "not what someone thought [the word 'sex'] meant one, ten, or twenty years ago," but rather, "what the correct rule of law is now in light of [this Court's] authoritative interpretations[.]" *Hively*, 853 F.3d at 350 n.5.[5] For this

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[4] Of course, "sexual orientation" was not in the dictionary in 1964, "but neither was the term 'sexual harassment' – a concept that, although it can be distinguished from 'sex,' has at least since 1986 been included by [this Court] under the umbrella of sex discrimination." *Hively*, 853 F.3d at 350 n.5 (citations omitted).

[5] Indeed, rather than a determination to exclude sexual orientation from protection under Title VII at the time of enactment, the greater likelihood is that the early legislative history "may reflect nothing more than the speakers' incomplete understanding of the world upon which the statute will operate." *Fort Stewart Schools*, 495 U.S. at 650 (Scalia, J.). This is obviously so because "[w]hile every statute's *meaning* is fixed at the time of enactment, new *applications* may arise in light of changes in the world."

reason, Clayton County seeks to make a straw person out of Mr. Bostock's petition by arguing that he means to "re-write Title VII" with a "novel legal theory," Resp. Br., p. 20, albeit one accepted by the U.S. Equal Employment Opportunity Commission and the Second and Seventh Circuits of the United States Court of Appeals sitting en banc.

Finally addressing the real question in light of this Court's prior decisions, Clayton County argues that *Price Waterhouse* does not "remotely suggest that Title VII prohibits discrimination on the basis of sexual orientation," but offers no argument on the merits beyond citing the decisions on that side of the Circuit split. Resp. Br., pp. 26-28. Clayton County again misses the point by arguing that *Oncale v. Sundowner Offshore Srvcs., Inc.*, 523 U.S. 75 (1998), which recognized that same-sex harassment is actionable under Title VII, did nothing to recognize sexual orientation discrimination claims. Resp. Br., pp. 28-30. The import of *Oncale*, of course, is that this Court held that a form of sex discrimination not contemplated by Congress when it passed Title VII was nevertheless prohibited as an "evil" that was "reasonably comparable" to those it did contemplate. 523 U.S. at 79 (Scalia, J.). Clayton County simply begs the question.

Clayton County also makes much of the fact that Congress has many times declined to amend Title VII to specifically include "sexual orientation" as a

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Wisconsin Cent. Ltd. v. United States, 138 S. Ct. 2067, 2074 (2018) (Gorsuch, J.) (emphasis in original).

protected class. Resp. Br., pp. 20-22. The County recognizes that this Court has warned not to read too much into this, but nevertheless argues congressional inaction in and of itself as the only reason Congress supposedly disfavors Title VII protection for gay and lesbian employees. *Id.* at pp. 22-24. However, the EEOC interpreted Title VII to prohibit sexual orientation discrimination in *Baldwin v. Foxx*, Appeal No. 0120133080, 2015 WL 4397641 (July 16, 2015), and the construction of a statute "by those charged with its enforcement combined with congressional acquiescence 'creates a presumption in favor of the administrative interpretation, to which [the Court] should give great weight[.]'" *Costanzo v. Tillinghast*, 287 U.S. 341, 345 (1932) (cited in *Haig v. Agee*, 453 U.S. 280, 300 (1981)). And congressional "failure to repeal or revise in the face of such administrative interpretation has been held to constitute persuasive evidence that the interpretation is the one intended by Congress." *Zemel v. Rusk*, 381 U.S. 1, 11 (1965) (citations omitted).[6] That Congress approves of the EEOC's construction of Title

[6] Clayton County's argument that the EEOC's position has changed, Resp. Br., at p. 23, rings hollow because the agency explained the evolution of its interpretation in *Baldwin*, 2015 WL 4397641, and "[a]n initial agency interpretation is not instantly carved in stone," because an agency "must consider varying interpretations and the wisdom of its policy on a continuing basis," *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Srvcs.*, 545 U.S. 967, 981-82 (Thomas, J.) (reversing the Ninth Circuit for failure to accord deference to the Federal Communications Commission's changed interpretation of whether cable companies providing broadband internet access provided "telecommunications service" within the meaning of the Communications Act of 1934).

VII is surely a better explanation for its silence than that it disfavors inclusion of gay and lesbian employees under the umbrella of Title VII, but regardless, the latter conclusion is unwarranted because "[c]ongressional inaction frequently betokens unawareness, preoccupation, or paralysis," *Zuber v. Allen*, 396 U.S. 168, 185 n.21 (1969).

This is especially so when "unawareness" is also a compelling explanation – that is, Congress has not passed an amendment to Title VII to specifically forbid discrimination based on "sexual orientation" because it is unaware that one is necessary, since most Americans believe it is already illegal. *See* Katy Steinmetz, Lawmakers to Introduce Historic LGBT Non-Discrimination Bills, TIME, July 23, 2015 (noting the "vast misconception" on the part of as much as 87% of the country "that it is already illegal to discriminate against gay people"), *available at* http://time.com/3968995/equality-act-congress-lgbt/ (last visited Aug. 16, 2018); Alex Lundry, Voters in both parties back workplace equality for gays, CNN.Com, Oct. 22, 2013, *available at* https://www.cnn.com/2013/10/22/opinion/lundry-nondiscrimination-gay-workers/index.html (citing a survey of 2,000 registered voters showing that eight in ten registered voters across the country believed workplace discrimination against gay and lesbian people was already illegal under federal law). This is not surprising of course, given that most Americans also overwhelmingly support such protection for their gay and lesbian sons, daughters, brothers, sisters, mothers, and fathers. *See* Alex Vandermaas-Peeler, et al., Public Religion Research

Institute, Emerging Consensus on LGBT Issues: Findings from the 2017 American Values Atlas, May 1, 2018, p. 18, Americans Continue to Support Nondiscrimination Protections for LGBT People, *available at* https://www.prri.org/wp-content/uploads/2018/05/AVA-2017-FINAL-1.pdf (last visited Aug. 16, 2018).[7]

CONCLUSION

Certiorari is warranted in this case because there is an irreconcilable Circuit split as to whether Title VII prohibits discrimination because of sexual orientation. Contrary to Clayton County's argument, the split is not "very recent," and this Court needs no further "development" of the law in this area by the lower courts, for the Circuits have already considered and either accepted or rejected the proposition that the *Price Waterhouse* gender stereotyping theory of sex discrimination encompasses sexual orientation discrimination. Clayton County also cannot defend the erroneous refusal of the Eleventh Circuit to conclude that this Court's

[7] And this is not new. Gallup Polling shows that the number of Americans who said homosexual men and women should have "equal rights in terms of job opportunities" has been above 80% for the last 25 years. *See* Gallup, Gay and Lesbian Rights, *available at* https://news.gallup.com/poll/1651/ga-lesbian-rights.aspx#caption-20170529215643 (last visited Aug. 16, 2018). Even a majority of Republicans favor laws to protect gay and lesbian people from discrimination in jobs, public accommodations, and housing. *See* Alex Vandermaas-Peeler, et al., Support for Nondiscrimination Protections Transcends Partisan Boundaries, https://www.prri.org/wp-content/uploads/2018/05/AVA-2017-FINAL-1.pdf, p. 19.

interpretations of Title VII over the years have eviscerated the pre-*Price Waterhouse* precedents precluding claims for sexual orientation under the statute. Clayton County is forced instead to claim that Mr. Bostock asks the Court to "seize legislative power" and "rewrite Title VII." But he does no such thing. He simply asks the Court to clarify its own pronouncements on the scope of Title VII to resolve the Circuit split for him and all gay and lesbian employees in America. Ultimately, Clayton County offers no persuasive reason why this Honorable Court should not discharge its duty to "say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Certiorari should be granted.

Respectfully submitted,

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