Nos. 17-1618, 17-1623, 18-107

# In the Supreme Court of the United States

GERALD LYNN BOSTOCK, *Petitioner*,
v.
CLAYTON COUNTY, GEORGIA, *Respondent*.

ALTITUDE EXPRESS, INC., *et al.*, *Petitioners*,
v.
MELISSA ZARDA, *et al.*, *Respondents*.

R.G. & G.R. HARRIS FUNERAL HOMES, INC., *Petitioner*,
v.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and
AIMEE STEPHENS, *Respondents*.

**On Writs of Certiorari to the United States Courts of Appeals for the Eleventh, Second, and Sixth Circuits**

## BRIEF OF WALTER DELLINGER, KAREN DUNN, NEAL KATYAL, THEODORE B. OLSON, AND SETH WAXMAN AS AMICI CURIAE IN SUPPORT OF THE EMPLOYEES


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## INTEREST OF *AMICI CURIAE*[1]

*Amici* are four former Solicitors General and Acting Solicitors General of the United States, and a former Associate White House Counsel. They have written and lectured about questions of statutory and constitutional interpretation, as well as the institutional role of the Supreme Court, and they maintain a strong professional and scholarly interest in the development of the law. They file this brief to identify a narrow, textualist ground on which to decide the questions presented.

## SUMMARY OF ARGUMENT

These cases are simpler than they seem. The "cardinal principle of judicial restraint" is that "if it is not necessary to decide more, it is necessary not to decide more . . . ." *PDK Labs., Inc. v. U.S. Drug Enf't Admin.,* 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in judgment). Here, all that is necessary to decide the questions presented is a direct application of textualist principles to the plain language of Title VII.

**I.** Statutory interpretation begins with the text and ends there when the text is unambiguous. These cases turn on a dispute over the meaning of Title VII's ban on discrimination "because of such individual's . . . sex." In interpreting that text, the Court looks to the original

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[1] *Amici* state that no party's counsel authored the brief in whole or in part; no party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than *amici* and their counsel—contributed money intended to fund preparing or submitting the brief. All parties have consented to the filing of this brief. *See* Sup. Ct. R. 37.6.

*Amici* join this brief as individuals; in so doing, they do not indicate endorsement by their institutional employers of positions advocated.

meaning of the terms when Title VII was enacted—but does not defer to original expectations about how the text (or its purpose) would apply in particular cases.

Here, giving the statutory text its common, ordinary meaning at the time of enactment, three points stand out. First, the phrase "because of" requires a very broad view of what it means for a protected characteristic to impermissibly affect an employment decision. Second, the phrase "such individual's" shows that Title VII does not protect classes from discrimination, but rather protects each and every individual employee from decisions made "because of" the enumerated characteristics. Finally, the meaning of the term "sex" was contested in the mid-1960s—but in ways that the Court need not resolve, since the employees must prevail under even under the most narrow view of "sex" as an immutable, assigned-at-birth division of humanity into "males" and "females" based on specified anatomical or genetic characteristics.

**II.** For two distinct reasons, discrimination based on transgender status necessarily constitutes discrimination "because of such individual's . . . sex." First, an employer who discriminates on this basis accounts for "sex" at every single step of his or her reasoning. Indeed, such reasoning would be inarticulable without express reference to the employee's assigned sex, beliefs about that assigned sex, and presumptions about the connection between that sex and the employee's gender presentation. Second, and independently, Title VII's prohibition on discrimination based on specified characteristics includes discrimination based on actual or stated changes in those characteristics. This is true for every other characteristic identified in Title VII and there is no basis for exempting "sex" from that general rule. A survey of common objections to these conclusions demonstrates that they are without merit.

**III.** Discrimination based on sexual orientation is also inherently a subset of discrimination "because of such individual's . . . sex." The definition of sexual orientation has two components, each of which depends on assigned sex: (1) the sex of the individual and (2) the sex of those to whom that individual is attracted. If either sex-based component changed, the discrimination would abate. It follows that discrimination based on sexual orientation is motivated, at least in part, by sex. Judges who have reached a contrary conclusion have improperly invoked arguments based on purposivism and original expected applications; have incorrectly suggested that employers merely "notice" sex when they fire employees because of the combination of their sex and the sex of their preferred sexual partners; and have relied on a distinction between status and conduct that is inapplicable to this analysis.

Adherence to textualism offers an easy way to decide these cases. The Court should choose that path, which also vindicates foundational principles of judicial restraint.

## ARGUMENT

### I. THE PLAIN MEANING OF TITLE VII

As Justice Kagan has observed, "we're all textualists now." *See* Elena Kagan, *The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes* (Nov. 17, 2015); *see also* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2118 (2016) ("Statutory interpretation has improved dramatically over the last generation . . . The text of the law is the law."). The Court thus "begins with the statutory text, and ends there as well if the text is unambiguous." *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004).

Here, the parties sharply dispute the application of textualist methods to Title VII's ban on discrimination "because of such individual's . . . sex." Much of that dispute concerns the relevance of beliefs held by Americans in the 1960s about how Title VII might apply in cases like these. We first describe the interpretive principles which control that question; we then apply those principles to Title VII.

### A. The Relevance of Original Statutory Meaning and the Irrelevance of Expected Applications

The Court's analysis of statutory text is disciplined by the "fundamental canon" that "words will be interpreted as taking their ordinary, contemporary, common meaning . . . at the time Congress enacted the statute." *Perrin v. United States*, 444 U.S. 37, 42 (1979) (citations omitted). This ensures that "the people may rely on the original meaning of the written law." *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018); *see also New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019); *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014); *Crawford v. Metro. Gov't of Nashville & Davidson Cty.*, 555 U.S. 271, 276 (2009). To ascertain ordinary meaning, the Court considers a myriad of historical sources, including contemporary dictionaries, *see, e.g.*, *Wis. Cent.*, 138 S. Ct. at 2070; *Sandifer*, 571 U.S. at 227-28, statutes and regulations, *see, e.g.*, *New Prime*, 139 S. Ct. at 543; *Wis. Cent.*, 138 S. Ct. at 2070-71, and judicial decisions, *see, e.g.*, *New Prime*, 139 S. Ct. at 540; *Sandifer*, 571 U.S. at 229-30.

Critically, as the Court has made clear time and again, historical study may clarify the "statute's meaning" but it does not (and cannot) preclude "new applications" of a statute that "arise in light of changes in the world." *Wis. Cent.*, 138 S. Ct. at 2074. A statute's meaning is distinct

from how people may have expected the statute would apply when it was enacted. "We are governed by what our lawmakers said—by the principles they laid down—not by any information we might have about how they themselves would have interpreted those principles or applied them in concrete cases." Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 Fordham L. Rev. 1269, 1284 (1997).

That precept most often comes into play when the Court interprets expansive statutes. As Justice Scalia and Bryan Garner have explained, "some think that when courts confront generally worded provisions, they should infer exceptions for situations that the drafters never contemplated and did not intend their general language to resolve." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 101 (2012). But that is wrong: "Traditional principles of interpretation reject this distinction because the presumed point of using general words is to produce general coverage—not to leave room for courts to recognize ad hoc exceptions." *Id.*

Not coincidentally, the most famous articulation of this point occurred in another case about Title VII's ban on discrimination "because of such individual's . . . sex." There, the Court held that Title VII forbids "male-on-male sexual harassment in the workplace." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998). Admittedly, there may not have been "a single reference in all the committee reports and congressional debates" on Title VII that addressed "excessive male-on-male sexual harassment." *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 612 n.6 (2004) (Thomas, J., dissenting). But this was irrelevant. What matters is the text, not the outcomes

expected by those who enacted it: "[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately our laws rather than the principal concerns of our legislators by which we are governed." *Oncale*, 523 U.S. at 79.

This canon of interpretation is not unique to Title VII. Consider, for example, *Pennsylvania Department of Corrections v. Yeskey*, which held that Title II of the Americans With Disabilities Act (ADA) covers inmates in state prisons. *See* 524 U.S. 206 (1998). This conclusion would almost certainly have dismayed the Congress that enacted the ADA. *See id.* at 212-13. Yet the Court waved such concerns aside: "As we have said before, the fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *Id.* (citation omitted).

*Oncale* and *Yeskey* thus anchor a line of authority that distinguishes between a statute's original meaning (which matters a great deal) and a statute's expected applications (which matter not at all). The Court looks to history for insight into what statutory words mean, but the sources it finds do not get a vote in how those words are applied. *See Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 345 (7th Cir. 2017) (en banc) ("[T]he fact that the enacting Congress may not have anticipated a particular application of the law cannot stand in the way of the provisions of the law that are on the books.").

### B. Interpreting Title VII's Ban on Discrimination "Because Of Such Individual's . . . Sex"

Title VII makes it illegal "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 . . . sex." 42 U.S.C. § 2000e-2(a)(1). Notwithstanding the undoubted breadth of this language, it is unlikely that many Americans in 1964 expected it to ban employment discrimination against gay men, lesbians, bisexuals, or transgender people.

But for the reasons just given, a determination of Title VII's meaning does not depend on what outcome most people in 1964 expected. The Court instead asks *why* they would have expected any particular outcome. Were the words "discriminate . . . because of such individual's . . . sex" understood in a manner that necessarily precluded such applications? Or did this expectation instead reflect a failure to appreciate the full implications of the broad language that Congress enacted into law? Perhaps it also rested on a widespread belief that gay men, lesbians, bisexuals, and transgender people were "psychopaths, criminals, and enemies of the people"—outcasts who, to many at the time, *obviously* could be fired without restriction. William N. Eskridge Jr., *Title VII's Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 Yale L.J. 322, 336 (2017).[2]

The latter possibility is hardly outlandish. The term "sexual harassment" was not defined in *any* dictionary in the 1960s. No legal authorities forbade it and few scholars had studied it. Many Americans would surely have been amazed to learn that Congress had just outlawed "sexual harassment," which in the eyes of many was an entirely normal if not specifically named employment practice.

[2] *See also* Katie R. Eyer, *Statutory Originalism and LGBT Rights*, 54 Wake Forest L. Rev. 63, 75-76 (2019).

And yet, several decades later, the Court held that Title VII did exactly that—not only as to different-sex harassment, but also as to same-sex harassment, which few judges had ever treated as unlawful. *See Oncale*, 523 U.S. at 80; *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986); *see also Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 1154 (2d. Cir. 2018) ("[B]ecause Congress could not anticipate the full spectrum of employment discrimination that would be directed at the protected categories, it falls to courts to give effect to the broad language that Congress used."). Experience with Title VII's text, and with the many ways in which employers can account for sex, led the Court to a once-unthinkable outcome. *See Meritor*, 477 U.S. at 67 ("[A] requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets." (citation omitted)).

The Court must therefore study Title VII's plain text to answer the question at bar, accounting for historical evidence of original meaning and its own precedent.

### 1. "Because of"

The first key phrase is "because of." As the Court has explained, "the ordinary meaning of 'because of' is 'by reason of' or 'on account of.'" *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 350 (2013) (citing *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 176 (2009); 1 *Webster's Third New International Dictionary* 194 (1966); 1 *Oxford English Dictionary* 746 (1933); *The Random House Dictionary of the English Language* 132 (1966)). Under the original meaning of Title VII, discrimination "because of" a protected characteristic refers to actions that would

not have occurred "but for" that characteristic. *See Gross*, 557 U.S. at 176-77. And in 1991, Congress amended Title VII to ensure that it also reaches cases where a protected characteristic is so much as a "motivating factor." *See* 42 U.S.C. § 2000e-2(m).

Read this way, the phrase "because of" plays a crucial role in ensuring that "sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989) (plurality opinion). The onus is not on the employee to prove that he or she was fired solely (or even primarily) for prohibited reasons. Rather, "if an employer allows gender [or other enumerated characteristics] to affect its decisionmaking process, then it must carry the burden of justifying its ultimate decision." *Id.* at 248. Title VII's plain text thus requires a broad view of what it means for a protected characteristic to influence an employment decision. When such a characteristic is part of the employer's reasoning, even if only a component part, Title VII applies.

### 2. "Such Individual's"

Next up is "such individual's." This phrase is often taken for granted, but it reflects a fundamental aspect of the statutory scheme: Title VII protects individuals, not groups. Title VII is not "*class*-based legislation, aimed only at employer policies or workplace conditions that disfavor women and favor men, or disfavor blacks and favor whites, or disfavor Catholics and favor Protestants." Eskridge, *Title VII's Statutory History*, at 342-43. Instead, "Title VII operates as *classification*-based legislation, aimed at employer policies or workplace

conditions that disadvantage any employee because of her or his race, sex, or religion . . . ." *Id.* at 343.

The Court has long recognized this dimension of Title VII's protections. As it explained in *City of Los Angeles v. Manhart*, "[t]he statute's focus on the individual is unambiguous," requiring "that we focus on fairness to individuals rather than fairness to classes." 435 U.S. 702, 708-09 (1978). Employment practices which do not discriminate against all members of a group, or even against most of them, can still violate Title VII if they take prohibited characteristics into account. *See id.*

Title VII thus forbids excluding women with young children but hiring similarly-situated men, even though that policy does not affect most female employees. *See Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (per curiam); *see also Automobile Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 211 (1991) (holding that Title VII forbids employees from treating women who are capable of bearing children differently from other similarly-situated women). By the same token, an employer cannot fire women for refusing sexual advances and then defeat liability on the ground that most women were left alone (or were subsequently replaced with other women, preserving the overall gender balance of the workplace). *Cf. Meritor*, 477 U.S. at 66. Title VII expressly safeguards each employee *individually* from being treated less favorably than other employees because of his or her sex. *See, e.g.*, *Connecticut v. Teal*, 457 U.S. 440, 455 (1982) ("Congress never intended to give an employer license to discriminate against some employees on the basis of . . .

sex merely because [it] favorably treats other members of the employees' group.").[3]

### 3. "Sex"

That leads to the most hotly-disputed term in this case: "sex." Several judges have concluded that "sex" had a clear meaning in 1964: biologically *male* or *female*. *See, e.g.*, *Hively*, 853 F.3d at 362 (Sykes, J., dissenting); *Wittmer v. Phillips 66 Co.*, 915 F.3d 328, 334 (5th Cir. 2019) (Ho, J., concurring). On this view, "sex" refers exclusively to the division of humanity into two groups—male and female—with every person unalterably assigned to a group at birth based on perceived anatomical or genetic characteristics. Other judges, in contrast, have concluded that "sex" refers to more than a set of biological traits fixed at birth. *See, e.g.*, *Zarda*, 883 F.3d at 114. These judges note that a person's sex may not actually be that which was assigned at birth. *See, e.g.*, *Hively*, 853 F.3d at 347. They add that "sex" cannot be reduced to a set of biological structures lacking any social meaning, and that sex is inextricably entangled with the concept of gender and a web of associated social sex norms. *See Schroer v. Billington*, 424 F. Supp. 2d 203, 212-13 (D.D.C. 2006) (emphasizing the "real variations in how the different components of biological sexuality—chromosomal, gonadal, hormonal, and neurological—interact with each

[3] This rule qualifies, and provides context for, statements that might be taken to suggest that Title VII is concerned only with general parity between sexes. *See, e.g.*, *Oncale*, 523 U.S. at 80 ("The 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." (citation omitted)).

other, and in turn, with social, psychological, and legal conceptions of gender").

The best available scholarship does not conclusively demonstrate that either interpretation constituted the exclusive, ordinary meaning of "sex" in 1964. Historians have shown that the meaning of "sex" was contested rather than settled when Congress enacted Title VII. *See generally* Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 Harv. L. Rev. 1307 (2012). Contemporary dictionaries included the narrower definition of sex—but also included equally plausible and widespread definitions that referred to gender, social norms, and sexuality. *See* Eskridge, *Title VII's Statutory History*, at 338 & n.62 (quoting several dictionaries).[4]

This Court's precedent interpreting "sex" plainly does not require the narrow definition. For starters, the Court has long used "sex" and "gender" interchangeably. *See, e.g.*, *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 66 (2006); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22 (1993). In doing so, moreover, the Court has never suggested that "sex" must be understood as the sex assigned by outsiders at birth, as opposed to a person's sex as that person understands and lives it. Nor has the Court limited Title VII liability to discrimination based purely on sex assigned at birth. It has held that Title VII reaches discrimination based on physical characteristics correlated with sex, *see Manhart*, 435 U.S. at 712 (life expectancy), as well as societal norms about sex—regardless of whether those norms have any actual or perceived connection to biology, *see Price Waterhouse*,

[4] To the extent it is relevant, Title VII's legislative record does not clarify the meaning of "sex." *Meritor*, 477 U.S. at 64.

490 U.S. at 250-51. These decisions stand in tension with the narrowest view of "sex" as confined to sex assigned at birth. *See E.E.O.C. v. R.G. &. G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 577-78 (6th Cir. 2018).

Fortunately, as we explain below, the Court can (and therefore should) decide these cases without definitively resolving the meaning of "sex" in Title VII. Under any interpretation of "sex," discriminating based on a person's transgender status (or transition), or a person's sexual orientation, necessarily qualifies as discrimination "because of such individual's . . . sex."[5]

## II. TITLE VII OUTLAWS DISCRIMINATION BASED ON TRANSGENDER STATUS

A transgender person is one "whose gender identity differs from the sex the person had or was identified as having at birth." *See Merriam-Webster Online Dictionary* (last visited July 3, 2019). Under any definition of "sex," discrimination against a person on this basis violates Title VII for two related but distinct reasons. First, an employer who discriminates based on transgender status necessarily accounts for sex at every single step of his or her reasoning. Second, just as it is forbidden to discriminate against a person for declaring a change in any other characteristic protected by Title VII, so, too, is it unlawful to discriminate against a person for declaring a change in that person's lived sex. These arguments resolve

[5] Title VII permits employers to take sex into account when sex is a "bona fide occupational qualification reasonably necessary to the normal operation of [a] particular business or enterprise," 42 U.S.C. § 2000e-2(e), but that narrow exception is irrelevant here.

the question presented and avoid any need for this Court to unravel the deep connections between sex and gender.

### A. Discrimination Based Solely on Transgender Status is Discrimination "Because of . . . Sex"

Imagine Adam hires John. A few months later, John comes out as transgender and says that she will now live all aspects of her life as Jane, the woman she has always innately known herself to be. In response, Adam fires Jane. The only reason given for this decision is that transgender people like Jane aren't welcome in his office. Has Adam fired Jane "because of [Jane's] . . . sex"?

Yes, he has. "[I]t is analytically impossible to fire an employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex." *R.G.*, 884 F.3d at 575.

To see why, we must pursue the hypothetical in *Price Waterhouse* and "ask[] the employer at the moment of the decision what [his] reasons were . . . ." 490 U.S. at 250. Any truthful answer would necessarily refer to Adam's views about what he considers Jane's "real" sex, his rejection of her self-identified sex, and his desire to employ only people who adhere to their assigned sex. By believing that Jane's sex at birth was the only way for her to live, and by acting on those beliefs in firing her, Adam took account of sex. Even if "sex" in Title VII were given the narrowest conceivable meaning, Adam's decision could not be coherently explained without repeated invocations of Jane's assigned sex and her perceived failure to conform thereto. *See Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) ("What matters . . . is that in the mind of the perpetrator the discrimination is related to the sex of the

victim . . . ."). Thus, as the Sixth Circuit correctly recognized below, "[b]ecause an employer cannot discriminate against an employee for being transgender without considering that employee's biological sex, discrimination on the basis of transgender status necessarily entails discrimination on the basis of sex—no matter what sex the employee was born or wishes to be." *R.G.*, 884 F.3d at 578.

That conclusion is independently confirmed by an assessment of what would happen if Jane's assigned sex were different: if Jane had been assigned female at birth, Adam would have no problem with her living as a woman. The reasons for Jane's termination dissipate the instant we change her assigned sex. That is as clear a signal as any that she has been fired "because of [her] . . . sex."

Of course, it is exceedingly unlikely that Adam has ever actually seen Jane's genitalia or otherwise confirmed her anatomical sex. Instead, since he first hired a man named John, he has almost certainly "presume[d] [John's] sex from [his] gendered appearance"—and it is ultimately "this sex-derived presumption that leads to the dismissal" when John transitions to Jane, rather than any first-hand insight into Jane's sex. Jillian Todd Weiss, *Transgender Identity, Textualism, and the Supreme Court: What Is the "Plain Meaning" of "Sex" in Title VII of the Civil Rights Act of 1964?*, 18 Temp. Pol. & C.R. L. Rev. 573, 589-90 (2009). Here, too, Adam's beliefs about Jane's sex—and his disapproval of decisions that flow directly from Jane's own understanding of her sex—are central to the decision. Adam's motives would be nonsensical without reference to the sex Jane was assigned at birth—a.k.a., "sex."

For that reason, the key term in this analysis is not actually "sex," but rather "because of." By striking broadly at the use of protected characteristics as a "motivating factor" for employers, *see* 42 U.S.C. § 2000e-2(m), and by outlawing decisions that would not have occurred but for such characteristics, *see Gross*, 557 U.S. at 177, Title VII guards against adverse action that turns on a wide array of sex-linked considerations. Applied here, the "because of" requirement teaches that when an employer fires even a single employee for reasons that depend partly on the employee's actual, perceived, or identified sex, Title VII makes the decision unlawful.

There is no basis in the statutory text for carving transgender individuals out of this rule. And invoking it here captures discrimination "because of . . . sex" that ranks as "reasonably comparable" to that which Title VII has long been interpreted to outlaw. *Oncale*, 523 U.S. at 79. Few forms of sex-based discrimination are more fundamental than firing someone on the premise that they have misapprehended their own sex. Title VII ensures that Jane need not choose between being fired and conforming to Adam's beliefs about what her sex is and how she should live it—just as Title VII protects employees from being treated worse because of an employer's beliefs about how people of their sex should order their lives or respond to sexual advances.[6]

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[6] For these reasons, it makes no sense to say that an employer who fires an employee for being transgender is merely *noticing* that employee's sex. This is not a case where the motivations have nothing to do with sex but happen to involve "sexual content or connotations." *Oncale*, 523 U.S. at 80. Far from it. To fire someone because they are transgender is to fire them for reasons that literally could not be articulated without reference to their sex, that directly concern their sex, and that are laden with beliefs about their sex. *See id.* at 81

### B. Discrimination Because a Person Changed Their Lived Sex Also Violates Title VII

An independent basis for concluding that Title VII prohibits discrimination based on transgender status is the principle that Title VII bars discrimination based on actual or stated changes in covered characteristics.

"In passing Title VII, Congress made the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees." *Price Waterhouse*, 490 U.S. at 239. Were employers free to discriminate against employees because they have changed one of these characteristics (or announced such a change), "sex, race, religion and national origin" would improperly remain relevant to decisions about employees.

Several courts have recognized that religion offers a useful analogy. An employer cannot fire someone on the ground that the person is Christian, or that the person is Jewish. But can the employer declare a general hostility to converts and then fire someone who converts from Christianity to Judaism? Obviously not: this would be discrimination "because of such individual's . . . religion," even though it targets not a religious affiliation *per se* but rather the fact of having changed religions. *See Schroer v. Billington*, 577 F. Supp. 2d 293, 306-07 (D.D.C. 2008); *see also Heller v. EBB Auto Co.*, 8 F.3d 1433, 1439 (9th Cir. 1993) (holding that "Title VII's protections clearly encompass . . . participation in [a] conversion ceremony").

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("[T]hat inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target.").

The same is true of Title VII's other protected characteristics. If an employee's skin color were to change, whether for medical or other reasons, it would certainly constitute discrimination "because of . . . color" to fire her for that change. *See Etienne v. Spanish Lake Truck & Casino Plaza, L.L.C.*, 778 F.3d 473, 476 (5th Cir. 2015) (holding that "color" includes skin pigmentation); *Bryant v. Bell Atl. Md., Inc.*, 288 F.3d 124, 132 n.5 (4th Cir. 2002) (same). Or imagine an employer who has no objection whatsoever to hiring people of all skin colors and races, but feels very strongly that his employees should always describe their skin color and race "accurately" (as judged against his own standards of accuracy). It would most certainly violate Title VII for this employer to fire an employee solely because she began describing herself at work as "light-skinned" rather than "dark-skinned," thus offending his deeply-held contrary views regarding her (supposed) actual skin color and the manner in which he believes she should live her racial identity.[7]

This point isn't limited to "religion" and "color." Imagine a hardworking, capable employee named Yusuf. Suppose that Yusuf's colleagues and employer believe him to be of Turkish origin. However, Yusuf has always known (though has never disclosed in the workplace) that his parents immigrated from Turkey to Mexico, where he was born. One day, Yusuf arrives at work, announces that he is of Mexican origin, and makes occasional reference to that origin. His boss—who harbors no prejudice against either Turks or Mexicans—responds that this is a ridiculous

[7] Efforts to treat religious conversion as irrelevant on the ground that religion is not immutable thus fail when the rest of Title VII is taken account—and also fail on their own terms for the reasons given below by the Sixth Circuit. *See R.G.*, 884 F.3d at 576.

claim, since Yusuf's family originated in Turkey and Yusuf has never before mentioned his "supposed" Mexican heritage. Complaining about people who don't understand where they are really from, Yusuf's boss fires him. Did he do so because of Yusuf's national origin? Yes, he did.

To be sure, each of these examples differs in some respects from the others and from this case. But they share a unifying principle: decisions premised solely on an actual or stated change in a protected characteristic violate Title VII. We struggle to imagine a case involving race, color, national origin, or religion where an employee could be fired on that ground. In each such case, the relevant characteristic would rank among the motivating factors for the adverse action. So too here. There is no reason based in Title VII's text or structure why "sex" should be uniquely exempted from that general principle, which necessarily forbids discrimination based solely on transgender status. *See Price Waterhouse*, 490 U.S. at 243 n.9 (emphasizing that Title VII "on its face treats each of the enumerated categories exactly the same").

### C. Objections to this Conclusion Lack Merit

The plaintiffs offer a detailed and effective response to the claim that Title VII allows discrimination based on transgender status. Several points deserve emphasis.

First, the most common objection to applying Title VII here is that "[n]o one seriously contends that, at the time of enactment, the public meaning and understanding of Title VII included . . . transgender discrimination." *Wittmer*, 915 F.3d at 334 (Ho, J., concurring). This is often characterized as a claim about original meaning. *See id.* But in fact, it is a claim about expected applications. *See Zarda*, 883 F.3d at 137 (Lohier, J., concurring) ("[T]he

[dissent's] hunt for the 'contemporary' 'public' meaning of the statute in this case seems to me little more than a roundabout search for legislative history.").

As this Court recognized when it rewrote the question presented, nobody argues that the original meaning of "sex" was "transgender." That framing of the case goes awry at the very first step. The real question in dispute is whether discrimination based on transgender status necessarily takes account of—and is partly motivated by—"sex." To answer that question by observing that most people in 1964 thought Title VII permitted transgender discrimination is to assign controlling weight to original expectations about how Title VII would apply. And as we have already shown, that is precisely the wrong way to engage in textualism. *See* Scalia & Garner, *Reading Law,* at 101. It departs from sound interpretive methods and fails to explain several of this Court's decisions. Indeed, notwithstanding conclusory protestations that cases like *Meritor* and *Oncale* should have "surprise[d] no one," *Wittmer*, 915 F.3d at 335 n.1 (Ho, J., concurring), the truth is that those decisions would have surprised a great many people had they been issued in 1964—long before "sexual harassment" was societally recognized at all, let alone recognized as sexist and intolerable, and even longer before same-sex sexual harassment fit that conceptual framework. *See, e.g.*, *Tomkins v. Pub. Serv. Elec. & Gas Co.*, 422 F. Supp. 553, 556 (D.N.J. 1976); *Miller v. Bank of Am.*, 418 F. Supp. 233, 236 (N.D. Cal. 1976).[8]

[8] The same is true of *Price Waterhouse v. Hopkins*, a decision fully consistent with the plain language of Title VII but inconsistent with widespread beliefs (and practices) in the 1960s about mandating compliance with outmoded sex-role norms in the workplace.

True commitment to textualism requires giving broad terms a broad reading. Sometimes that may produce results at odds with original expectations, but this is the very nature of adherence to the written word as binding law. *See Union Bank v. Wolas*, 502 U.S. 151, 158 (1991) ("[T]hat Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning.").

Second, Judge Ho has argued that the elephants canon militates against holding that Title VII's plain text covers discrimination based on transgender status. *See Wittmer*, 915 F.3d at 336 (Ho, J., concurring) ("Congress 'does not alter the fundamental details of a regulatory scheme in vague or ancillary provisions—it does not, one might say, hide elephants in mouseholes.'" (citation omitted)). But of all the adjectives that might reasonably describe Title VII, "ancillary" and "vague" are curious choices. *See Harris*, 510 U.S. at 22 (referring to Title VII's "broad rule of workplace equality"). If there were somehow such a thing as an "elephanthole"—we've checked, there isn't—that would provide a far more apt analogy.

Because Congress chose broad, prohibitory language, the proper interpretive guide is the general-terms canon, not a canon that takes its name from tiny furry rodents. *See* Scalia & Garner, *Reading Law*, at 101 ("Without some indication to the contrary, general words (like all words, general or not) are to be accorded their full and fair scope. They are not to be arbitrarily limited."). As Judge Goldberg once explained:

> Congress chose neither to enumerate specific discriminatory practices, nor to elucidate in extenso the parameter of such

> nefarious activities. Rather, it pursued the path of wisdom by being unconstrictive, knowing that constant change is the order of our day and that the seemingly reasonable practices of the present can easily become the injustices of the morrow.

*Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971).

Of course, the gravamen of the mousehole objection in this context is really a claim about law and democracy. *See Wittmer*, 915 F.3d at 338 (Ho, J., concurring) ("Under the elephants canon, significant policy issues must be decided by the people, through their elected representatives in Congress, using clearly understood text."). But where the best reading of a statute's text requires that the statute apply, the Court lacks authority to vary from that result in service of a judicial policy preference for fuller and more express democratic deliberation on the precise question at issue. "A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means." Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION 3, 23 (Amy Gutmann ed., 1997).

A third and final objection is that Title VII exists only to prevent employers from "favoring men over women, or vice versa." *Wittmer*, 915 F.3d at 334 (Ho, J., concurring). On this view, employers can make decisions based on their employees' sex, and impose sex-differentiated policies, so long as they do so in a manner that equally affects men and women as groups. Discriminating against transgender

employees is permissible, the argument goes, because all persons who identify as transgender are treated the same.

This argument is inconsistent with the statute's plain text, which directs attention to discrimination based on "such *individual's* . . . sex" (emphasis added). "[T]he basic policy of the statute requires that [the Court] focus on fairness to individuals rather than fairness to classes." *Manhart*, 435 U.S. at 709. General assertions about the statute's purposes, which include (but are not limited to) eradicating gender inequality in the workplace, cannot overcome statutory text. *See* Scalia & Garner, *Reading Law*, 20 ("Where purpose is king, text is not."); *see also* Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 Harv. J.L. & Pub. Pol'y 61, 67 (1994) ("[S]tatutory text and structure, as opposed to legislative history and intent (actual or imputed), supply the proper foundation for meaning."). If an employee's sex constitutes a motivating factor in his or her termination, *that employee* has faced discrimination "because of such individual's . . . sex." Her employer cannot escape liability by asserting that he would also discriminate against other transgender people of either sex. In that case, "the employer's discrimination across sexes does not demonstrate that sex is irrelevant, but rather that each individual has a plausible sex-based discrimination claim." *Hively*, 853 F.3d at 359 n.2 (Flaum, J., concurring).

For all these reasons, the Court need only consult the plain statutory text to conclude that discrimination based on transgender status is prohibited by Title VII.

## III. TITLE VII OUTLAWS DISCRIMINATION BASED ON SEXUAL ORIENTATION

The textualist analysis that we have applied to discrimination based on transgender status also applies to discrimination based on sexual orientation—and requires the same result. Obviously, this is not to claim that "sex" meant "sexual orientation" in 1964. It is, instead, to claim that discrimination based on sexual orientation inherently constitutes discrimination "because of such individual's . . . sex." *See Hively*, 853 F.3d at 343 ("[A]ctions taken on the basis of sexual orientation are a subset of actions taken on the basis of sex."); *see also Zarda*, 883 F.3d at 112-13.

To see why, one need only consult a dictionary. Sexual orientation is defined as "[a] person's predisposition or inclination toward sexual activity or behavior with other males or females," and is often categorized as "heterosexuality, homosexuality, or bisexuality." *See Homosexuality*, *Black's Law Dictionary* (11th ed. 2019). "Homosexuality," in turn, is defined as "having a sexual propensity for persons of one's own sex." *See Sexual Orientation*, *Oxford English Dictionary* (5th ed. 1964). Bisexuals have a sexual propensity for persons of their own sex as well as persons of different sexes.[9]

As the EEOC has explained, "sexual orientation is inseparable from and inescapably linked to sex." *Baldwin v Foxx*, EEOC Decision No. 0120133080, 2015 WL 4397641, at *5 (July 16, 2015). Chief Judge Katzmann echoed this point in his *en banc* majority opinion for the

[9] The American Psychological Association rightly emphasizes both physical *and* emotional attraction in defining these terms. *See* Am. Psychological Ass'n, Definition of Terms: Sex, Gender, Gender Identity, Sexual Orientation (Feb. 18-20, 2011).

Second Circuit: "Because one cannot fully define a person's sexual orientation without identifying his or her sex, sexual orientation is a function of sex." *Zarda*, 883 F.3d at 113; *see also id.* at 136 (Lohier, J., concurring) ("[T]here is no reasonable way to disentangle sex from sexual orientation in interpreting the plain meaning of the words 'because of . . . sex.' The first term clearly subsumes the second, just as race subsumes ethnicity.").[10] Simply put, sexual orientation consists in major part of the relationship between a person's sex and the sex of those to whom he or she is sexually and/or romantically attracted.

From this understanding of the connection between "sex" and "sexual orientation," it inevitably follows that "sexual orientation discrimination involve[s] sex-based considerations." *Baldwin*, 2015 WL 4397641, at *5. Indeed, that link appears in the words a person would use to explain why she has fired an employee for being gay: *I fired him because he is a man attracted to other men, and I disapprove of that*. Even on the narrowest definition of the term, "sex" is referenced not once, but twice in this plain English account of an employer's motives for sexual orientation discrimination. *See Zarda*, 883 F.3d at 113 ("[S]exual orientation is doubly delineated by sex because it is a function of both a person's sex and the sex of those to whom he or she is attracted."). And to borrow Judge Flaum's analysis, "if discriminating against an employee because she is homosexual is equivalent to discriminating against her because she is (A) a woman who is (B) sexually attracted to women, then it is motivated, in part, by an

[10] It would therefore "require considerable calisthenics to remove the 'sex' from 'sexual orientation,'" a point confirmed by opinions seeking to do so, which evince "confusing and contradictory results." *Hively*, 853 F.3d at 350; *see also Hively v. Ivy Tech*, 830 F.3d 698, 711 (7th Cir. 2016), *reversed en banc*, *Hively,* 853 F.3d at 350.

enumerated characteristic: the employee's sex." *Hively*, 853 F.3d at 359 (Flaum, J., concurring). Of course, under 42 U.S.C. § 2000e-2(m), "[t]hat is all an employee must show to successfully allege a Title VII claim." *Id.*

The entanglement of discrimination because of "sexual orientation" with sex-based motives is confirmed by a straightforward application of the familiar "but-for" test articulated in *Manhart*. *See* 435 U.S. at 711. A man who is fired for marrying a man would not have been fired if he were a woman who married a man. A woman who is fired for being attracted to women would not be fired if she were a man who were attracted to women. The fact that some employers may refer to sexual orientation rather than sex in explaining their motives is irrelevant: sexual orientation is defined by sex-linked terms and, as a factual matter, evokes sex-based motives. *See Zarda*, 883 F.3d at 113 ("The employer's failure to reference gender directly does not change the fact that a 'gay' employee is simply a man who is attracted to men."). Although this comparator test is ordinarily used to weigh case-specific evidence, it can also serve the useful function of clarifying whether discrimination of a general kind is inherently discrimination "because of such individual's . . . sex."[11]

[11] Contrary to a common misunderstanding, the hypothetical in this paragraph does *not* change two characteristics by comparing a man who is attracted to men to a woman who is attracted to men. It isolates the single relevant variable—the sex of "such individual"—and switches only that characteristic. This also changes the employee's sexual orientation (from gay to straight), but that only proves the sex-dependency of sexual orientation. Comparing a homosexual man to a homosexual woman, in contrast, stuffs the rabbit in the hat by changing the variable whose sex-linked nature we are trying to ascertain. Thus, *Price Waterhouse* did not compare a gender nonconforming man with a gender nonconforming woman to see if

The counterarguments raised against that reasoning in the lower courts do not support a different conclusion.

First, several judges have opined that Title VII exists only to prohibit sex inequality. *See, e.g.*, *Zarda*, 883 F.3d at 143 (Lynch, J., dissenting) ("The problem sought to be remedied by adding 'sex' to the prohibited bases of employment discrimination was the pervasive discrimination against women in the employment market, and the chosen remedy was to prohibit discrimination that adversely affected members of one sex or the other."). This argument is occasionally buttressed by contentions that nobody in 1964 would have believed "discrimination because of such individual's . . . sex" to encompass discrimination against gay men, lesbians, and bisexuals. *See id.* at 167 (Livingston, J., dissenting). But as explained above with respect to discrimination based on transgender status, such objections bottom out on claims regarding purpose and expected application—even when they are characterized as arguments about the original meaning of statutory text. To accept these arguments would be to construct a Trojan Horse through which purposivism and legislative history could be readily smuggled into textualist analysis. *See Lewis v. City of Chicago*, 560 U.S. 205, 215 (2010) ("It is not for us to rewrite the statute so that it covers only what we think is necessary to achieve what we think Congress really intended.").

Second, Judge Sykes has argued that discrimination based on sexual orientation "accounts for" sex only "in the limited sense that [the employer] notices [it]." *Hively*, 853 F.3d at 367 n.5 (Sykes, J., dissenting). On this view, "sex"

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gender nonconformity is a sex-linked characteristic. It changed only the sex of the employee to see if sex-linked motives were at play.

is "not the object of the employer's discriminatory intent, not even in part." *Id.* But whereas Judge Sykes criticizes efforts to "split homosexuality into two parts," those two parts are merely the definition of homosexuality: (1) "a person's sex" and (2) "his or her attraction to persons of the same sex." *Id.* It hardly plumbs the outer limits of English usage to say that firing someone for being gay is motivated by the very term that appears *twice* in the standard definition of being gay. And that term is not just "noticed" in passing: there wouldn't be a problem *at all* if the employee, or the employee's romantic partner, were of a different sex. In that concrete sense, sex is central.

Finally, Judge William Pryor has concluded that Title VII sharply separates status and conduct, protecting only against discrimination based on statutorily enumerated statuses (and conduct seen as failing to conform with those statuses). *See Evans v. Georgia Reg'l Hosp.*, 850 F.3d 1248, 1259-60 (11th Cir. 2017) (W. Pryor, J., concurring). Although Judge Pryor agrees that discrimination based on transgender status is prohibited, *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011), he maintains that discrimination based on sexual orientation is allowed because it targets only a statutorily uncovered status and conduct that may not always reflect a gender stereotype, *Evans*, 850 F.3d at 1260 (W. Pryor, J., concurring).

As Judge Rosenbaum explained in dissent, this sharp separation of status and conduct lacks any basis in Title VII's text and demonstrably rests on a misunderstanding of how ascriptive gender stereotypes apply to sexual orientation. *See id.* at 1261-68 (Rosenbaum, J., concurring in part and dissenting in part). Regardless, with respect to a purely textualist analysis, Judge Pryor's distinction is irrelevant. Even if Title VII is read as prohibiting only

discrimination because of a person's "sex"—understood as the status of being male or female—it bars employment discrimination based on sexual orientation because a person's "sex" (and that of his or her desired partners) is a motivating factor in such discrimination.[12]

## CONCLUSION

For the foregoing reasons, *Amici* respectfully submit that this Court should affirm the judgments of the Second and Sixth Circuits and reverse the judgment of the Eleventh Circuit.

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[12] Put differently, if an employer's motives for firing an employee include "such individual's . . . sex," it simply does not matter whether the manner in which the employer is taking account of sex also implicates a "status" which is not enumerated in Title VII. The statute does not cover "marital status" or "parental status," but firing a person for sex-linked reasons that overlap with (or are inherent) to such statuses would still be actionable under Title VII. So too here.