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

BRIEF FOR RESPONDENT

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INTRODUCTION

When Congress prohibited sex discrimination in employment approximately 55 years ago, it did not simultaneously prohibit discrimination on the basis of sexual orientation. The text of Title VII does not include sexual orientation or homosexuality as a protected class, and the Courts of Appeals and the Equal Employment Opportunity Commission ("EEOC") unanimously held for decades that Title VII does not encompass sexual orientation. During the past forty-five years, on more than fifty occasions, Congress has rejected proposed bills to amend Title VII to encompass sexual orientation.

Petitioner Gerald Bostock ("Bostock") nevertheless asserts various legal theories in an attempt to convince the Court to insert "sexual orientation" into the text of Title VII. However, amending Title VII is the sole province of Congress. Moreover, the legal theories advanced by Bostock are contrary to the Court's precedents. Sex and sexual orientation are separate and distinct concepts, and employment decisions based on sexual orientation do not treat employees of one sex more favorably than similarly situated employees of the other sex. Additionally, employment decisions based on sexual orientation are not motivated by the employee's sex, and do not apply sex-specific stereotypes. For these and additional reasons discussed herein, the Eleventh Circuit's decision that

Title VII does not encompass sexual orientation discrimination should be affirmed.

STATEMENT OF THE CASE

Bostock is a gay male who worked for Clayton County ("the County") as the Child Welfare Services Coordinator assigned to the Juvenile Court of Clayton County. (Appendix for Petition for Writ of Certiorari ("App.") 6-7.) Bostock asserts that he was responsible for the Clayton County Court Appointed Special Advocate program. (*Id*. at 7.)

Bostock claims that he began playing in a gay recreational softball league in January 2013. (App. 7.) Bostock alleges 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*.) Bostock claims that the audit was a pretext for discrimination because of his sexual orientation. (*Id*. at 7-8.) On or about June 3, 2013, the Chief Judge of the Juvenile Court of Clayton County terminated Bostock's employment. (*Id*. at 8.) The stated reason for Bostock's termination was conduct unbecoming of a County employee, but Bostock contends that the real reason for his termination was his sexual orientation. (*Id.*)

The County denies that Bostock'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 Bostock for legitimate, non-discriminatory reasons based on the results of the audit. (*Id.* at 8.)[1]

Bostock 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, Bostock filed his Second Amended Complaint ("Complaint") on September 12, 2016 asserting that he was terminated in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. because of his sexual orientation.[2] (*Id*.)

The County filed a Motion to Dismiss arguing that Title VII does not prohibit discrimination on the basis of sexual orientation. (App. 9-17.) The magistrate judge issued a Report and Recommendation ("R&R") on November 3, 2016 recommending dismissal of the Complaint. (App. 5-25.) The R&R determined that Bostock's claim 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.) Bostock filed Objections to the R&R, asserting that Title VII encompasses discrimination on

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[1] Because this case was decided on the County's Motion to Dismiss, the County did not have the opportunity to introduce facts into the record regarding the results of the audit, which showed significant financial improprieties regarding his use of juvenile court funds that justified his termination.

[2] The district court dismissed a gender stereotyping claim that Bostock also asserted. Bostock did not appeal that ruling.

the basis of sexual orientation. (App. 26.) The district court deferred consideration of the R&R until after the Eleventh Circuit issued its decision in *Evans v. Ga. Reg'l Hosp.* (App. 29.)

On March 10, 2017, the Eleventh Circuit issued its decision in *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248 (11th Cir.), *cert. denied*, 138 S. Ct. 557 (2017), which held that *Blum* remained binding precedent in the Eleventh Circuit, and that Title VII does not prohibit discrimination on the basis of sexual orientation. Relying on *Evans*, the district court adopted the R&R and dismissed Bostock's Complaint on July 21, 2017. (App. 31.)

Bostock appealed the district court's ruling to the Eleventh Circuit. Bostock argued that Title VII encompasses sexual orientation and that the Eleventh Circuit's contrary rulings 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.) Bostock also filed a preliminary petition for rehearing en banc on November 13, 2017 asserting similar arguments, which the Eleventh Circuit denied on May 3, 2018. (App. 4, 60-77.)

On May 10, 2018, the Eleventh Circuit issued an opinion affirming the district court's dismissal of Bostock's Complaint 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:

> 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 affirmed the district court's decision dismissing Bostock's Title VII sexual orientation discrimination claim. (App. 3.)

Bostock filed his Petition for Writ of Certiorari on June 1, 2018. Shortly thereafter, the Eleventh Circuit again declined to rehear the case en banc. *Bostock v. Clayton Cty. Bd. of Comm'rs*, 894 F.3d 1335 (11th Cir. 2018).

SUMMARY OF THE ARGUMENT

Terms that otherwise are not defined in a statute should be given their ordinary, contemporary, common meaning at the time the statute was enacted. *See*, *e.g.*, *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019). The reason for this canon (hereinafter referred to as "the original public meaning")[3] is to ensure that courts do not amend or rewrite a statute, which is the sole province of Congress. This is exactly what Bostock asks the Court to do.

The original public meaning of "sex" in 1964 was being male or female. This public meaning remains the same today. Neither Bostock nor the decisions upon which he relies, *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (en banc) and *Hively v. Ivy Tech. Cmty. Coll. of Indiana*, 853 F.3d 339 (7th Cir. 2017) (en banc), suggest otherwise. Sexual orientation, on the other hand, refers to one's sexual preference, and homosexuality refers to one's attraction to one's own sex. Thus, the original public meaning of Title VII prohibits employment discrimination because of an individual being male or female and not because of an individual's sexual orientation. Contrary to Bostock's assertions, all of the Court's precedents have applied the original public meaning of Title VII's prohibition against sex discrimination. For this reason, the EEOC and all the Courts of Appeals to consider the issue held

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[3] *Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2075 (2018).

for decades that Title VII does not prohibit discrimination on the basis of sexual orientation.

Relying on *Zarda* and *Hively*, Bostock advances various legal theories in hopes of persuading the Court to do what Congress has declined to do for approximately forty-five years: amend Title VII by adding sexual orientation as a protected class. The Court should decline Bostock's invitation, as the legal theories asserted by Bostock fail to demonstrate that sexual orientation discrimination is just another form of sex discrimination.

First, Bostock asserts that sexual orientation discrimination is a subset of sex discrimination. In support, Bostock attempts to construct a "but for" test to show that similarly situated male and female employees are treated differently because of their sex. However, the "but for" test Bostock offers is fatally flawed because it changes *two* variables: the employee's sex *and* the employee's sexual orientation. That rigs the test to produce the answer Bostock desires.

Bostock also argues that an employer cannot consider an individual's sexual orientation without considering that person's sex. However, sexual orientation and sex are separate and distinct concepts. Moreover, an employer who makes a decision based on homosexuality, for example, is not motivated by the employee's sex, but rather by the employee's sexual orientation.

Second, Bostock argues that sexual orientation discrimination is another form of sex stereotyping prohibited by *Price Waterhouse*. However, homosexuality

is not a sex-specific stereotype such as the sex-specific stereotypes at issue in *Price Waterhouse*. Homosexuality is a trait that is equally present in men and women, and an employer who disapproves of homosexuality objects to it as a trait in both men and women. Furthermore, *Price Waterhouse* did not make sex stereotyping actionable *per se*. Rather, a claim of sex discrimination based on sex stereotyping may be established only if an employer relies on a stereotype that applies exclusively to one sex or the other in a manner that results in disparate treatment of men and women. *Price Waterhouse*, 490 U.S. at 250.

Third, Bostock argues that sexual orientation discrimination is a form of prohibited association discrimination because of sex. This theory relies on *Loving v. Virginia*, 388 U.S. 1 (1967), which invalidated statutes that prohibited interracial marriage on the ground that these statutes constituted invidious race discrimination. This theory does not apply to sexual orientation discrimination because, as previously stated, it is separate and distinct from sex discrimination. Moreover, sexual orientation discrimination does not involve invidious discrimination based on sex or favor one sex over the other sex. In addition, claims of sex discrimination cannot be analyzed identically as race discrimination claims, as reflected by numerous Courts of Appeals decisions that correctly have upheld different treatment of men and women with respect to grooming, dress, physical fitness standards and privacy spaces (such as overnight facilities, locker rooms,

restrooms and showers), whereas no such differences based on race would be tolerated.

More fundamentally, there is no basis to believe that Congress would have adopted a policy so significant as one prohibiting employment discrimination on the basis of sexual orientation through a device so subtle and oblique as a statute that prohibits employment discrimination on the basis of "sex." In other words, as this Court repeatedly has recognized, Congress does not hide elephants in mouseholes.

Finally, the reality that Congress did not prohibit discrimination on the basis of sexual orientation in Title VII is further demonstrated by the fact that: (1) Congress repeatedly has rejected dozens of amendments to Title VII to add sexual orientation as a protected class; (2) Congress re-enacted Title VII's prohibition against sex discrimination in the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 without change and against the backdrop of unanimous interpretations by the EEOC and several circuits that Title VII does not prohibit discrimination on the basis of sexual orientation; and (3) Congress repeatedly has included sexual orientation in certain civil rights statutes when it decided to include sexual orientation as a protected class—and omitted sexual orientation from civil rights statutes (such as Title VII) when it decided not to include sexual orientation as a protected class.

The Eleventh Circuit's decision in favor of the County should be affirmed.

ARGUMENT

I. THE ORIGINAL PUBLIC MEANING OF "SEX" AS USED IN TITLE VII PROHIBITS DISCRIMINATION ON THE BASIS OF SEX, NOT SEXUAL ORIENTATION

A. This Court Repeatedly Has Interpreted Statutes Applying Their Original Public Meaning

This Court has reiterated that "it's a 'fundamental canon of statutory construction' that, unless otherwise defined, words generally should be 'interpreted as taking their ordinary, contemporary, common meaning.'" *Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)). *Accord New Prime*, 139 S. Ct. at 539; *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014).

The term "contemporary" refers to the time frame when the statute at issue was enacted, not when a court is interpreting it years or decades later in litigation. *See*, *e.g.*, *New Prime*, 139 S. Ct. at 539-40 (applying meaning of "contracts of employment" as defined and commonly understood in 1925 when Federal Arbitration Act was adopted); *United States DOJ v. Landano*, 508 U.S. 165, 173 (1993) (applying meaning of "confidential" as defined and commonly understood at time Congress enacted amendment to Freedom of Information Act in 1986).

The purpose of this canon is to enable the public to rely on the written law as commonly understood at the time it was enacted and to ensure that Congress—

not the courts—determines whether to rewrite a statute Congress has enacted. In this regard, the Court emphasized just over a year ago that:

> Written laws are meant to be understood and lived by. If a fog of uncertainty surrounded them, if their meaning could shift with the latest judicial whim, the point of reducing them to writing would be lost. . . . Congress alone has the institutional competence, democratic legitimacy, and (most importantly) constitutional authority to revise statutes in light of new social problems and preferences. Until it exercises that power, the people may rely on the original meaning of the written law.

Wisconsin Cent., 138 S. Ct. at 2074.

> The Court reiterated last term that:
>
> [I]f judges could freely invest old statutory terms with new meanings, we would risk amending legislation outside the "single, finely wrought and exhaustively considered procedure" the Constitution commands. *INS v. Chadha*, 462 U.S. 919, 951, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983). We would risk, too, upsetting reliance interests in the settled meaning of a statute.

New Prime, 139 S. Ct. at 539. These admonitions are especially compelling because this is exactly what Bostock is attempting to convince the Court to do: amend Title VII to add sexual orientation as a protected class.

To escape this conclusion, Bostock cites *West v. Gibson*, 527 U.S. 212 (1999). (Bostock Br. 33, 46.) In *West*, the Court held that, because the Civil Rights Act of 1991 authorized compensatory damages, such damages were an "appropriate" remedy that the EEOC was authorized to award to federal employees under 42 U.S.C. § 2000e-16(b) even though this provision was enacted in 1972 before this remedy was available. *Id*. at 218. *West* is inapposite, however, because, as the Court also explained last term, "Of course, statutes may sometimes refer to an external source of law and fairly warn readers that they must abide that external source of law, later amendments and modifications included." *New Prime*, 139 S. Ct. at 539. The amendment to Title VII construed in *West* simply was an example of one such statute. *West*, 527 U.S. at 218 (holding that term "appropriate" "naturally refers to forms of relief that Title VII itself authorizes").

B. The Original Public Meaning Of The Term "Sex" At The Time Congress Adopted Title VII In 1964 Was The Trait Of Being Male Or Female, Not Sexual Orientation Or Homosexuality

The provision of Title VII at issue provides that it is an unlawful 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; . . .

42 U.S.C. § 2000e-2(a)(1). The text of Title VII does not include sexual orientation as a protected class.

The prohibition against discrimination on the basis of "sex" was added to Title VII "at the last minute on the floor of the House of Representatives." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 63 (1986) (citation omitted). The legislation "quickly passed as amended, and we are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on 'sex.'" *Id*. at 64.

In the absence of any definition of "sex" in the text or legislative history of Title VII, the Court should apply the original public meaning of the term "sex" at the time Congress enacted Title VII. (*See* Section I.A, *supra*.) The term "sex" as commonly understood in the era during which Title VII was enacted meant the trait of being male or female and did not refer to sexual orientation or homosexuality. For example, WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 1335 (college ed. 1964) included the following definitions: "**1.** either of the two divisions of organisms distinguished as male or female; males or females (especially men or women) collectively. **2.** The character of being a male or female; all of the things which distinguish a male from a female." *Accord* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1187 (1st ed. 1969) (defining "sex" as "[t]he condition

or character of being male or female; the physiological, functional, and psychological differences that distinguish the male and the female"); BLACK'S LAW DICTIONARY 1541 (rev. 4th ed. 1968) (defining "sex" to mean "[t]he sum of the peculiarities of structure and function that distinguish a male from a female organism; the character of being male or female").[4]

The meaning of the term "sex" remains unchanged today. *See, e.g.*, Dictionary.com (including the following definition of "sex": "1. either the male or female division of a species, especially as differentiated with reference to the reproductive functions") (last viewed August 13, 2019); THE AMERICAN HERITAGE DESK DICTIONARY (5th ed. 2013) (defining "sex" as "[e]ither of the two divisions, female and male, by which most organisms are classified on the basis of their reproductive organs and functions[;] the condition or character of being female or male").

The term "'sexual orientation' does not appear in dictionaries at or around the time of Title VII's enactment." *Hively*, 853 F.3d at 363 n.3 (Sykes, J., dissenting). However, Bostock has cited definitions for "homosexual" at or before the enactment of Title VII, including "[h]aving a sexual propensity for one's own sex" and "of, relating to, or characterized by a tendency to direct sexual desire toward another of the same

[4] Because "[d]ictionaries tend to lag behind linguistic realities, . . . [i]f you are seeking to ascertain the meaning of a term in an 1819 statute, it is generally quite permissible to consult an 1828 dictionary." Antonin Scalia & Bryan A. Garner, *A Note on the Use of Dictionaries*, 16 Green Bag 2d 419, 423 (2013).

sex[.]" (Bostock Br. 13) (citing dictionaries from 1961 and 1964). More recently, "sexual orientation" has been defined as: "a person's sexual identity in relation to the gender to whom he or she is usually attracted; (broadly) the fact of being heterosexual, bisexual, or homosexual." *Hively*, 853 F.3d at 363 n.3 (quoting OXFORD ENGLISH DICTIONARY (2009 ed.)) (Sykes, J., dissenting). *Accord*, BLACK'S LAW DICTIONARY 1584 (10th ed. 2014) (defining "sexual orientation" as "[a] person's predisposition or inclination toward sexual activity or behavior with other males or females; heterosexuality, homosexuality, or bisexuality").

Bostock attempts to counter this straightforward reality by offering obviously inapplicable definitions that refer to "sex" as a "sphere of behavior" rather than a trait or characteristic. (Bostock Br. 32-33) (citing secondary definitions contained in WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2296 (2d unabridged ed. 1961). Title VII, however, prohibits employment discrimination on the basis of various traits or characteristics (race, color, religion, sex and national origin), not "spheres of behavior" or acts. Words in a statute must be interpreted according to their context. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 356 (2013) ("Text may not be divorced from context.").

Thus, applying the original public meaning "sex" as used in Title VII at the time of its enactment in 1964, Title VII prohibits employment discrimination on the basis of an individual being male or female, not

on the basis of an individual being heterosexual, homosexual or bisexual.[5]

For this reason, every circuit court to address this issue prior to 2017 held that Title VII does not prohibit discrimination on the basis of sexual orientation, and this had been the consensus of the circuit courts for decades.[6] *See*, *e.g.*, *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261, 263-65 (3d Cir. 2001), *cert. denied*, 534 U.S. 1155 (2002); *Hopkins v. Baltimore Gas & Elect. Co.*, 77 F.3d 745, 751-52 (4th Cir.), *cert. denied*, 519 U.S. 818 (1996); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979); *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 763-66 (6th Cir. 2006), *cert. denied*, 551 U.S. 1104 (2007); *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 704 (7th Cir. 2000); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) (per curiam); *Rene*

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[5] A memorandum authored by two bipartisan comanagers of Title VII in the Senate states that "those distinctions or differences in treatment or favor prohibited by section 704 are those which are based on any five of the forbidden criteria: race, color, religion, sex, and national origin. *Any other criterion or qualification for employment is not affected by this title*." 110 Cong. Rec. 7213 (1964) (emphasis added) (cited in *Price Waterhouse*, 490 U.S. at 243-44). The Court previously has acknowledged the authoritativeness of this memorandum. *Price Waterhouse*, 490 U.S. at 243 n.8 (citation omitted).

[6] As previously discussed, the Seventh Circuit reversed course in 2017 and held in *Hively* that Title VII prohibits discrimination on the basis of sexual orientation. The Second Circuit did likewise in 2018 in *Zarda*.

v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1063-64 (9th Cir. 2002) (en banc), *cert. denied*, 538 U.S. 922 (2003); *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005); *Evans*, 850 F.3d at 1255.

II. THIS COURT HAS NEVER INTERPRETED TITLE VII'S PROHIBITION AGAINST SEX DISCRIMINATION IN A MANNER THAT CONFLICTS WITH THE ORIGINAL PUBLIC MEANING OF "SEX"

Applying the original public meaning of Title VII, the Court consistently has emphasized that Title VII prohibits the *disparate treatment* of men and women. *See*, *e.g.*, *Meritor*, 477 U.S. at 64 (holding that Title VII's prohibition against sex discrimination "evinces a congressional intent 'to strike at the entire spectrum of *disparate treatment of men and women*' in employment") (quoting *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978) (emphasis added)); *AMTRAK v. Morgan*, 536 U.S. 101, 116 (2002) (same); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) (same); *Price Waterhouse*, 490 U.S. at 251 ("'[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of *disparate treatment of men and women* resulting from sex stereotypes.'") (quoting *Manhart*, 435 U.S. at 707 n.13) (emphasis added).

A. The Court Did Not "Reject" The Original Public Meaning Of Discrimination Because Of "Sex" In *Oncale*, But Rather Applied It

Bostock contends that *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) "rejected" the original public meaning of "sex" discrimination and represented a departure from the Court's precedents set forth above. (Bostock Br. 45.) In support of this contention, Bostock relies on the following analysis in *Oncale*:

> As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.

(*Id*. at 44) (quoting *Oncale*, 523 U.S. at 79).

Contrary to Bostock's assertions, neither this passage nor any other language in *Oncale* suggests Title VII should be interpreted in a manner that conflicts with its original public meaning prohibiting treating one sex more favorably than the other sex. Indeed, *Oncale* reiterated the original public meaning of Title VII as prohibiting disparate treatment of men and women by stating that "'[t]he critical issue . . . 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*, 510 U.S. at 25 (Ginsburg, J., concurring)).

The Court in *Oncale* explained that, if the alleged harasser is a heterosexual male, women are subjected to disadvantageous terms and conditions of employment and men are not. *Id*. at 80. If the alleged harasser is a homosexual male, men are subjected to disadvantageous terms and conditions of employment and women are not. *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 all of these situations, the target of the harassment is selected because of the employee's sex and thus easily falls within Title VII's prohibition of discrimination because of "sex."[7]

Thus, *Oncale* provides no support for Bostock's assertion that the Court should interpret Title VII in a manner that conflicts with its original public meaning. *Oncale* simply was a new application of Title VII's fixed meaning prohibiting employment discrimination because of an individual being male or female.[8] *See*

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[7] The fact that the plaintiff in *Oncale* was the only man on the offshore oil platform who was sexually harassed (Bostock Br. 17) is unremarkable and irrelevant.

[8] Although Bostock attempts to make much of *Oncale*'s reference to "reasonably comparable evils" (Bostock Br. 11, 30),

Wisconsin Cent., 138 S. Ct. at 2074 ("While every statute's *meaning* is fixed at the time of enactment, new *applications* may arise in light of changes in the world.") (emphasis in original). But Bostock seeks something very different: a drastic change in Title VII's fixed meaning. Simply put, applying the original public meaning of Title VII to different scenarios that Congress may not have envisioned in 1964 is one thing; adopting an interpretation of Title VII that conflicts with its original public meaning to, in effect, amend Title VII to add a whole new protected class, is quite another.

B. The Other Cases Cited By Bostock Properly Applied The Original Public Meaning Of "Sex" In Title VII

Bostock cites numerous decisions of this Court that he contends supports his contention that the Court should rewrite Title VII to add sexual orientation as a protected class. None of these cases cited by Bostock has anything to do with discrimination on the basis of sexual orientation, and all of them applied Title VII in a manner that is consistent with its original public meaning prohibiting discrimination on the basis of being male or female.

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same-sex harassment was "a reasonably comparable evil" to the principal concerns of Congress in enacting Title VII because, as discussed herein, it subjects members of one sex to disadvantageous terms and conditions of employment to which members of the other sex are not exposed.

For example, *Meritor* (Bostock Br. 37, 46-47), held that sexual harassment of a subordinate because of the employee's sex constitutes discrimination on the basis of sex. *Meritor*, 477 U.S. at 64. The Court reasoned that Title VII's prohibition against discrimination in the "terms, conditions, or privileges of employment" "evidences a congressional intent to strike at the entire spectrum of *disparate treatment* of *men and women* in employment." *Id*. (punctuation and citations omitted) (emphasis added). As one circuit judge recently observed, "[i]t should surprise no one that a statute drafted to eradicate sex discrimination in the workplace would later be unanimously construed by the Supreme Court to reach workplace conduct that pressures members of one sex out of the workplace, but not the other." *Wittmer v. Phillips 66 Co.*, 915 F.3d 328, 335 n.1 (5th Cir. 2019) (Ho, J., concurring) (citing *Meritor*).

Bostock's reliance on *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (per curiam) fares no better. (Bostock Br. 16.) In *Phillips*, the employer had a policy of not hiring women with pre-school children, while at the same time hiring men with pre-school children. The Court held that Title VII did not permit the employer to have one hiring policy for men and a less favorable one for women. *Id*. at 544. Thus, *Phillips* was a straightforward case of sex discrimination where the employer's hiring policy treated women less favorably than similarly situated men.

Int'l Union, United Auto, Aerospace & Ag. Implement Workers of Am., UAW v. Johnson Controls, Inc.,

499 U.S. 187 (1991) similarly is inapposite. (Bostock Br. 16.) In that case, the employer adopted a policy prohibiting women who were pregnant or capable of bearing children from working in positions involving lead exposure. *Id*. at 192. Despite evidence that lead exposure had a debilitating effect on the male reproductive system, the employer did not preclude men from working in positions with high lead exposure. *Id*. at 198. Thus, the Court had no difficulty finding that the employer's policy violated Title VII because, under the policy, "[f]ertile men, but not fertile women, are given a choice as to whether they wish to risk their reproductive health for a particular job." *Id*. at 197. Therefore, *Johnson Controls* held that the employer engaged in unlawful sex discrimination because it treated men more favorably than women with respect to eligibility for positions involving lead exposure.

Bostock's reliance on *Manhart* likewise misses the mark. (Bostock Br. 14-15.) In *Manhart*, the employer required 14.84% higher pension contributions from female employees than from male employees because it determined based on a study of mortality tables and its own experience that its female employees would live a few years longer than its male employees. *Manhart*, 435 U.S. at 705 & n.5. The Court emphasized that, while women as a group might live longer than men, many female employees would not live as long as the average man. *Id*. at 708. The Court thus held that "[a]n employment practice that requires 2,000 individuals to contribute more money into a fund than 10,000 other employees simply because each of them is a woman,

rather than a man" violated Title VII's prohibition against sex discrimination. *Id*. at 710. Once again, *Manhart* merely was a classic case of sex discrimination where the employer treated men more favorably than women with respect to pension contributions and take-home pay.

Bostock's citation to *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983) is equally unavailing. (Bostock Br. 15, 37.) In *Newport News*, the employer provided hospitalization benefits for its female employees that afforded the same level of benefits for pregnancy-related conditions as they did for other conditions. *Id*. at 671. However, hospitalization benefits for the wives of male employees provided a lower level of benefits for pregnancy-related conditions than for other conditions. *Id*. at 672-73 & n. 6. The Court held that the Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 ("PDA") "makes clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions." *Id*. at 684.[9] The Court held that "discrimination against

[9] Bostock incorrectly asserts that the PDA contains a command that Title VII "must be read broadly to prohibit discrimination on account of any sex-based classifications, even those not enumerated in the statute." (Bostock Br. 35 n.9, 36.) The PDA contains no such command. Instead, the PDA specified that three sex-specific characteristics – "pregnancy, childbirth, or related medical conditions" fell within the meaning of the terms "because of sex" and "on the basis of sex" as used in § 2000e-2(a)(1) and elsewhere in Title VII. 42 U.S.C. § 2000e(k). The "include, but are not limited to" language in § 2000e(k) simply reiterates that Title VII prohibits not only pregnancy discrimination, but also other

female spouses in the provision of fringe benefits is also discrimination against male employees." *Id*. Thus, *Newport News* involved a case of sex discrimination where the employer provided more favorable benefits to female employees and their beneficiaries than male employees and their beneficiaries.

Finally, Bostock argues that *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) supports a reading of Title VII's prohibition against sex discrimination that departs from its original public meaning. (Bostock Br. 13, 17, 38-39.) *Price Waterhouse*, however, did no such thing. In *Price Waterhouse*, a female senior manager was not invited to become a partner with an accounting firm. *Id*. at 223. The plaintiff introduced evidence that various male partners made stereotypical comments about her when considering her candidacy, including her being too aggressive. *Id*. at 234-35.

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 exclusively with the employee's sex was sufficient to establish a violation under Title VII for discrimination because of her sex. *Price Waterhouse*, 490 U.S. at 251; *id*. at 258-261 (White, J., concurring); *id*. at 302 (O'Connor, J., concurring). The Court explained that, "in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum

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forms of sex discrimination covered by the other provisions of Title VII. *Id*.

of disparate treatment of men and women resulting from sex stereotypes." *Id*. at 251 (punctation and citations omitted).

Thus, *Price Waterhouse* involved a scenario where a female employee was treated less favorably than male employees with respect to qualifications for partnership because she did not satisfy requirements that applied *exclusively* to women.[10]

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[10] Bostock argues that Congress ratified the holdings in the decisions discussed above in passing the Civil Rights Act of 1991. (Bostock Br. 38-39.) As discussed above, these decisions are inapposite, applied the original public meaning of Title VII and do not support Bostock's contention that Title VII prohibits discrimination on the basis of sexual orientation. Thus, whether or not Congress ratified these decisions by passing the Civil Rights Act of 1991 is immaterial. Moreover, Bostock's assertion that the Civil Rights Act of 1991 provided a "congressional mandate that the statutory language of Title VII must be interpreted broadly to prohibit forms of sex discrimination not explicitly set forth in the statute" (Bostock Br. 40) is incorrect. The Civil Rights Act of 1991 contains no such language. Indeed, Congress rejected a provision in the original House version of the bill that stated that Title VII and other federal civil rights laws "shall be broadly construed to effectuate the purpose of such laws to provide equal opportunity and provide effective remedies." Civil Rights and Women's Equality Act of 1991, H.R. 1, 102d Cong. § 11 (1991).

III. THE LEGAL THEORIES OFFERED BY BOSTOCK IN HOPES OF CONVINCING THE COURT TO REWRITE TITLE VII TO PROHIBIT DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION ARE WRONG

Bostock does not dispute that the original, public meaning of Title VII only prohibits discrimination on the basis of sex. (Bostock Br. 32.) Bostock instead asserts three legal theories to argue that sexual orientation discrimination *is* sex discrimination. However, embracing any of Bostock's legal theories would constitute a radical departure from the Court's precedents and the original public meaning of sex discrimination in Title VII as prohibiting discrimination on the basis of being male or female, and morph Title VII into a statute that Congress did not enact in 1964—one that also prohibits discrimination on the basis of sexual orientation. Bostock is asking the Court to re-write Title VII by inserting "sexual orientation" into the list of protected classes set forth in 42 U.S.C. § 2000e-2(a). The Court should reject Bostock's request.

A. Employment Decisions Based On Sexual Orientation Are Not Made Because Of Sex

1. The "Simple Test" Bostock Recites Is Fatally Flawed

Bostock contends that sexual orientation discrimination is a form of sex discrimination because it fails "the simple test" enunciated in *Newport News* and *Manhart* that sex discrimination occurs if the evidence

shows "treatment of a person in a manner which but for that person's sex would be different." (Bostock Br. 15.) Bostock then contends that sexual orientation discrimination fails this "simple test" because the County treated him—a male employee sexually attracted to men—differently than it would have treated a similarly situated female employee sexually attracted to men. (*Id*.) This argument is a reiteration of the "comparative test" employed in the *Zarda* and *Hively* majority opinions. *Zarda*, 883 F.3d at 116-19; *Hively*, 853 F.3d at 345-47.[11]

However, this hypothetical "load[s] the dice by changing *two* variables – the plaintiff's sex and sexual orientation—to arrive at the hypothetical comparator." *Hively*, 853 F.3d at 366 (Sykes, J., dissenting). It therefore does *not* establish prohibited sex discrimination.

Establishing an actual case of sex discrimination based on the employer's treatment of a comparator, as an evidentiary matter, requires keeping all relevant traits other than the employee's sex the same. *Hively*, 85 F.3d at 366 (Sykes, J., dissenting); *see also Newport News*, 462 U.S. at 685 (insurance program providing inferior benefits for male employees and their beneficiaries compared to similarly situated female employees and their beneficiaries constitutes unlawful sex discrimination); *Texas Dep't of Cmty. Affairs v. Burdine*,

[11] The "comparative test" is an evidentiary technique to prove a claim of discrimination and not an appropriate tool of statutory construction. *Hively*, 853 F.3d at 63-66 (Sykes, J., dissenting). Regardless, the manner in which Bostock, *Zarda* and *Hively* employed it is fatally flawed, as discussed herein.

450 U.S. 248, 258 (1981) ("[I]t is the plaintiff's task to demonstrate that similarly situated employees were not treated equally.") One relevant trait that must be kept the same is the employee's sexual orientation, since that is the very trait that is the subject of this case. Thus, a hypothetical example illustrating an actual case of sex discrimination based on the employer's treatment of a similarly situated comparator is if an employer fires a female employee because she is lesbian but retains a male employee who is homosexual. In this example (unlike the one presented by Bostock), the only variable is the sex of the two employees, and the sexual orientation of the two employees is the same.

Recognizing that the hypothetical presented in *Zarda* and *Hively* and by Bostock is fatally flawed for the reasons discussed above, Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") as amicus for Bostock, unveils a different hypothetical comparing a bisexual man attracted to men to a bisexual woman attracted to men. (Br. of Lambda Legal, p. 15.) This hypothetical, however, fares no better than the previous one because it contradicts itself. After all, an individual who is bisexual, by definition, is not attracted only to men, but rather is attracted to *both* men and women. An employer who objects to bisexuality would not treat the two individuals in this hypothetical differently, thus showing the absence of sex discrimination.

Thus, for the reasons discussed above, the "simple test" set forth in *Newport News, Manhart* and *Johnson*

Controls does not support Bostock's cause nor compel the outcome he asserts. Indeed, the evidence would *not* show the "treatment of a person in a manner which but for that person's sex would be different" if the employer treats homosexual men and lesbian women in the same manner.

Bostock attempts to escape this inevitable conclusion by contending that *Newport News*, *Manhart, Phillips* and *Johnson Controls* "found violations of Title VII where only certain subgroups of each gender were adversely affected by the policies at issue." (Bostock Br. 16.) Bostock's characterization of these holdings, however is incorrect: *one* sex was treated less favorably than similarly situated members of the *other* sex. For example, the employer in *Manhart* required that *all* female employees make higher pension contributions than male employees. In *Newport News, Johnson Controls* and *Phillips*, the subgroup of one sex was treated more favorably than the subgroup of the other sex.

An employer that makes a decision based on sexual orientation does not treat men (or a subgroup of men) more favorably than women (or a subgroup of women), or vice versa. "Same-sex attraction is not 'a function of sex' or 'associated with sex' in the sense that life expectancy or childbearing capacity are." *Zarda*, 883 F.3d at 152 (Lynch, J., dissenting). Nothing "suggest[s] that rates of homosexuality differ significantly between men and women." *Id*. at 152 n.19.

Bostock contends that this analysis "has no basis in the text of Title VII or the Court's decisions"

(Bostock Br. 16), but as discussed above, this analysis properly applies the text of Title VII and the Court's precedents. Bostock contends that the Court has applied a "classification-based rather than a class-based approach in applying Title VII," but does not state the purported difference between these two concepts, cite any authority in support thereof or explain its purported relevance to this case. (*Id*.)

Instead, Bostock cites *Manhart* for the unremarkable proposition that Title VII protects individuals rather than classes. (*Id*.) Applying this concept in *Manhart*, the Court explained that, "[i]f height is required for a job, a tall woman may not be refused employment merely because, on the average, women are too short." *Manhart*, 435 U.S. at 708. The Court similarly held that requiring female employees to make a larger pension contribution than male employees based on the longer life expectancy of women violated Title VII because there was no assurance that any specific female employee would live as long as the average female employee (and thus receive higher pension benefits to compensate for the higher contributions) or even the average male employee. *Id*. at 708-09. This analysis, however, has no relevance to whether Title VII prohibits discrimination on the basis of sexual orientation. Under the "simple test" invoked by Bostock, he still must show that he is treated less favorably than a similarly situated female employee, and he cannot make any such showing.

Thus, Bostock's assertion that "[t]he Court has refused time and time again to narrow Title VII to

prohibit only discrimination against men or women based on biological traits linked exclusively to them as such" (Bostock Br. 17) is incorrect. As shown above, the Court repeatedly and consistently has required a plaintiff alleging sex discrimination under Title VII to establish that an employment practice treats members of one sex more favorably than the other sex.

2. Decisions Based On Sexual Orientation Are Not Motivated By Sex And Do Not Favor One Sex Over The Other Sex

Bostock contends that Title VII's prohibition of sex discrimination also encompasses discrimination on the basis of sexual orientation because "one simply cannot consider an individual's sexual orientation without first considering his sex." (Bostock Br. 13.) Bostock also argues that "one cannot define a person's sexual orientation without first taking his sex into account." (*Id*. at 14) (citing *Zarda* and *Hively*).

This does not change the fact that sex and sexual orientation

> are never used interchangeably, and the latter is not subsumed with the former; there is no overlap in meaning. Contrary to the majority's vivid rhetorical claim, it does not take "considerable calisthenics" to separate the two. . . . The words plainly describe different traits, and the separate and distinct meaning of each term is easily grasped. More specifically to the point here, discrimination "because of sex" is not reasonably understood to include

> discrimination based on sexual orientation, a different immutable characteristic. Classifying people by sexual orientation is different than classifying them by sex. The two traits are categorically distinct and widely recognized as such.

Hively, 853 F.3d at 363 (Sykes, J., dissenting) (footnote omitted). Indeed, amicus Lambda Legal acknowledges that sex and sexual orientation are *not* "synonyms or interchangeable." (Lambda Legal Amicus Br. 8.) *Accord Hively*, 853 F.3d at 347 (acknowledging that sex and sexual orientation are different; *see also Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 92-94 (1973) (discrimination on the basis of citizenship status does not constitute discrimination on the basis of national origin because these concepts are different and are not interchangeable).[12]

Bostock essentially argues that merely noticing or being aware of an employee's sex is the equivalent of being motivated by the employee's sex. However, this is incorrect. *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033 (2015) ("the intentional discrimination provision prohibits certain *motives*, regardless of the actor's knowledge. Motive and knowledge are separate concepts.") (emphasis in original); *Staub v.*

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[12] The Court's decisions concerning the constitutional rights of gays and lesbians confirm that the Court never has treated sexual orientation discrimination as a form of sex discrimination. (Bostock Br. 46 n.14 (citing cases).) Moreover, Bostock "conflate[s] the distinction between state action, which is subject to constitutional limits, and private action, which is regulated by statute." *Hively*, 853 F.3d at 372 (Sykes, J., dissenting).

Proctor Hosp., 562 U.S. 411, 424 (2011) ("[a] 'motivating factor' is a factor that 'provide[s] . . . a motive,'" and "[a] 'motive,' in turn, is 'something within a person . . . that incites him to action.'") (Alito, J., concurring) (citation omitted); *Price Waterhouse*, 490 U.S. at 1805 ("Race and gender always 'play a role' in an employment decision in the benign sense that these are human characteristics of which decisionmakers are aware") (O'Connor, J., concurring). An employer's intent or motive is the reason for the challenged employment decision. *Price Waterhouse*, 490 U.S. at 1790. In other words, the employer's motive is what prompts it to take the challenged action.

Therefore, the fact that an employer may notice, identify or know an individual's sex does not mean that the employer is *motivated* by the individual's sex. To the contrary, an employer that discriminates on the basis of sexual orientation is prompted to take the challenged action because it objects to the individual's sexual orientation, not his or her sex. Such an employer "is not excluding gay men because they are men and lesbians because they are women. [The employer's] discriminatory motivation is independent of and unrelated to the applicant's sex." *Hively*, 853 F.3d at 1365 (Sykes, J., dissenting). Moreover,

> [a]n employer who refuses to hire a lesbian applicant because she is a lesbian only "accounts for" her sex in the limited sense that he notices she is a woman. But that's not the object of the employer's discriminatory intent, not even in part. Her sex isn't a motivating

> factor for the employer's decision; the employer objects only to her sexual orientation.

Id. at 1367 n.5 (Sykes, J., dissenting). *Accord Zarda*, 883 F.3d at 156 (Lynch, J., dissenting).

Ultimately, Bostock argues that Title VII prohibits an employer from noticing, identifying or knowing an employee's sex and then applying a rule or policy to that employee that does not favor one sex over the other. Neither the text of Title VII nor any of the Court's precedents support such a far-reaching conclusion. To the contrary, as previously stated, the Court repeatedly has emphasized that Title VII prohibits the *disparate treatment* of men and women. *See*, *e.g.*, *Oncale*, 523 U.S. at 80; *Meritor*, 477 U.S. at 64; *Manhart*, 435 U.S. at 707 n.18; *AMTRAK*, 536 U.S. at 116; *Harris*, 510 U.S. at 21; *Price Waterhouse*, 490 U.S. at 251.

For this reason, the Courts of Appeals routinely have upheld employment practices that require the employer to be aware of the employee's sex in order to apply a policy that does not treat one sex more favorably than the other sex. *See, e.g.*, *Baur v. Lynch*, 812 F.3d 340, 351 (4th Cir. 2016) ("an employer does not contravene Title VII when it utilizes physical fitness standards that distinguish between the sexes on the basis of their physiological differences but impose an equal burden of compliance on both men and women requiring the same level of physical fitness for each"); *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1111 (9th Cir. 2005) (en banc) (employer's grooming and appearance policy that treated men and women

differently did not violate Title VII because plaintiff failed to demonstrate that it was "more burdensome for women than for men") (citing cases from numerous circuits); *Etsitty v. Utah Transit Auth.*, 502 F.3d 1216, 1225 (10th Cir. 2007) ("[b]ecause an employer's requirement that employees use restrooms matching their biological sex does not expose biological males to disadvantageous terms and does not discriminate against employees who fail to conform to gender stereotypes, [the employer's] proffered reason of concern over restroom usage is not discriminatory on the basis of sex"). *See also United States v. Virginia*, 518 U.S. 515, 540, 550 n.19 (1996) (requiring female admission into all-male military academy and acknowledging need for accommodations in arranging housing assignments and "to adjust aspects of the physical training programs").

In sum, "[u]nder the longstanding view, universally accepted by federal circuits for forty years, Title VII prohibits employers from favoring men over women, or vice versa." *Wittmer*, 915 F.3d at 334 (Ho, J., concurring). The view espoused by Bostock and embraced by *Zarda* and *Hively* "requires employers to be entirely blind to a person's sex." *Id*. As discussed above, such a gender-blind view of Title VII's prohibition against sex discrimination is contrary to the Court's precedents, would in effect amend Title VII to add sexual orientation as a protected class and would eviscerate the reasonable, evenly-applied dress, grooming, physical fitness and restroom usage policies of employers that have been upheld by the Courts of Appeals for decades.

B. Employment Decisions Based On Sexual Orientation Do Not Involve Sex Discrimination Using Sex-Specific Stereotypes Prohibited By *Price Waterhouse*

Bostock then argues that Title VII prohibits discrimination on the basis of sexual orientation because it is a form of sex stereotyping under *Price Waterhouse*. (Bostock Br. 23-29.) Bostock's argument is that an employer who disapproves of homosexuality is applying a sex-based stereotype that men should only be attracted to women and that women should only be attracted to men. (*Id*.)

For decades, the Courts of Appeals had no difficulty rejecting this argument. *See*, *e.g.*, *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 290 (3d Cir. 2009); *Vickers*, 453 F.3d at 763; *Medina*, 413 F.3d at 1135. The Second Circuit and Seventh Circuit recently changed course and adopted the *Price Waterhouse* sex stereotyping argument advanced by Bostock.

However, sex stereotyping is not a stand-alone claim, but rather may constitute evidence that one sex was favored over another sex. *Price Waterhouse*, 490 U.S. at 251 ("Remarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision. The plaintiff must show that the employer actually relied on her gender in making its decision."); *see also Hively*, 853 F.3d at 369 (Sykes, J., dissenting); *Wittner*, 915 F.3d at 339 ("under *Price Waterhouse*, sex stereotyping is actionable only to the extent it provides evidence of

favoritism of one sex over the other") (Ho, J., concurring). *Zarda*, 883 F.3d at 119-123; *Hively*, 853 F.3d at 346-47.

Moreover, the fatal flaw in Bostock's sex stereotyping theory is succinctly stated as follows:

> To put the matter plainly, heterosexuality is not a *female* stereotype; it is not a *male* stereotype; it is not a *sex-specific* stereotype at all. An employer who hires only heterosexual employees is neither assuming nor insisting that his female and male employees match a stereotype specific to their sex. He is instead insisting that his employees match the dominant sexual orientation *regardless of their sex*. Sexual orientation discrimination does not classify people according to invidious or idiosyncratic *male or female* stereotypes. It does not spring from a sex-specific bias at all.

Hively, 853 F.3d at 370 (Sykes, J., dissenting) (emphasis in original).

An employer who disapproves of homosexuality "is not deploying a stereotype about men or about women to the disadvantage of either sex. Such an employer is expressing disapproval of the behavior or identity of a class of people that includes both men and women." *Zarda*, 883 F.3d at 158 (Lynch, J., dissenting). Thus, an employer's objection to homosexuality

> does not stem from a desire to discriminate against either sex, nor does it result from any sex-specific stereotype, nor does it differentially harm either men or women vis-a-vis the

> other sex. Rather, it results from a distinct type of objection to anyone of whatever gender, who is identified as homosexual. The belief on which it rests is not 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 – to be heterosexual, and to have sexual attraction to or relations with only members of the opposite sex.

Id. (emphasis in original).

To refute this cogent analysis, Bostock contends that Title VII does not require that a stereotype be "sex-specific" to men or women "as such," but rather that the stereotype be "sex-based" as to the individual employee. (Bostock Br. 28.) Not surprisingly, Bostock does not cite any authority in support of this assertion. Although Bostock emphasizes that Title VII prohibits discrimination against individuals (*id*.), stereotypes, by their very nature, refer to generalizations about a specific group of people. A claim of sex discrimination based on evidence of sex stereotyping therefore may be established only if an employer applies a stereotype that applies exclusively to men or women in a manner that results in disparate treatment of men and women. *Price Waterhouse*, 490 U.S. at 250. Thus, for example, "[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*.

An employer's disapproval of homosexuality is entirely unlike the sex stereotyping at issue in *Price Waterhouse*. The problem for the employer in *Price Waterhouse* was that, even assuming that the plaintiff was "aggressive" and "curt" as the employer asserted, "this would not tell us that the partners who cast their evaluations of [the plaintiff] in sex-based terms would have criticized her as sharply (or criticized her at all) if she had been a man." *Price Waterhouse*, 490 U.S. at 258. *Price Waterhouse* thus suggests that, if the evidence had shown that the partners would have criticized the plaintiff in the same way for being "aggressive" or "curt" if she had been a man, then the employer would have successfully established that it did not discriminate against the plaintiff because of her sex. *Id*.[13] Instead, the evidence presented supported an inference that the partners objected to the plaintiff being "aggressive," "curt" and using foul language (Bostock Br. 17) because they viewed these traits as undesirable traits for *women—but not men*—to have, based on a sex-specific stereotype that *women—but not men*—are supposed to be submissive, passive and pleasant, not "aggressive," "curt" or vulgar.

In contrast, an employer's disapproval of homosexuality is not based on sex-specific stereotypes that are applied to men or women but not both, such as those at issue in *Price Waterhouse*. An employer who objects

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[13] Although Bostock asserts that *Price Waterhouse* "was an evolution in the legal understanding of sex as gender" (Bostock Br. 27), courts use the terms "sex" and "gender" interchangeably. *Zarda*, 883 F.3d at 107 n.2.

to homosexuality as a trait objects to the presence of this trait in *both* men and women. Because an employer's objection to homosexuality applies to both men and women, such an objection is not the result of a sex-specific stereotype. If an employer takes adverse action against a male employee because of traits (or the absence of traits) that are *not* "specific" or "exclusive" to men (Bostock Br. 29), then the employer's actions are, by definition, *not* the result of sex-specific stereotypes.

C. Sexual Orientation Discrimination Is Not A Form Of Association Discrimination Based On Sex

Bostock also contends that sexual orientation discrimination is prohibited by Title VII because it constitutes a form of association discrimination based on his sex. (Bostock Br. 18-23.) Bostock's theory relies on *Loving v. Virginia*, 388 U.S. 1 (1967). In that case, the Court invalidated Virginia statutes that prohibited a white person from marrying a "colored" person and provided for incarceration for one to five years. *Id*. at 5. The Supreme Court characterized the asserted justifications for these statutes as "an endorsement of the doctrine of White Supremacy." *Id*. at 7. The Court also rejected the State's argument that the statutes punished both whites and Negroes equally, explaining that "[t]here is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on

their own justification, as measures designed to maintain White Supremacy." *Id*. at 11.

Several Courts of Appeals have extended the rationale of *Loving* and held that Title VII prohibits race discrimination based on an employee's association with a member of another race. (Bostock Br. 19) (citing cases). Bostock argues that the *Loving* rationale should be extended further to sexual orientation discrimination "because it is discrimination on the basis of an employee's association with another person of the same sex." (*Id*. at 18, 19) (citing *Zarda* and *Hively*).

In making this argument, first, Bostock ignores that an employer who objects to homosexuality does not have concerns with, for example, a male employee merely associating with other males, having close male friends, socializing with male friends or having lunch or dinner with male friends. Nor does such an employer have any concerns with a male employee who lives with other males, assuming that this is just a platonic arrangement. The employer's only objection is if a male employee has a romantic relationship with another male that reflects that the male employee is homosexual. This simple illustration demonstrates that the employer's animus[14] is not directed toward one sex

[14] Bostock argues that "there is no requirement of animus to show a violation of Title VII." (Bostock Br. 21) (citing *Ricci v. DeStefano*, 551 U.S. 557, 579-80 (2009)). However, Bostock does not suggest that any "benevolent" or "well intentioned" motives such as the ones involved in *Ricci* are implicated in cases of prohibited association discrimination. In any event, whether

or the other, but rather toward homosexuality as a sexual orientation.

Second, because sexual orientation discrimination is separate and distinct from sex discrimination (*see* Section III.A, *supra*), Bostock's association discrimination argument fails too. *See Walsh v. Friendship Vill. of South Cty.*, 352 F. Supp. 3d 920, 927 (E.D. Mo. 2019) (rejecting association discrimination claim under Fair Housing Act because such claims are not "actionable with respect to classes unprotected by the statute at issue" and "sexual orientation is one such unprotected class"). Simply put, an employer who disapproves of homosexuality does not disapprove of an employee's associations with other members of the employee's sex and does not harbor animus toward members of that sex in general, but rather objects to associations that demonstrate or suggest that the employee is homosexual.

Third, the anti-miscegenation statutes invalidated in *Loving* were inherently racist, constituted invidious race discrimination and were enacted for the express purpose of perpetuating the purported superiority of the white race over other races. In contrast, sexual orientation discrimination is not based on notions of superiority of one sex over another sex, does not prefer one sex over the other sex and is not inherently sexist. *Hively*, 853 F.3d at 368 (Sykes, J., dissenting); *Zarda*, 883 F.3d at 125-28 (Lynch, J., dissenting).

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characterized as benevolent or otherwise, the employer's motives are focused on the employee's sexual orientation, not his sex.

Bostock counters that the Court in *Loving* rejected the argument that "equal application" of the prohibition against interracial marriages to both whites and non-whites provided adequate justification for the statutes.[15] (Bostock Br. 20.) However, the punishment of both whites and blacks for interracial marriages in *Loving*, if anything, *advanced* the State's purpose in promoting white supremacy and racial hatred, whereas, as previously stated, sexual orientation discrimination does not involve the promotion of one sex as superior or preferable to the other sex. Similarly, even assuming an even-handed purpose to preserve the "integrity" of all races and not just the "integrity" of whites, the anti-miscegenation statutes still contained odious and invidious classifications based on race, and preserving the "integrity" of all races still had the overall purpose of promoting white supremacy. *Loving*, 388 U.S. at 8, 11 n.11.

Bostock's contention that "there is no principled reason why the association theory of discrimination should not also apply to sex discrimination under Title VII" (Bostock Br. 20) also misses the mark. Race-based

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[15] Bostock argues that prohibiting sexual orientation discrimination would further the purpose of Title VII. (Bostock Br. 21 n.6.) However, the Court repeatedly has rejected such arguments that "whatever might appear to further the statute's primary objective must be the law." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) (punctuation and citation omitted). "[W]e will not presume with petitioners that any result consistent with their account of the statute's overarching goal must be the law, but will presume more modestly instead that [the] legislature says . . . what it means and means . . . what it says." *Id*. (punctuation and citation omitted).

distinctions inherently treat one race more favorably than another race, as was the case in *Loving*. As discussed in Section III.A.2 above, Title VII only prohibits employers from treating one sex more favorably than the other sex, and numerous courts have upheld policies that draw distinctions between men and women regarding grooming, dress, physical fitness and bathroom usage but do not treat men more favorably than women or vice versa. In contrast, no court has suggested that employers may have different policies with respect to grooming, dress, physical fitness or restroom usage based on race. *See Zarda*, 883 F.3d at 151 n.17 (Lynch, J., dissenting). Therefore, Bostock's assertion that race discrimination claims and sex discrimination claims under Title VII are always analyzed identically is incorrect.

D. Congress Did Not Enact A Prohibition Against Sexual Orientation Discrimination Through The Subtle Device Of Prohibiting Sex Discrimination

In addition to the numerous flaws discussed above, the various legal theories asserted by Bostock are contrary to another fundamental rule of statutory construction: "Congress does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions, it does not, one might say, hide elephants in mouseholes." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1626-27 (2018) (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (punctuation and citations omitted)); *Gonzalez v. Oregon*, 546 U.S.

243, 268 (2006) (citing cases). Under this canon, "significant policy issues must be decided by the people, through their elected representatives in Congress, using clearly understood text – not by judges, using 'oblique,' 'cryptic' or 'subtle' statutory parsing." *Wittmer*, 915 F.3d at 338 (citing *Gonzalez* and other Supreme Court decisions) (Ho, J., concurring).

The Court has applied this fundamental canon of statutory construction to reject radical interpretations of statutes of plain meaning that would have far-reaching policy implications, including those that are the subject of heated political and cultural debate. *See*, *e.g.*, *Gonzalez*, 546 U.S. at 261, 267-68 (Congress did not delegate to Attorney General authority to decide controversial issue of state-permitted physician-assisted suicide through "oblique" and "implicit" means by enacting statute allowing Attorney General to deregister physicians whose registration would be "inconsistent with the public interest"); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 151 (2000) (Congress could not have intended to delegate to Food and Drug Administration a decision of such economic and political significance as regulating the tobacco industry, in "cryptic" fashion by giving the FDA the authority to regulate drugs and devices to ensure their "safety"); *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 231 (1994) ("it is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as

permission to 'modify' rate-filing requirements"). *Accord Cyan, Inc. v. Beaver Cty. Empls. Ret. Fund*, 138 S. Ct. 1061, 1071 (2018) ("Congress does not make radical—but entirely implicit—changes through technical and conforming amendments.") (punctuation and citation omitted); *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 984 (2017) ("[t]he importance of the priority system" in bankruptcy cases "leads us to expect more than simple statutory silence if, and when, Congress were to intend a major departure").

Here, one would expect that, if Congress intended to enact a statute of such magnitude—socially, culturally, politically and policy-wise—as one prohibiting employment discrimination on the basis of sexual orientation, Congress specifically would have so stated in the text of Title VII. Instead, Bostock would have this Court conclude that Congress enacted a prohibition against sexual orientation discrimination in such an oblique, subtle and cryptic way under the guise of prohibiting discrimination because of "sex," that it took more than fifty years after Title VII's enactment for the EEOC or any Court of Appeals to discover this "true" meaning. Simply put, Congress did not by stealth prohibit sexual orientation discrimination by prohibiting sex discrimination and hope that courts would discover what it actually did more than fifty years later, by deploying judicial thought experiments and applying strained interpretations of the Court's precedents that have nothing to do with sexual orientation.

In reality, Bostock and his amici "ask[] us to add words to the law to produce what is thought to be a desirable result," but "[t]hat is Congress's province." *Abercrombie & Fitch*, 135 S. Ct. at 2033. Indeed, "it would be improper to conclude that what Congress omitted from the statute is nevertheless within its scope." *Nassar*, 570 U.S. at 353. As the Court has observed, "Even if Congress could or should have done more, still it 'wrote the statute it wrote – meaning, a statute going so far and no further.'" *Cyan*, 138 S. Ct. at 1073 (citation omitted).

IV. NUMEROUS LEGISLATIVE DEVELOPMENTS FURTHER CONFIRM THAT TITLE VII DOES NOT INCLUDE SEXUAL ORIENTATION AS A PROTECTED CLASS

A. The Fact That Congress Repeatedly Has Failed To Adopt Proposed Legislation To Add Sexual Orientation As A Protected Class Further Confirms That Title VII Does Not Encompass Sexual Orientation

That Title VII does not cover discrimination on the basis of sexual orientation is further confirmed by the fact that Congress *repeatedly* has refused to amend Title VII to add sexual orientation as a protected class in spite of numerous attempts by proponents to do so almost every year since 1974. *Zarda*, 883 F.3d at 153 n.23 (listing more than fifty proposed bills) (Lynch, J.,

dissenting).[16] The U.S. House of Representatives earlier this year passed the Equality Act of 2019, which, among other provisions, would amend Title VII to prohibit discrimination on the basis of sexual orientation. Equality Act, H.R. 5, 116th Cong., § 701A (2019). However, the Equality Act of 2019 has not yet passed the U.S. Senate and is not expected to do so.

Bostock 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. (Bostock Br. 42-43) (citing *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) and *Zuber v. Allen*, 396 U.S. 168, 185 n. 21 (1969)).[17]

However, Bostock's suggestion that Congress has not amended Title VII at any point during the last forty-five 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 preposterous. The circuit courts

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[16] In contrast, in the years and decades that followed the enactment of Title VII, Congress has enacted several anti-discrimination statutes to prohibit employment discrimination on the basis of additional protected classes. *See*, *e.g.*, the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621, *et seq.*; the PDA; the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq.*; the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601, *et seq.*; and the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. § 4301, *et seq*.

[17] The County did not "concede" this point in its response to Bostock's Petition for Writ of Certiorari (Bostock Br. 42), but rather simply recited Bostock's argument on this issue. (Br. of Resp. in Opp. to Cert. 23.)

unanimously held for decades that Title VII does not encompass sexual orientation (Section I.B, *supra*), and the EEOC's position for decades likewise was that Title VII does not encompass sexual orientation. (*See* Section IV.B, *infra*).

To demonstrate otherwise, Bostock points to a statement made by former House Speaker John Boehner during a press conference in November 2013 concerning one such bill, wherein he stated that "I see no basis or no need for this" because "people are already protected [in the workplace]." (Bostock Br. 42) (citation omitted). However, this statement is vague as to its specific meaning and context and falls far short of affirmatively stating that Title VII already prohibits sexual orientation discrimination. Regardless, Bostock cannot explain away approximately forty-five years of failed attempts by Congress to amend Title VII to add sexual orientation as a protected class on the basis of a vague statement made by one House member with respect to one proposed bill.

Nor can Bostock demonstrate that Congress's failure to amend Title VII to add sexual orientation as a protected class during the past forty-five years was the result of "unawareness, preoccupation, or paralysis." *Zuber*, 396 U.S. at 185 n.21.[18] The sheer number of bills introduced over the course of approximately forty-five years seeking to amend Title VII to add sexual

[18] No specific amendment was introduced or voted on concerning the issue that was the subject of *Zuber*. *Zuber*, 396 U.S. at 183-85; *id*. at 204 (Black, J., dissenting).

orientation as a protected class alone demonstrates that Congress has not been unaware of this issue or preoccupied with other issues. *See Heckler v. Day*, 467 U.S. 104, 118 n.30 (1984) ("where Congress has rejected repeated demands" to impose specific deadlines on processing Social Security disability claims at various stages, that "demonstrates far more than simple congressional inaction"); *Bob Jones Univ. v. United States*, 461 U.S. 574, 599-601 (1983) (finding "significant" the fact that no fewer than thirteen bills were introduced in preceding twelve years seeking to overturn IRS rulings that denied tax exempt status to private schools that practice race discrimination, and that no congressional action was taken in spite of "prolonged and acute awareness of so important an issue").

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

B. By Enacting The Civil Rights Act of 1991, Congress Incorporated The Unanimous Decisions Of The EEOC And Several Circuits That Title VII Does Not Prohibit Discrimination On The Basis Of Sexual Orientation

The Court repeatedly has held that "'[w]hen Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" *Sebelius v. Auburn*, 568 U.S. 145, 159 (2013) (quoting *Commod. Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974); *see also Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239-240 (2009) ("'Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without material change.'") (quoting *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)).

In this case, the EEOC, which is the agency primarily responsible for administering and enforcing Title VII, consistently interpreted Title VII as not prohibiting discrimination on the basis of sexual orientation for at least sixteen years prior to Congress's enactment of the Civil Rights Act of 1991. *See*, *e.g.*, *Dillon v. USPS*, 1990 EEOPUB LEXIS 1709, at *8-9, 1990 WL 1111074 (1990); *Viveros v. USPS*, 1987 EEOPUB LEXIS 1791, at *2 (1987); EEOC Dec. No. 77-28, 1977

EEOC LEXIS 12, at *1 (1977); EEOC Dec. No. 76-125, 1976 EEOC LEXIS 38, at *1 (1976); EEOC Dec. No. 76-115, 1976 EEOC LEXIS 32, at *4-5 (1976); EEOC Dec. No. 76-75 (1975), 1975 EEOC LEXIS 57, at *5, 1975 WL 342769; EEOC Dec. No. 76-67, 1975 EEOC LEXIS 51, at *4 (1975).[19]

By adopting the Civil Rights Act of 1991 and thereby reenacting Title VII's prohibition against discrimination on the basis of "race, color, religion, sex, or national origin," *see*, *e.g.*, 42 U.S.C. § 2000e-2(m), Congress incorporated the EEOC's longstanding interpretation that Title VII does not prohibit discrimination on the basis of sexual orientation.

In a similar vein, the Court has held that "[if] a word or phrase has been . . . given a uniform interpretation by inferior courts . . . a later version of that act perpetuating the wording is *presumed* to carry forward that interpretation." *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2520 (2015) (emphasis added). The Court unanimously reiterated this principle just last term. *Helsinn Healthcare S.A. v. Teva Pharm. USA, Inc.*, 139 S. Ct. 628, 633-34 (2019).

At the time Congress enacted the Civil Rights Act of 1991, every Court of Appeals to consider the issue had concluded that Title VII does not prohibit discrimination on the basis of sexual orientation. *Williamson*

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[19] The EEOC did not change its position until 2015 in *Baldwin v. Foxx*, EEOC Dec. No. 0120133080, 2015 EEOPUB LEXIS 1905, 2015 WL 4397641 (2015).

v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989) (per curiam); *DeSantis v. Pac. Tel. & Tel. Co., Inc.*, 608 F.2d 327, 333 (9th Cir. 1979); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979). *See also Ulaine v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984) (because homosexuals do not enjoy Title VII coverage, transsexuals also are not covered).

In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all former Fifth Circuit decisions issued prior to September 30, 1981. Therefore, *Blum* also represented the law in the Eleventh Circuit. Thus, at the time that Congress enacted the Civil Rights Act of 1991, it was the law in four circuits that Title VII does not prohibit discrimination on the basis of sexual orientation, and a fifth circuit (the Seventh Circuit) had reached the same conclusion, albeit arguably in dicta.

The Court has found that Congress carried forward prior judicial interpretations of terms contained in reenacted statutes under comparable judicial landscapes. *See*, *e.g.*, *Helsinn*, 139 S. Ct. at 633-34 (finding ratification based on "implicit" Supreme Court decisions and "explicit" rulings from Federal Circuit, which had exclusive jurisdiction over patent appeals, on meaning of "on sale"); *Tex. Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. at 2519-20 (finding ratification based on unanimous rulings from nine Courts of Appeals that Fair Housing Act permitted disparate impact claims); *Cannon v. Univ. of Chicago*, 441 U.S. 677, 694-99 & n. 20-22 (1979) (finding ratification of conclusion that Title

IX permits implied private right of action based on Fifth Circuit decision and several district court decisions directly on point, a dozen other federal court decisions that "reached similar conclusions in the same or related contexts," and three Supreme Court decisions construing "language similar to that in Title IX" in other civil rights statutes); *Manhattan Properties, Inc. v. Irving Trust Co.*, 291 U.S. 320, 334-36 (1934) (finding ratification where six Courts of Appeals concluded claims of lost future rents were not provable in bankruptcy proceedings, but decision in one Court of Appeals supported contrary view).

Bostock argues that Congress did not incorporate these circuit decisions when it enacted the Civil Rights Act of 1991 because there is no indication that Congress was actually aware of these decisions. (Bostock Br. 40-41.) Bostock also points out that Congress was aware of the Courts of Appeals decisions at issue in *Tex. Dep't of Hous. & Cmty. Affairs*. (*Id.*) However, as stated above, the Court repeatedly has emphasized that Congress is *presumed* to be aware of the existing judicial landscape when it reenacts a statute that contains the same language that has been construed unanimously by the Courts of Appeals. *Helsinn*, 139 S. Ct. at 633-34; *Tex. Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. at 2520; *Cannon*, 441 U.S. at 699.

C. Congress Repeatedly Has Enacted Certain Civil Rights Statutes That Prohibit Discrimination On The Basis Of Sex And Other Civil Rights Statutes That Prohibit Discrimination On The Basis Of Both Sex And Sexual Orientation

The same Congress that enacted Title VII in 1964 enacted the previous year the Equal Pay Act of 1963, 29 U.S.C. § 206(d), which amended the Fair Labor Standards Act. The Equal Pay Act prohibits discrimination on the basis of sex by paying wages to employees "at a rate less than the rate at which he pays *employees of the opposite sex*" if certain conditions are met and subject to certain affirmative defenses the employer may assert. § 206(d) (emphasis added). Title VII specifically incorporates the affirmative defenses of the Equal Pay Act. 42 U.S.C. § 2000e-2(h); *Cty. of Washington v. Gunther*, 452 U.S. 161, 170 (1981).

Thus, the term "sex" as used in the Equal Pay Act clearly referred to being male or female, not sexual orientation. This Court recently has reaffirmed that it will presume that the same language used in related statutes will have the same meaning. *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1812 (2019) ("This Court does not lightly assume that Congress silently attaches different meanings to the same term in the same or related statutes."); *United States v. Davis*, 139 S. Ct. 2319, 2329 (2019) ("[W]e normally presume that the same language in related statutes carries a consistent meaning.").

Moreover, Congress subsequently has enacted various civil rights statutes that prohibit discrimination on the basis of sex, but not sexual orientation or homosexuality. *See*, *e.g.*, 42 U.S.C. § 3604 (Fair Housing Act of 1968); 20 U.S.C. § 1681(a) (Title IX of the Civil Rights Act of 1972); *see also* 42 U.S.C. § 18116(a) (prohibiting discrimination on ground prohibited by Title IX) (enacted as part of Affordable Care Act of 2010); 29 U.S.C. §§ 2901(b)(4) and (5) (one purpose of Family and Medical Leave Act of 1993 was to "minimize[] the potential for employment discrimination on the basis of sex" by ensuring leave is available "on a gender-neutral basis" and to "promote the goal of equal employment opportunity for women and men").

In contrast, Congress has included sexual orientation as a protected class in addition to sex or gender in various other civil rights statutes and other statutes enacted between 1998 and 2013. *See*, *e.g.*, 34 U.S.C. § 12291(b)(13)(A) (prohibiting funded programs and activities from discriminating on numerous grounds, including sex and sexual orientation, under Violence Against Women Act); 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) gender and sexual orientation); 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 gender and 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) gender and sexual orientation).

All of the above-referenced statutes reflect the common understanding—from 1964 to the present—that the term "sex" refers to being male or female, whereas the terms "sexual orientation" or "homosexual" refer to sexual preference. (*See* Section I.B, *supra*). Moreover, the above-referenced statutes reflect an unmistakable pattern: when Congress decides to include sexual orientation as a protected class, Congress includes it in the statutory text; when Congress decides not to include sexual orientation as a protected class, Congress does not include it in the statutory text.[20] *See Wittmer*, 915 F.3d at 338 (if Congress decides to prohibit sex discrimination, but not sexual orientation discrimination, "the most obvious way" to do so is to include the former, but not the latter in statutory text) (Ho, J., concurring).[21]

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[20] States that have prohibited employment discrimination on the basis of sexual orientation have done so by legislation adding "sexual orientation" as a protected class—not by any court decision adopting the legal theories espoused by Bostock. *See Hively*, 853 F.3d at 364 (listing state statutes) (Sykes, J., dissenting). Although not binding, these state statutes are "indicative of a general understanding that the term [sex] does not embrace [sexual orientation]." *Espinoza*, 414 U.S. at 88 n.2.

[21] Contrary to Petitioner's assertions (Bostock Br. 43 n.12), the Court may consult the text of other anti-discrimination statutes to construe Title VII. *Nassar*, 570 U.S. at 349-352, 357 (comparing text of ADA and ADEA to Title VII to construe anti-retaliation provision of Title VII). *See also Gross v. FBL Fin. Servs.*, 557 U.S. 167, 174-75, 177 & n.3 (2009) (comparing text of ADEA to Title VII to construe ADEA).

Finally, contrary to *Zarda*'s suggestion that the inclusion of both sex and sexual orientation in the above-referenced statutes simply reflects "belts and suspenders" legislating, the Court repeatedly has disfavored interpretations of statutes that would render terms as superfluous. *See, e.g.*, *Burlington N. Santa Fe Ry. v. Loos*, 139 S. Ct. 893, 901 (2019); *Nat'l Ass'n of Mfrs. v. Dep't of Defense*, 138 S. Ct. 617, 630 (2018); *Water Splash, Inc. v. Menon*, 137 S. Ct. 1504, 1510 (2017). Moreover, Congress did not include sexual orientation as a protected class in the above-referenced statutes "just in case" when every circuit that had considered the issue at the time these statutes were enacted held that sex discrimination does not encompass sexual orientation. *See* Section I.B, *supra*).

V. THE REMAINING REASONS ASSERTED BY BOSTOCK FOR WHY THE COURT SHOULD RE-WRITE TITLE VII TO ADD SEXUAL ORIENTATION AS A PROTECTED CLASSIFICATION SHOULD BE REJECTED

A. Holding Sexual Orientation To Be Beyond The Scope Of Title VII Does Not Conflict With The "Motivating Factor" Provision Of 42 U.S.C. § 2000e-2(m)

Bostock argues that failing to hold sexual orientation discrimination to be actionable under § 2000e-2(a) would conflict with the "motivating factor" provision of § 2000e-2(m). (Bostock Br. 48-51.)

However, the § 2000e-2(m) inquiry does not turn on how one *defines* "sex" or "sex" discrimination; rather, the analysis under § 2000e-2(m) is one of *degree*: to what extent was the employment decision based on sex. *See Nassar*, 570 U.S. at 355 ("§ 2000e-2(m) is not itself a substantive bar on discrimination" but rather "is a rule that establishes the causation standard for proving a violation defined elsewhere in Title VII"). Here, for the reasons discussed in Section III.A.2, *supra*, an employer who discriminates on the basis of sexual orientation is not motivated by the employee's sex, in whole or in part. Bostock's assertion that sexual orientation can simultaneously be a legitimate consideration order under § 2000e-2(a) and an illegitimate consideration under § 2000e-2(m) is illogical on its face. There is no conflict between § 2000e-2(a) and § 2000e-2(m).

To buttress his argument, Bostock cites two cases as examples where lower courts purportedly misapplied § 2000e-2(m) by "erroneously throwing out cases where [discrimination] is motivated by both [sex and sexual orientation.]" (Bostock Br. 49) (citing *Kay v. Independence Blue Cross*, 142 F. App'x 48, 50-51 (3d Cir. 2005) and *Swift v. Countrywide Home Loans, Inc.*, 770 F. Supp. 2d 483, 488 (E.D.N.Y. 2011)). However, neither case even discussed § 2000e-2(m) or mixed motive, presumably because the plaintiff did not assert mixed motive as a theory of liability in either case.

B. Distinguishing Between Viable Claims Of Sex Discrimination Based On Evidence Of Sex Stereotyping And Sexual-Orientation Discrimination Is Not "Unworkable"

Finally, Bostock argues that interpreting Title VII to encompass sexual orientation is necessary to clear up "the puzzling morass of conflicting lower court decisions" that distinguish between claims of sex stereotyping and claims based on sexual orientation. (Bostock Br. 51.) He argues that courts have applied different standards in resolving such claims, "lead[ing] to confusing and contradictory results." (*Id.* at 56.)

Any such alleged confusion, however, is due to the fact that some lower courts and litigants such as Bostock have misread *Price Waterhouse* as recognizing stand-alone claims of sex stereotyping, when in fact *Price Waterhouse* only held that sex stereotyping may constitute *evidence* of sex discrimination. To be clear, the theory of Title VII liability in *Price Waterhouse* was not that the plaintiff was denied partnership for failing to conform to a sex-specific stereotype, but rather that she was denied partnership "because she is a woman," *Price Waterhouse*, 490 U.S. at 258, as evidenced in part by certain partners' "stereotyped remarks" about the plaintiff. *Id.* at 251. *See also Wittmer*, 915 F.3d at 339 (Ho, J., concurring) ("*Price Waterhouse* doesn't make sex stereotyping *per se* unlawful under Title VII."); *Hively*, 853 F.3d at 371 ("If the lower-court decisions involving 'sex stereo-typing' are a confusing hodge-podge – and I agree that they are – the confusion stems from an unfortunate tendency to read [*Price Waterhouse*] for more than it's worth.") (Sykes, J., dissenting).

Ironically, the error of Bostock's expansive reading of *Price Waterhouse* is vividly illustrated in the very judicial opinion from which he quotes extensively. (Bostock Br. 54-55.) Contrary to Bostock's assertions, Judge Posner's concurring opinion in *Hamm v. Weyauwega Milk Prods.*, 332 F.3d 1058 (7th Cir. 2003) did not suggest that the judicial confusion was due to the fact that Title VII does not prohibit sexual orientation discrimination; instead, he criticized the trend of lower-court decisions misreading *Price Waterhouse* to endorse causes of action based on sex stereotypes alone. *Id*. at 1066 (Posner, J., concurring).

For example, Judge Posner concluded that an employer's discrimination against a man because of his effeminacy should not be actionable unless that discrimination was evidence of the employer's favoritism of women over men for the position in question. *Id.* at 1067. Likewise, Judge Posner explained that, "[i]f the producer of *Antony and Cleopatra* refuses to cast an effeminate man as Antony or a mannish woman as Cleopatra, he is not discriminating against men in the first case and women in the second, although he is catering to the audience's sex stereotypes." *Id*. at 1068.[22]

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[22] While Judge Posner recently expressed in his concurrence in *Hively* that he believes claims of sexual orientation discrimination should be actionable under Title VII, he made clear this belief is not grounded in the original public meaning of the statute's text but rather in the "passage of time and concomitant change in attitudes toward homosexuality and other unconventional forms of sexual orientation" in the decades since Title VII first was enacted, and the need to "updat[e] old statutes." *Hively*, 853 F.3d at 356, 357 (Posner, J., concurring).

In any event, the cases cited by Bostock as examples of "confusion" are straightforward decisions and properly apply the Court's precedents. *See*, *e.g.*, *Hamm*, 332 F.3d at 1061-65 (affirming summary judgment on sexual harassment claim where only two incidents even arguably involved gender stereotyping; remaining incidents related to plaintiff's job performance or perceptions that he was homosexual); *Kay*, 142 F. App'x at 51 (even if incidents at issue were based on gender stereotyping rather than sexual orientation, they were too sporadic to establish hostile work environment); *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 870, 874-75 (9th Cir. 2001) (no argument that harassment was based on sexual orientation); *Schmedding v. Tnemec Co.*, 187 F.3d 862, 865 (8th Cir. 1999) (reversing dismissal where plaintiff disavowed allegation of harassment based on perceived sexual preference and agreed to amend complaint on remand to delete it, and remaining allegations stated claim for same-sex sexual harassment).

Regardless, the remedy for any alleged confusion by the lower courts in applying *Price Waterhouse* is not to rewrite Title VII to prohibit discrimination on the basis of sexual orientation, as Bostock urges the Court to do. Instead, the Court may provide to the lower courts whatever additional guidance the Court determines is necessary or appropriate concerning the proper scope of *Price Waterhouse*.

CONCLUSION

For the reasons discussed herein, the Eleventh Circuit's decision should be affirmed.

Respectfully submitted,

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