RAYMOND J. LOHIER, JR., *Circuit Judge, concurring*:

I agree with the majority opinion that there is no reasonable way to disentangle sex from sexual orientation in interpreting the plain meaning of the words "because of . . . sex." The first term clearly subsumes the second, just as race subsumes ethnicity.[1] Oral Arg. Tr. at 53:5-6 (Government conceding that "ethnicity can be viewed as a subset of race"). From this central holding, the majority opinion explores the comparative approach, the stereotyping rationale, and the associational discrimination rationale to help determine "when a trait other than sex is . . . a proxy for (or function of) sex." Maj. Op. at 31. But in my view, these rationales merely reflect nonexclusive "evidentiary technique[s]," Jacobs, J., Concurring Op. at 6, frameworks, or ways to determine whether sex is a motivating factor in a given case, rather than interpretive tools that apply necessarily across all Title VII cases. Zarda himself has described these three rationales as "evidentiary theories" or "routes." Oral Arg. Tr. at 4:17-18. On this understanding, I join the majority opinion as to Parts II.A and II.B.1.a, which reflect the textualist's approach, and join the remaining parts of the opinion only insofar as they can be said to apply to Zarda's particular case.

[1] In that sense, I agree with Judge Cabranes that the inquiry could end there.

A word about the dissents. My dissenting colleagues focus on what they variously describe as the "ordinary, contemporary, common meaning" of the words "because of . . . sex," Lynch, J., Dissenting Op. at 19 n.8; Livingston, J., Dissenting Op. at 2, or the "public meaning of [those] words adopted by Congress in light of the social problem it was addressing when it chose those words," Lynch, J., Dissenting Op. at 61. There are at least two problems with this position. First, as the majority opinion points out, cabining the words in this way makes little or no sense of Oncale or, for that matter, Price Waterhouse. See Maj. Op. at 24-25 . Second, their hunt for the "contemporary" "public" meaning of the statute in this case seems to me little more than a roundabout search for legislative history. Judge Lynch's laudable call (either as a way to divine congressional intent or as an interpretive check on the plain text approach) to consider what the legislature would have decided if the issue had occurred to the legislators at the time of enactment is, unfortunately, no longer an interpretive option of first resort. Time and time again, the Supreme Court has told us that the cart of legislative history is pulled by the plain text, not the other way around. The text here pulls in one direction, namely, that sex includes sexual orientation.