Nos. 17-1623 & 18-107

In The Supreme Court of the United States

ALTITUDE EXPRESS, INC., *et al.*,

Petitioners,

v.

MELISSA ZARDA, *et al.*,

Respondent.

R.G. & G.R. HARRIS FUNERAL HOMES, INC.,

Petitioners,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *and* AIMEE STEPHENS,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Second And Sixth Circuits

BRIEF OF RYAN T. ANDERSON AS AMICUS CURIAE IN SUPPORT OF EMPLOYERS

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BOOKS

INTEREST OF AMICUS[1]

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SUMMARY OF ARGUMENT

Respondents and their amici contend that any policy that *adverts* to sex must *discriminate* because of sex. Only in this way are they able to give Title VII a scope that for decades no one would have ascribed to it. And in the process, they are forced to rely on confused theories of discrimination and of sex. Over and

[1] No counsel for a party authored this brief in whole or in part, and no person other than amicus or its counsel made a monetary contribution to prepare and submit this brief. All parties have provided consent to the filing of this brief.

over, Respondents and their amici offer crucially flawed analogies, comparators, and analyses that effectively read the words "discrimination," "disadvantageous," and "comparable terms" out of the law altogether. This distorted reading leads to absurd and costly results that cut against the balance Congress struck in crafting Title VII. This brief aims to clarify the philosophical issues behind that costly distortion.

As this Court explained in *Oncale v. Sundowner Offshore Services, Inc.*, Title VII requires "neither asexuality nor androgyny." 523 U.S. 75, 81 (1998). It requires equality and neutrality. It forbids double standards for men and women—policies that disfavor at least some individuals of one sex compared to similarly situated members of the other. So, as the Court unanimously held in *Oncale*, quoting Justice Ginsburg: "The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Oncale*, 523 U.S. at 80 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)). This Ginsburg reading, embraced by the whole Court, remains valid. And yet Respondents and their amici explicitly reject it, as their position requires. This Court should hold fast to the Ginsburg reading—on which Title VII violations consist of *double standards* for women and men.

In *Price Waterhouse v. Hopkins*, this Court observed that under Title VII, sex "must be irrelevant to employment decisions." 490 U.S. 228, 240 (1989) (plurality opinion). This requires, as *Price Waterhouse* also

says, that sex not be used to create "*disparate treatment* of men and women." 490 U.S. at 251 (quoting *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978) (internal quotation marks omitted)). Expanding on this point, Justice O'Connor's concurrence points out that an employee's sex may "always 'play a role' in an employment decision in the benign sense that these are human characteristics of which decisionmakers are aware . . . in a perfectly neutral and nondiscriminatory fashion." *Id*. at 277 (O'Connor, J., concurring). Title VII does not require blindness to sex; it requires "neither asexuality nor androgyny." *Oncale*, 523 U.S. at 81.

Title VII forbids discrimination—in a word, unfairness—because of sex. It excludes, not just any sex-conscious standards, but double standards. Yet Respondents and their amici urge the Court to adopt a theory of sex discrimination that would rule out (as discriminatory) any policies that advert to sex, rather than only those sex-related policies that result in "disparate treatment of men and women," where members of one sex suffer under "disadvantageous terms" that the other does not. That would lead to asexuality and androgyny.

Adopting Respondents' theory would not simply distort the statutory text and flout the Supreme Court's unanimous precedent in *Oncale*. It would also work serious practical harms—and unsurprisingly so. After all, the Court would be rewriting the law Congress passed but with no opportunity to add to the qualifications and limits Congress might have

included if it had actually decided to address sexual orientation and gender identity. For instance, Respondents' position would require either the elimination of all sex-specific programs and facilities or allow access based on an individual's subjective identity rather than their objective biology. That Respondents and their amici are evasive about which of these outcomes is required by their theory is telling. Making its implications explicit would prove decisively that their reading is unsound.

It would also highlight the severe consequences for privacy, safety, and equality. Employers would be prevented from protecting their employees' privacy and would be exposed to ruinous liability. They would have to cover objectionable medical treatments. Physicians would have to perform them against conscience. And the consequences would not be limited to the employment context. If this new theory of sex and of discrimination is imposed on Title VII, then why not Title IX? A Respondent-friendly reading of sex discrimination would spell the end of girl's and women's athletics, along with private facilities at school.

In short, Respondents ask this Court to rewrite our nation's civil rights laws in a way that would directly undermine one of their main purposes: protecting the equal rights of girls and women. Congress did not legislate such an outcome, and the Court should not usurp Congress's authority by imposing such an extreme policy on the nation. Biology is not bigotry; this Court should not conclude otherwise. Only Congress, not this Court, can craft policy to address sexual

orientation and gender identity—concepts distinct from sex—with attention to all the competing considerations.

ARGUMENT

I.

Sex, Sexual Orientation, and Gender Identity Are Analytically Distinct Concepts

Respondents and amici seek to bypass Justice Ginsburg's reading of Title VII—embraced unanimously by this Court—by claiming that sex, sexual orientation, and gender identity are analytically inseparable. For instance, Respondent Stephens claims "it is impossible to discriminate against a person for being transgender without their sex assigned at birth being a cause of the decision." Brief for Respondent Aimee Stephens ("Resp. Br.") 25, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission* 21, 139 S. Ct. 1599 (2019) (No. 18-107). And amici Philosophy Professors claim: "If an employer decides to terminate an employee on the basis of same-sex sexual attraction (i.e., a particular sexual orientation) or gender nonconformity (*e.g.*, being transgender), the employer must first presume the employee's specific sex." Brief of Philosophy Professors as Amici Curiae in Support of the Employees ("Phil. Profs. Am. Br.") 2, *Bostock v. Clayton County., Georgia*, Nos. 17-01618, 17-10623, 18-00107 (U.S., July 3, 2019).

None of this is true.

Petitioner Harris Homes did not "first presume the employee's specific sex." Phil. Profs. Am. Br. 2. Rather, every document that Stephens presented during the first six years of employment stated that Stephens was a male. During the entirety of those six years, Stephens abided by the male dress code. It was only when Stephens declared to be a woman and desired to start dressing according to the female dress code that Harris Homes learned that Stephens identified as transgender.

Even so, the philosophy professors write:

> It is simply not possible to identify an individual as being attracted to the same sex without knowing or presuming that person's sex. Likewise, it is not possible to identify someone as gender nonconforming (including being transgender) without reference to that person's known or presumed sex and the associated social meanings.

Phil. Profs. Am. Br. 1–2.

But is it really true that individuals cannot be identified as gay or trans "without knowing or presuming that person's sex"? Consider: Kim just came out as trans. Or, Kim just came out as gay. So far, all we know is that Kim is trans or gay. We have no idea if Kim is a man or a woman. We do not know the sex of Kim at all. It could be Kim Kardashian or Kim Jong Un. But because we know the sexual orientation and gender identity, we could act based on that without being motivated by—let alone even knowing—Kim's sex.

Nevertheless, law professors Andrew Koppelman and William Eskridge declare that "[y]ou can't say gay without classifying Kim by his sex." Brief for William N. Eskridge Jr. & Andrew M. Koppelman as Amici Curiae Supporting Respondents ("Eskridge & Koppelman Am. Br.") 5, *Bostock v. Clayton Cty., Ga.* 139 S. Ct. 2049 (2019) (No. 17-1618). Of course you can. "Kim is gay." What we now know is that Kim is attracted to people of the same sex. But this is not to classify Kim as either male or female.

The language LGBT advocates use reflects these distinctions. Consider three forms of discrimination: sexism, cissexism, and heterosexism. In their focal cases, these forms of discrimination have the following targets: women, people who identify as transgender, and people who identify as gay. When these three forms of discrimination occur against their focal targets they can be described as misogyny, transphobia, and homophobia. The three sets of terms naming three different social phenomena reveal something important about the chain of decision-making. Sexism, with its typical target of women, manifesting in the focal case as misogyny, entails treating at least some individuals of one sex (women) worse than individuals of the other sex (men). Cissexism, with its typical target of people who identify as transgender, manifesting in the focal case as transphobia, entails treating at least some individuals of a certain gender identity (transgender) worse than individuals of another (cisgender). Heterosexism, with its typical target of people who identify as gay, manifesting in the focal case as

homophobia, entails treating at least some individuals of a certain sexual orientation (gay) worse than individuals of another (straight). No one outside this legal dispute would seriously refer to transphobia and homophobia as sexism.

Not only are the concepts "sexual orientation" and "gender identity" analytically separate from sex; the underlying realities are also different. Sex is a stable, binary, biological phenomenon, determined by how an organism is organized with respect to sexual reproduction.[2] By contrast, sexual orientation and gender identity are fluid, exist along spectra, and are subjective. Respondents' theory thus raises unavoidable questions. What does an employer do for employees who identify as nonbinary? Which locker room or dress code should they use? What about employees who are gender-fluid, identifying as men at some times and women at others? Acting on the basis of sex could violate a gender identity nondiscrimination norm while acting on the basis of gender identity could violate a sex nondiscrimination norm. Consequently, employers are forced into a Catch-22.

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[2] RYAN T. ANDERSON, WHEN HARRY BECAME SALLY: RESPONDING TO THE TRANSGENDER MOMENT, at 77-92 (2018) [hereinafter WHEN HARRY BECAME SALLY].

II.

No One Is Excluded from Title VII's Sex Protections, But Title VII Does Not Protect Sexual Orientation or Gender Identity

Respondents argue that failure to redefine the word "sex" to mean "sexual orientation" and "gender identity" will result in excluding from Title VII's protections people who identify as gay and transgender. For instance, Stephens contends "Harris Homes and the United States effectively ask this Court to write an exclusion into Title VII to deny transgender people the protection from sex discrimination that the statute provides to all employees." Resp. Br. 17. Title VII protects *all* employees from *sex* discrimination, not purported discrimination on some other basis. Employees who identify as transgender have the same Title VII protections as employees identified as cisgender: protections from sex discrimination.

Zarda takes it a step further, contending "[f]ederal courts have consistently and properly recognized that Title VII does not exempt any class of employees from its protection, and therefore gay employees have the same ability as heterosexual employees to bring sex stereotyping claims that involve their nonconformity to masculine or feminine sex stereotypes." Zarda Br. 28–29. To be sure, gay employees have the right to bring sex-discrimination claims, including in cases where sex stereotypes are evidence of that discrimination. But, as explained below, conjugal marriage rests on no masculine or feminine sex stereotypes.

In all events, no one is being excluded from the protections of Title VII. Everyone, regardless of sexual orientation and gender identity, is protected from being discriminated against because of their sex. Whether they identify as gay or straight, cisgender or transgender, all people have the legal right not to be discriminated against because of their sex. But no one has the legal right to redefine the word sex in federal law to *mean* something other than sex. And so no one has Title VII protections based on sexual orientation or gender identity.

III.

Respondents Ignore that Double Standards Based on Sex Were at the Heart of *Phillips v. Martin Marietta*

Respondents and amici get wrong this Court's ruling in *Phillips v. Martin Marietta Corp.*, by ignoring the double standard that drove the judgment in that case. 400 U.S. 542 (1971). For starters, Respondent Stephens claims: "Much as Ms. Phillips was discriminated against for being a woman and for having young children, so Ms. Stephens was fired for having a male sex assigned at birth and for living openly as a woman. That is sex discrimination." Resp. Br. 25.

But this assertion ignores the actual structure of the discrimination in *Phillips*. Ms. Phillips was discriminated against on the basis of sex because men with young children were not held to the same terms and conditions as women with young children. Had

both men *and* women been held to the same standard, there would have been no disparate impact on men and women and no double standard on terms and conditions based on sex. Nothing remotely similar is true in this case. Stephens was fired for not complying with the company's EEOC-compliant sex-specific dress code. And both males and females have to equally follow this dress code; it does not impose more of a burden on one or the other. The EEOC-compliant dress code does not create "disparate treatment of men and women" nor does it create conditions in which "members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." The "sex plus" theory simply does not apply in Stephens's case.

Nor does it apply in Zarda's case. Respondent Zarda argues:

> Had Martin Marietta articulated its policy as a refusal to hire "mothers," rather than not hiring "women with young children," the result would have been the same. Phillips's sex (plus her parental status) is why she did not get the job. . . . The same logic applies to Zarda. Were he not a man, he would not have been fired for his attraction to men. Conversely, persons who shared his attraction to men but not his sex (i.e., "heterosexual women") were not denied job opportunities. Saying he was fired for being "gay" does not change the analysis. Thus, Zarda has properly alleged discrimination "because of [his] sex."

Brief for Respondents ("Zarda Br.") 21, *Altitude Exp., Inc. v. Zarda*, 139 S. Ct. 1599 (2019).

But the reason Martin Marietta was guilty of discrimination based on sex was not that it used certain magical words ("women with young children," rather than "mothers") but rather it did not apply the same terms and conditions to "men with young children" and "fathers." If it had an evenhanded policy against "people with young children" and "parents," then there would have been no sex discrimination. So, too, an evenhanded policy against same-sex relationships does not discriminate on the basis of sex.

Respondents obscure this dispositive point by picking an inapposite comparator. Comparing Zarda to "persons who shared his attraction to men but not his sex (*i.e.*, 'heterosexual women')" changes two factors—sex and sexual orientation—and so fails to ferret out the basis for the employment decision. Comparing a homosexual man to a heterosexual woman will not tell us if the employment decision was driven by sex or by sexual orientation. The question is whether men and women attracted to their own sex are treated differently from each other.

This is why Zarda's appeal to *Oncale* fails: "Only men who are attracted to men are fired for that attraction; women attracted to men can keep their jobs. In other words, men have been 'exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.'" Zarda Br. 37. But in such a situation men would be exposed to

exactly the same terms and conditions as women: no same-sex attraction. There is no double standard—no greater burden on women than men or vice versa.

Respondents answer that "the fact that the employer has another, parallel policy that it applies to women—namely, that it fires them if they are attracted to women—cannot insulate the employer from liability. That simply means that women as well are exposed to a disadvantageous term or condition of employment to which members of the other sex are not exposed." Zarda Br. 37. But this flatfooted, rule-counting test sidesteps the crucial question—whether men and women face unequal burdens under the policies at issue. The answer is clear: they do not. Under such policies, both men and women are prohibited from same-sex relationships.

IV.

Title VII Does Not Simply Forbid Any Action "Causally Linked" To Sex

Respondent Stephens claims that "any time the same decision would not have been made had the employee's sex been different, an employer discriminates 'because of sex.'" Resp. Br. 21. Koppelman and Eskridge argue that "an employer violates the law if it (1) takes negative employment action (2) that is causally linked to (3) the sex of the employee." Eskridge & Koppelman Am. Br. 5.

These theories focus simply on "negative" treatment—not disadvantages to which individual women but not men are exposed and vice versa. So neither of these theories identifies *discrimination*. Both flout the Ginsburg reading—on which Title VII forbids double standards. In contravention of *Oncale*, both require asexuality and androgyny.

To see that, just look at what embracing such theories would require: Suppose a male employee at a fitness center repeatedly goes into the woman's locker room and is fired. Had his "sex been different" he would not have been fired; the decision to fire him was "causally linked" to his sex. But the negative treatment the employee faced was not sex *discrimination*, because the employer imposed no double standard for men and women. It enforced a bathroom policy that imposed *the same burden* on men and women.

Or suppose a female lifeguard is fired because she wears swimsuit bottoms but refuses to wear tops. Had her "sex been different," she would not have been fired; the decision to fire her was "causally linked" to her sex. Yet her termination was not sex discrimination under Title VII because a male lifeguard who exposed his private parts would have similarly been fired. The attire policy thus was no more burdensome for women than for men.

Respondents' proposed test is too simplistic. It does not test for sex-based discrimination. In both of the above examples, the employees were fired because they acted in ways that violated benign company

privacy policies—i.e., policies that do not impose "disadvantageous terms or conditions of employment" on anyone, much less impose disadvantages on some "to which members of the other sex are not exposed."

Preventing males from entering women-only private facilities, far from being an instance of sex discrimination, is required to *avoid* sex discrimination. In her majority opinion in *United States v. Virginia*, Justice Ginsburg explained that for the all-male Virginia Military Institute to become co-ed, it "would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements." 518 U.S. 151, 550 n.19 (1996). Moreover, in 1975, when critics argued that the Equal Rights Amendment would require unisex intimate facilities, then-Professor Ginsburg explained that a ban on sex discrimination would not require such an outcome: "Separate places to disrobe, sleep, perform personal bodily functions are permitted, in some situations required, by regard for individual privacy."[3] An employer who allowed males to enter private women-only facilities would be guilty of violating privacy because it would foster a hostile work environment in violation of Title VII. Yet Respondents and their amici would hold such an employer guilty if he *prevented* males from entering. Their theory requires asexuality and

[3] Ruth Bader Ginsburg, *The Fear of the Equal Rights Amendment*, *WASH. POST* (April 7, 1975), https://www.washingtonpost.com/news/volokh-conspiracy/wp-content/uploads/sites/14/2016/05/ginsburg.jpg.

androgyny, but Title VII does not—it forbids double standards and protects sensible workplace privacy policies.

V.

No Sex Stereotyping Is Taking Place in These Cases

Respondents and amici also evade Justice Ginsburg's reading of Title VII by stretching *Price Waterhouse* beyond all recognition. In their view, any policies that advert to sex or sexual conduct are "sex stereotypes" and thus constitute "discrimination" "because of sex." But the petitioners in these cases are committing no sex stereotyping at all.

As Justice Ginsburg explained in *United States v. Virginia*, sex stereotyping takes place when there are "[o]verbroad generalizations about the different talents, capacities, or preferences of males and females." 518 U.S. at 533. And while *Price Waterhouse* condemns stereotyping, it does not refer to just any belief or norm (*e.g.*, dress codes) that somehow touches on sex. Rather, it refers to beliefs, norms, or expectations that *disadvantage* women (at least some women relative to some men) or *disadvantage* men (at least some men relative to some women).

After all, *Price Waterhouse* was interpreting Title VII, which is about *discrimination*. The *Price Waterhouse* Court simply held that discrimination against women can take the form of expectations that

disadvantage them by imposing on them special burdens. "An 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." *Price Waterhouse*, 490 U.S. at 251. In other words, Title VII lifts women (and men) out of the bind of a double standard by forbidding employers to impose on men and women unequal burdens.

By contrast, Respondents and their amici object to neutral policies that make no generalizations at all about the "talents, capacities, or preferences of males and females" and that place no greater burden on any women compared to men (or vice versa). For instance, Respondent Stephens argues that she was fired by Harris Homes "for failing to conform to its sex-based stereotypes about how men and women should identify, appear, and behave." Resp. Br. 16. But Harris Homes asked all employees—male and female—to abide by an EEOC-compliant sex-specific dress code and to use single-sex facilities that match their sex. This being so, the only way Respondents could prevail is if all sex-specific dress codes and single-sex facilities stem from discriminatory sex stereotyping. They do not.

Nonetheless, Stephens contends Harris Homes engaged in discriminatory sex stereotyping by not treating her as a woman: "Just as Price Waterhouse discriminated against Ms. Hopkins because it deemed her insufficiently feminine for a woman, so Harris

Homes fired Ms. Stephens because it considered her insufficiently feminine for a woman." Resp. Br. 31. But Harris Homes did not consider Stephen's femininity at all—as that is not what determines whether someone is a man or woman. In fact, Harris Homes refused to go along with the stereotype-based determination of sex that Respondents proposed and instead treated Stephens in accordance with objective biological realities. It is not that Stephens was "insufficiently feminine"; it is that Stephens is not a woman. And being a woman is not a stereotype.

Remarkably, Stephens argues that any policy that treats sex as a biological matter rather than a self-declared identity is somehow based on a stereotype. "The notion that someone assigned a male sex at birth will identify, look, and behave 'as a man' is undeniably a sex-based stereotype." Resp. Br. 32. But Harris Homes makes no claim about whether Stephens behaves "as" a man; it claims that Stephens *is* a man, and thus should abide by the EEOC-compliant dress code for men.

The only parties trading in sex stereotypes in these cases are Respondents. Respondent tries to drive a wedge between "male" and "man," between "sex assigned at birth" and "gender identity." But it is *these* distinctions that ultimately rest on stereotypes—according to which gender identity is determined by how one fits or does not fit into prevailing sex stereotypes.[4]

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[4] *See* WHEN HARRY BECAME SALLY, at 27-33, 45-48; *see also* Ryan T. Anderson, *The Philosophical Contradictions of the Transgender Worldview*, PUB. DISCOURSE (Feb. 1, 2018).

Harris Homes has a simple policy: It treats all males—however they identify, and regardless of their masculinity or femininity—the same way. Likewise it treats all females the same—however they identify, and regardless of their masculinity or femininity. Nowhere did Harris Homes "generaliz[e] about the different talents, capacities, or preferences of males and females." *Virginia*, 518 U.S. at 533.

Zarda raises a similar argument about sex stereotypes, claiming that normative commitments to conjugal sexuality rely on sex stereotypes. Zarda argues that "the notion that men should be attracted only to women and women should be attracted only to men is a normative sex-based stereotype." Zarda Br. 25. This is false. While Petitioner Altitude Express denies being motivated by Zarda's sex or sexual orientation at all—it dismissed Zarda for inappropriate conduct with customers—the question of law is straightforward. The conviction that sex belongs in marriage, understood as the conjugal union of spouses who can engage in an act that unites them as one flesh, does not rely on *any* stereotypes about men and women.[5] It makes no "generalizations about the different talents, capacities, or preferences of males and females" at all. *Virginia*, 518 U.S. at 533. It holds that all male-female couples, regardless of stereotypical attributes of masculinity and

[5] *See* SHERIF GIRGIS, RYAN T. ANDERSON & ROBERT P. GEORGE, WHAT IS MARRIAGE? MAN AND WOMAN: A DEFENSE 23-36 (2012); RYAN T. ANDERSON, TRUTH OVERRULED: THE FUTURE OF MARRIAGE AND RELIGIOUS FREEDOM 13-35 (2015).

femininity, can unite as one flesh. That all male-female couples, regardless of having or not having stereotypical personality traits, can so unite. And that there is *intrinsic* value in such conjugal marital union.

Thus, any policy against sex outside marriage relies on no stereotypes and no double standards. Far from imposing separate standards for "proper female behavior" and "proper male behavior," it imposes exactly the same terms and conditions on members of both sexes. And the rationale has nothing to do with male expectations or female expectations, of masculine traits or feminine traits. Rather, it is about the conviction about the good of marriage as a one-flesh union and the role that sexual activity plays in instantiating or impairing that good. In these cases—unlike in *Price Waterhouse*—no expectation particular to one sex (but not the other) is being used to disadvantage one sex (but not the other).

This Court has been presented with the argument-theory that male-female marriage laws constituted discrimination based on sex in several cases. Not one Justice in any of those cases has ever endorsed this argument-theory even when it was fully briefed and presented. The Court should not now adopt and apply that theory to *private actors* based on their "decent and honorable religious or philosophical" convictions about marriage. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015).

And yet, Zarda argues that "[b]eliefs about sexual orientation are themselves inextricably interrelated to, and indeed premised upon, views about appropriate sex roles and the sexism that often underlies those views." Zarda Br. 33–36. This is a mistake. The core conviction about a man and a woman's ability to unite as one flesh is not premised—in any way, shape or fashion—on social expectations about sex roles.

Koppelman and Eskridge attempt what appears to be a more nuanced argument, noting "the many ways that anti-gay feelings are linked to rigid assumptions about proper sex roles." Zarda Br. 34–36. No doubt there are many ways in which anti-gay bigotry is based on false beliefs about sex roles and sex stereotypes. But the focal case of support for marriage as the union of husband and wife is not anti-gay, not bigotry, and not based on any beliefs about sex roles or sex stereotyping. In every case in which public marriage laws were directly at issue, this Court has refused to say otherwise. Accordingly, it would be a gross mistake for the Court to now pronounce that private citizens' convictions about marriage are, after all, motivated by bigotry.

VI.

No "Neutral" Sex Stereotypes Are Taking Place

When it comes to double standards and stereotypes, Respondents and amici obscure the proper level of analysis. For example, Zarda claims:

> A company that imposes female sex stereotypes on women and male sex stereotypes on men does not thereby insulate itself from liability under Title VII. Consider an employer who has a policy that "All employees shall conform to the stereotypes appropriate to their sex" and fires both a woman like Hopkins for being too "macho" and a man for not being sufficiently "manly." At an artificially high level of abstraction, the conform-to-your-own-sex's-stereotype policy might be said to govern both men and women. Nonetheless, actions pursuant to the policy are both "because of sex"—indeed, explicitly so—and discriminatory.

Zarda Br. 38–39.

But no stereotyping *at all* is taking place in these cases. It is not as if an employer said female (but not male) employees must be docile. Or that men alone are suited for physically demanding jobs. Or that economics is appropriate for boys and home economics appropriate for girls. No, the rule has nothing to do with the relative strengths, weaknesses, character traits, or proper social, economic, or political roles of women as opposed to men. The rule makes no reference to "generalizations about the different talents, capacities, or preferences of males and females." The rule is not that males should abide by stereotypical notions of masculinity and females by stereotypical notions of femininity. Rather, it is that *all* employees should abide by EEOC-compliant sex-specific dress codes and use the

private facilities that correspond to their sex.[6] This entails no stereotypes, no unequal burdens, no double standards—and as a result, no discrimination. How could it, after all, when Justice Ginsburg ruled for this Court that private facilities for each sex are *required*? *See*, *e.g.*, *Virginia*, 518 U.S. at 558.

The comparison cases prove the point. Women fired for being too "macho" and men fired for being insufficiently "manly" have been held to two standards: a standard of what women ought to be and a standard of what men ought to be. It can be re-described as "conform-to-your-own-sex's-stereotype policy." But that redescription hides what is important for the analysis: two separate standards, based on "generalizations about the different talents, capacities, or preferences of males and females," which create "disparate treatment of men and women" because "members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."

By contrast, EEOC-compliant dress codes, single-sex private facilities, and marital sexuality provide a single standard for all people. They are not based on any generalizations of talents, capacities, or preferences. To be sure, they can be re-described as two separate policies—males use the men's room, females use the women's room, males reserve sexual activity for

[6] Altitude Express denies taking any action at all about Zarda's sex or orientation. But for the legal question, if an employer did have a marital sex policy, it would not be based on stereotypes—neutral or otherwise—as noted above.

their wives, females reserve sexual activity for their husbands—but those re-descriptions hide what is important for the analysis. And that is a single standard equally applied to people of both sexes based on no stereotypes or generalizations at all, and creating no disparate treatment or disadvantageous terms for members of one sex over the other.

The philosophy professors also misunderstand this point:

> Every sex-specific stereotype can be pitched at a higher level of abstraction and achieve the same seemingly 'gender-neutral' character. Consider the stereotypes that women ought not to be aggressive, or that men ought not to be empathetic. Both can be pitched as the single imperative that people ought to be gender conforming.

Phil. Profs. Am. Br. 22–23.

The relevant question is which level of abstraction brings into focus the true motivating factor of the employment decision. And again, the offered examples prove the opposite point. "Women ought not be aggressive (but men should)" and "men ought not be empathetic (but women should)" highlight two different standards, two different expectations, based on generalizations about the sexes. By contrast: All people should use the restroom and follow the dress code that corresponds with their sex and reserve sexual activity for conjugal marriage. These do not flow from any generalizations about the sexes; they provide one standard

for all people, and they do not create a burden for a particular sex while exempting the other. Note that one could not say that with the expectations to be aggressive and to be empathetic. Each of those is based on generalizations about a particular sex and applies to only one of the two sexes.

Respondents and their amici seize on the fact that a single policy has sex-specific applications—men use the men's room, women use the women's room—and then contend this sex-specific application of a single standard is discriminatory. But that is fallacious. Provided the standard is applied equally, and the facilities and dress codes are comparable, policies that take our sex differences seriously need not entail any discrimination in the relevant sense. When sex differences are relevant, a single standard can have different applications. Only if there is no difference between male and female, or if that difference can never make a policy difference, could Respondents' theory succeed. And that would threaten many people's privacy, safety, and equality. Fortunately, this Court has unanimously ruled that Title VII requires "neither asexuality nor androgyny." *Oncale*, 523 U.S. at 81.

The simple reality is that just because a policy refers to sex does not mean that it *discriminates* because of sex. Sex-specific private facilities and dress codes rest on no generalizations about the talents, capacities, or preferences of males and females. They set up no double standard. Nor do they provide disadvantageous terms or conditions to one sex but not the other.

They do not violate Title VII at all. While they do distinguish based on sex in their application of a single policy, they do not "discriminate" provided that they offer comparable programs and facilities to members of each sex. As Professor-Justice Ginsburg pointed out, taking the demands of privacy and equality seriously does not constitute discrimination. And as Justice O'Connor reminded us, sex may "always 'play a role' in an employment decision in the benign sense that these are human characteristics of which decisionmakers are aware and about which they may comment in a perfectly neutral and nondiscriminatory fashion." *Price Waterhouse*, 490 U.S. at 277 (O'Connor, J., concurring).

The philosophy professors show where their theory leads—to asexuality and androgyny:

> Of course, all gender stereotype enforcement could be described as "sex-neutral" . . . if the stated basis for such enforcement were sufficiently abstract. Suppose an employer terminates anyone who violates presentational sex stereotypes. . . . This policy is not sex-neutral even though it can be applied to individuals of all sexes because the only way to apply it is to reference an employee's presumed sex.

Phil. Profs. Am. Br. 11.

Their theory would have this Court strike down as a violation of Title VII all sex-specific dress codes, even those that comply with the EEOC guidelines, simply because they "reference" sex. Again, the theory offered

by Respondents and amici is simplistic. Not just any reference to sex constitutes discrimination because of sex. Indeed, Justice Kennedy warned the Court not to treat every sexual difference as a stereotype: "To fail to acknowledge even our most basic biological differences . . . risks making the guarantee of equal protection superficial, and so disserving it. Mechanistic classification of all our differences as stereotypes would operate to obscure those misconceptions and prejudices that are real." *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 73 (2001).

VII.

Analogy Between Religious Conversion and Sex Reassignment is Little More than Wordplay

Stephens and amici make another misguided philosophical move when they compare sex reassignment to religious conversions. On a superficial level, both can be described as changes: changing religions and changing sexes. But Stephens goes further: "Just as firing someone for wanting to change religion is religious discrimination, so too firing a person for wanting to change sex is sex discrimination. In either case, the protected characteristic is a but-for cause of the employment decision." Resp. Br. 26.

This superficial parallel—wordplay, really—hides a fundamental difference: Religious conversion is an aspect of religion, under the plain meaning of "religion"; while sex reassignment is not an aspect of sex, under the plain meaning of "sex." Consider how the

Virginia Declaration of Rights describes religion: "Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence." Where religion is understood as a perceived duty to the Creator and the manner of discharging that duty, it can be directed only by convictions. Those convictions might change, which would then change the manner of discharge. Religious conversion—"changing religions"—is thus an aspect of religion. To convert or "change" religions *are themselves acts* of religion. That is, making an act of faith in Jesus ("converting to Christianity") is a *religious act*, an aspect of religion.[7]

Sex-reassignment procedures, be they social, hormonal, or surgical ("changing sexes"), are not an aspect of sex. In its focal sense, "sex" refers to one's biological organization with respect to sexual reproduction.[8] In a more extended sense, it refers to how one gives expression to that biological organization.[9] As for actions related to sex, Congress has added some—but not all—as protected classifications: marital status and pregnancy, for example. But nowhere is changing sexes an aspect of sex. So while making an act of faith is an aspect of religion for Title VII, engaging in hormone therapy is not an aspect of sex.

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[7] JOHN CORVINO, RYAN T. ANDERSON & SHERIF GIRGIS, DEBATING RELIGIOUS LIBERTY AND DISCRIMINATION 129–49 (2017).

[8] WHEN HARRY BECAME SALLY, at 77–92.

[9] WHEN HARRY BECAME SALLY, at 145–73.

Koppelman and Eskridge make a linguistic point but miss the larger, uniquely relevant point. They contend that "[j]ust as it makes no legal difference that 'convert' does not appear in Title VII's text, so it makes no legal difference that 'transgender' does not appear in the statute." Resp. Br. 7. But "convert" was understood in 1964 when the Civil Rights Act was passed—as it is today—to be an aspect of religion. On the other hand, neither in 1964 nor in 1991 (when the Act was amended) nor today is sex change or transition understood to be an aspect of sex.

In fact, each of those terms is understood in contradistinction to sex. According to the most recent gender theory, sex is merely biological, gender is a social construct, and gender identity is how someone internally perceives their gender.[10] Transitioning and transgender identity are explicitly distinct from sex. Transitioning and gender identity cannot fairly be described as aspects of sex.

[10] WHEN HARRY BECAME SALLY, at 27–33, 45–48.

VIII.

Opposition to Interracial Marriage Was Race Discrimination, Support for Conjugal Marriage Is Not Sex Discrimination

Respondents and amici also make a philosophical mistake when they argue that support for conjugal marriage is sex discrimination in the same way that opposition to interracial marriage is race discrimination. For example, Zarda argues:

> This Court has already established that discriminating against someone of a particular race for dating or marrying persons of a different race constitutes discrimination because of race. . . . Discriminating against someone of a particular sex for dating or marrying someone of the same sex constitutes discrimination because of sex.

Zarda Br. 38–39.

And yet, when the question of public marriage law was fully briefed and argued in front of this Court, and this same exact argument was advanced, not one Justice endorsed it.

Zarda phrases the argument with its focal case: "Just as firing a white employee for being married to an African American person constitutes discrimination because of race, so firing a male employee for being married to another man constitutes sex discrimination." Zarda Br. 31. But this stops the analysis too soon. One must ask *why*, in the focal case, people opposed "a white employee for being married to an African

American person." The answer has nothing to do with marriage, and everything to do with race: racism and white supremacy.[11] But opposition to men marrying men, and women marrying women, has nothing to do with sexism and male (or female) supremacy.

When this Court struck down bans on interracial marriage, it did not praise the motives of those opposed to interracial marriage. It did not, because it could not. Instead, this Court explained that opposition to interracial marriage was part of a larger project of white supremacy. But when this Court redefined marriage to include same-sex relationships it went out of its way not to cast traditionalists as bigots. Justice Kennedy highlighted that "[m]any who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here." *Obergefell*, 135 S. Ct. at 2602. Justice Kennedy further "emphasized that the traditional understanding of marriage 'long has been held—and continues to be held in good faith by reasonable and sincere people here and throughout the world.'" *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n*, 138 S. Ct. 1719, 1747 (2018) (quoting *Obergefell*, 135 S. Ct. at 2594). Nothing remotely similar could be written about antimiscegenation.

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[11] *See* Ryan T. Anderson, *Disagreement is Not Always Discrimination: On Masterpiece Cakeshop and the Analogy to Interracial Marriage*, 16 GEO. J.L. & PUB. POL'Y 123, 124 (2018).

The conjugal understanding of marriage could not form a sharper contrast with antimiscegenation. Marriage as the union of male and female has been present throughout human history, shared by the great thinkers and religions and by cultures with diverse viewpoints about homosexuality. Great thinkers—ancient and modern, of both East and West, from Plato and Aristotle, Musonius Rufus and Confucius, Augustine and Aquinas, Maimonides and al-Farabi, to Luther and Calvin, Locke and Kant, Gandhi and Martin Luther King—held the honest and reasoned conviction that male-female sexual bonds had distinctive value for individuals and society.[12] Nothing even remotely similar is true of antimiscegenation.

Koppelman and Eskridge disagree. They assume people who enact policies supporting conjugal marriage are really discriminating against homosexuals, which, they assert, is a form of sex discrimination. They accordingly compare those people to an employer who "does not want to hire 'interracial-sexuals'." Eskridge & Koppelman Am. Br. 6. Such an employer, they contend, "discriminates because of race in a but-for manner, and it would be no defense . . . to claim it was merely discriminating because of the employee's 'sexual orientation,' namely, the employee's romantic preference for persons of another race." *Id*. But again, this stops the analysis too soon. And the category "interracial-sexuals" reveals just that. Assuming someone re-described their opposition to interracial marriage as

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[12] WHAT IS MARRIAGE?, at 23–36; TRUTH OVERRULED, at 13–35.

an objection to "interracial-sexuals," one would have to ask "why" to evaluate it. As a matter of historical reality, opposition to interracial marriage was opposition to equality for blacks. Proponents sought to keep whites and blacks apart, to preserve white purity. It was about racial superiority, not about the nature of marriage or convictions about human sexuality. Indeed, marriage was redefined from its original color-blind reality to *exclude* interracial couples precisely because of racial bigotry.

By contrast, any reasonable opposition to same-sex sexual activity is grounded in opposition to all non-marital sexual activity. And here too, Koppelman and Eskridge cut short their analysis. Support for marriage as the conjugal union of husband and wife is not founded on any beliefs about hetero-supremacy or male (or female) supremacy. Nor is opposition on the basis of sex or sexual orientation. Rather, it is founded on the capacity that a man and a woman have to unite as one flesh.

IX.

"Race" and "Sex" Are Not Interchangeable in Our Nation's Nondiscrimination Laws

The preceding section highlights why it is a mistake to treat "race" and "sex" interchangeably in our nation's nondiscrimination laws. As a result of laws banning discrimination because of race, "whites only" water fountains and bathrooms were eliminated. "Negro league" sports teams ceased to exist. No one

suggests that race-specific athletic programing or private facilities are appropriate, because race is irrelevant to what we do on the athletic field or in the bathroom. Race-based policies came into practice solely as part of a larger project of white supremacy, where blacks were viewed first as subhuman and then as second-class citizens. Where their drinking from the same water fountain and using the same toilet could "pollute" the space. And so the separation of the races was premised to keep one race in subjugation. Separate but equal when it came to race was inherently unequal.

Nothing remotely is similar when it comes to sex. As a result of laws banning discrimination because of sex, sex-specific restrooms *were created and mandated* in the workplace, not eliminated. One aspect of women's equality in the workforce *required creating* private facilities for women. Likewise, bans on sex discrimination in education did not lead to the elimination of women's athletics but often required creating *additional* teams and *additional* sports for women. The bodily differences between males and females make a difference when it comes to bodily privacy and athletic competition, and so laws banning discrimination on the basis of sex did not require the elimination of female-only programs and facilities, but their creation.

Analogies to race-based discrimination are misleading because they obscure the questions that the Court needs to address. The deeper reason for "whites only" water fountains was white supremacy, just as the

deeper reason for bans on interracial marriage was white supremacy. In stark contrast, the deeper reason for women's bathrooms and sports teams is not about male supremacy. Nor is the deeper reason for conjugal marriage—here and across the globe, today and throughout human history—hetero-supremacy. The deeper reason is based on biological reality and "decent and honorable religious or philosophical premises." *Obergefell*, 135 S. Ct. at 2602.

X.

There Will Be Severe Public Consequences if the Court Redefines Sex and Embraces a Simplistic Account of Discrimination

This Court should not embrace a simplistic theory of "discrimination" and redefine the word "sex" to include "sexual orientation" and "gender identity." Not only would it impose enormous liability on employers and unconscionable outcomes on citizens; it would violate the separation of powers. Enacting a reasonable policy that addresses the needs of all is the responsibility of federal, state, and local legislatures responding to the voice of the people.[13] At any rate, the Civil Rights Act of 1964 does not provide answers to today's questions about sexuality and gender identity. And the

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[13] *See* Ryan T. Anderson, *Challenges to True Fairness for All: How SOGI Laws Are Unlike Civil Liberties and Other Nondiscrimination Laws and How to Craft Better Policy and Get Nondiscrimination Laws Right*, in RELIGIOUS FREEDOM, LGBT RIGHTS, AND THE PROSPECTS FOR COMMON GROUND (William Eskridge, Jr. & Robin Fretwell Wilson eds., 2019).

Court should not update it, usurping the authority of Congress, to provide its own answers.

If a simplistic theory of discrimination is embraced and sex is redefined, what might be in store?

Employers would no longer be allowed to protect their employees' privacy and safety by offering single-sex private facilities. Instead, single-sex facilities would either have to be eliminated because they treat a person's sex as a "but-for" cause to why they cannot enter. Or an employee's entrance would have to be governed based on subjective identity instead of objective biology. Either way, an employer would no longer be able to ensure that a female employee would not be exposed to a male body—which, in its own way, would open employers up to Title VII liability.

Employers would also have to offer benefit plans that would violate their sincerely held religious beliefs. For example, if an employer covers testosterone therapy for men with low testosterone, but declines to cover it for women who want to transition; or if the employer covers mastectomies and hysterectomies in the case of cancer, but not for sex-reassignment purposes, such an employer would be liable for discrimination because of sex. Likewise, if an employer offers marriage benefits to employees in conjugal marriages but not to employees in other domestic relationships, this would be viewed as discrimination because of sex. In short, support for the conjugal understanding of marriage would now be viewed as unlawful sex discrimination.

Nor would such a view of sex discrimination be limited to the employment context. After all, how could a new theory of discrimination and a new meaning of the word "sex" be embraced for Title VII but not for other areas of the law, such as Title IX? This will have consequences for school bathrooms, locker rooms, athletic competitions, dorm rooms, and hotel rooms for overnight field trips. This raises a host of privacy, safety, and equality concerns. The reason we have separate sex-specific private facilities in the first place is not because of "gender identity" but because of the bodily differences between males and females. This privacy concern is particularly acute for victims of sexual assault, who testify that seeing nude male bodies can function as a trigger. As for equality, already female athletes are losing athletic competitions, championships, and recruitment and scholarship opportunities to males identifying as female. And already a complaint has been filed with the Department of Education because a female student was sexually assaulted by a male student in the girls' bathroom. An adverse ruling by the Supreme Court would impose these policies on the entire nation.[14]

Such a ruling would also create particular challenges for faith-based employers and institutions. Faith-based schools would have to provide married student housing to same-sex couples or risk liability for sex discrimination. If they have single-sex dorms, then they would have to allow males who identify as

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[14] *See* Ryan T. Anderson, *A Brave New World of Transgender Policy*, 41 HARV. J.L. & PUB. POL'Y 309–14, 320–37 (2018).

women to live in the women's dorm and vice versa. Faith-based adoption agencies would have to place children with same-sex couples rather than with married mothers and fathers. And while the Ministerial Exception would provide some protection for faith-based institutions to hire for mission, there would be new—endless—litigation challenging adverse employment decisions where staffers do not share the convictions about sexuality.[15] This would also extend to the healthcare domain. Not just about the healthcare benefits that faith-based employers offer their employees but also what healthcare procedures physicians and hospitals must offer and what insurance must cover.

Redefining "sex" and forming a new approach to discrimination would not be limited to Title VII but to similar federal laws (such as Title IX as discussed above) and regulations that incorporate or refer to them (such as the Affordable Care Act). To be sure, this new approach would not require all physicians to perform transitions; but a surgeon who performs hysterectomies for cancer would also be required to perform them for sex-reassignment purposes, and an endocrinologist who administers testosterone for men with low testosterone would also have to do so for women who want to identify as men.

And because the Court would formulate this approach and not Congress, individual rights and ethics-based professions would immediately come under

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[15] DEBATING RELIGIOUS LIBERTY AND DISCRIMINATION, at 111–21.

attack. Without a legislative body that could craft a law that balances competing interests, there would be no exemptions for religious liberty and protections for conscience. Nor would best medical judgments be taken into account. Many doctors, after all, think hormonal and surgical transition procedures are bad medicine. Indeed, many doctors consider the appropriate medical response to gender dysphoria is one directed at the mind and the emotions, not at the body.[16]

In general, embracing Respondents' theory would weaponize the *Obergefell* decision to treat "decent and honorable" disagreement about marriage as sex discrimination. 135 S. Ct. at 2602. It would treat disagreement about human embodiment as male and female as sex discrimination. And it would turn our nation's cherished civil rights statutes into swords to persecute people with the wrong beliefs about human sexuality. Antidiscrimination laws should be understood as *shields* to protect citizens from unjust discrimination, *not as swords* imposing a sexual orthodoxy on the nation.[17] This Court should not treat biology as bigotry.

[16] *See Brave New World*, at 309–14, 349–51; WHEN HARRY BECAME SALLY, at 175–203.

[17] *See* Ryan T. Anderson, *Shields, Not Swords*, NAT'L AFF. (March 21, 2018).

CONCLUSION

For the foregoing reasons, this Court should reverse the judgments of the Second and Sixth Circuits.

Respectfully submitted,

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