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Section 1: Moot Court: Bostock v. Clayton County, Georgia; Altitude Express, Inc. v. Zarda

Institute of Bill of Rights Law at the William & Mary Law School

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Bostock v. Clayton County, Georgia

Ruling Below: *Bostock v. Clayton Cty. Bd. of Comm'rs*, 723 Fed. Appx. 964 (11th Cir. 2018)

Overview: Bostock brings employment discrimination suit under Title VII of the Civil Rights Act of 1964. He argued that the County discriminated against him based on sexual orientation and gender stereotyping. The County contends that Bostock was terminated due to the improper handling of CASA funds. The district court dismissed based on failure to state a claim.

Issue: Whether discrimination against an employee because of sexual orientation constitutes prohibited employment discrimination "because of . . . sex" within the meaning of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2.

Gerald Lynn BOSTOCK, *Plaintiffs—Appellant*

v.

CLAYTON COUNTY Board of Commissions, *Defendant*, Clayton County, *Defendant—Appellee*

United States Court of Appeals, Eleventh Circuit

Decided on May 10, 2018

[Excerpt; some citations and footnotes omitted]

TJOFLAT, WILSON, and NEWSOM, Circuit Judges, PER CURIAM:

Gerald Lynn Bostock appeals the district court's dismissal of his employment discrimination suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2(a)(1), against Clayton County, Georgia, for failure to state a claim. On appeal, Bostock argues that the County discriminated against him based on sexual orientation and gender stereotyping. After a careful review of the record and the parties' briefs, we affirm. "We review de novo the district court's grant of a motion to dismiss under [Fed. R. Civ. P.] 12(b)(6) for failure to state a claim, accepting the allegations in the complaint as true and construing them in the light most favorable to the plaintiff." Issues not briefed on appeal are deemed abandoned. Title VII prohibits employers from discriminating against employees on the basis of their sex. 42 U.S.C. §2000e-2(a). This circuit has previously held that "[d]ischarge for homosexuality is not prohibited by Title VII." And we recently confirmed that Blum remains binding precedent in this circuit. In *Evans*, we specifically rejected the argument that Supreme Court precedent in *Oncale v.*

Sundowner Offshore Servs., and *Price Waterhouse v. Hopkins*, supported a cause of action for sexual orientation discrimination under Title VII.

As an initial matter, Bostock has abandoned any challenge to the district court's dismissal of his gender stereotyping claim under *Glenn* because he does not specifically appeal the dismissal of this claim. Moreover, the district court did not err in dismissing Bostock's complaint for sexual orientation discrimination under Title VII because our holding in *Evans* forecloses Bostock's claim. And under our prior panel precedent rule, we cannot overrule a prior panel's holding, regardless of whether we think it was wrong, unless an intervening Supreme Court or Eleventh Circuit en banc decision is issued.

AFFIRMED.

Altitude Express, Inc. v. Zarda

Ruling Below: *Zarda v. Altitude Express, Inc*., 883 F.3d 100 (2d. Cir. 2018)

Overview: This is a case concerning employment discrimination based on sexual orientation. Don Zarda was terminated from his skydiving business employment after disclosing his sexual orientation to a client. He sued under the New York Human Rights Law and Title VII of the Civil Rights Act of 1964. Zarda claimed that in addition to discrimination based on his sexual orientation, he was also discriminated for his gender. The defendants contend that Zarda's Title VII claim should be dismissed because Zarda repeatedly testified that he believed the termination reason was because of his sexual orientation.

Issue: Whether the prohibition in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), against employment discrimination "because of . . . sex" encompasses discrimination based on an individual's sexual orientation.

Melissa ZARDA, co-independent executor of the estate of Donald Zarda, and William Allen Moore, Jr., co-independent executor of the estate of Donald Zarda, ***Appellant***

v.

ALTITUDE EXPRESS, INC., doing business as Skydive Long Island, and Ray Maynard, ***Appellee***

United States Court of Appeals, Second Circuit

Decided on February 26, 2018

[Excerpt; some citations and footnotes omitted]

KATZMANN, *Chief Judge*:

Donald Zarda, a skydiving instructor, brought a sex discrimination claim under Title VII of the Civil Rights Act of 1964 ("Title VII") alleging that he was fired from his job at Altitude Express, Inc., because he failed to conform to male sex stereotypes by referring to his sexual orientation. Although it is well-settled that gender stereotyping violates Title VII's prohibition on discrimination "because of ... sex," we have previously held that sexual orientation discrimination claims, including claims that being gay or lesbian constitutes nonconformity with a gender stereotype, are not cognizable under Title VII.

At the time *Simonton* and *Dawson* were decided, and for many years since, this view was consistent with the consensus among our sister circuits and the position of the Equal

Employment Opportunity Commission ("EEOC" or "Commission"). But legal doctrine evolves and in 2015 the EEOC held, for the first time, that "sexual orientation is inherently a 'sex-based consideration;' accordingly an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII." Since then, two circuits have revisited the question of whether claims of sexual orientation discrimination are viable under Title VII. In March 2017, a divided panel of the Eleventh Circuit declined to recognize such a claim, concluding that it was bound by *Blum* , 597 F.2d at 938, which "ha[s] not been overruled by a clearly contrary opinion of the Supreme Court or of [the Eleventh Circuit] sitting *en banc* ." One month later, the Seventh Circuit, sitting en banc, took "a fresh look at [its] position in light of developments at the Supreme Court extending over two decades" and held that "discrimination on the basis of sexual orientation is a form of sex discrimination." In addition, a concurring opinion of this Court recently called "for the Court to revisit" this question, emphasizing the "changing legal landscape that has taken shape in the nearly two decades since *Simonton* issued," and identifying multiple arguments that support the conclusion that sexual orientation discrimination is barred by Title VII.

Taking note of the potential persuasive force of these new decisions, we convened en banc to reevaluate *Simonton* and *Dawson* in light of arguments not previously considered by this Court. Having done so, we now hold that Title VII prohibits discrimination on the basis of sexual orientation as discrimination "because of ... sex." To the extent that our prior precedents held otherwise, they are overruled.

We therefore **VACATE** the district court's judgment on Zarda's Title VII claim and **REMAND** for further proceedings consistent with this opinion. We **AFFIRM** the judgment of the district court in all other respects.

BACKGROUND

The facts and procedural history of this case are discussed in detail in our prior panel decision. *See Zarda v. Altitude Express* , 855 F.3d 76, 79–81 (2d Cir. 2017). We recite them only as necessary to address the legal question under consideration.

In the summer of 2010, Donald Zarda, a gay man, worked as a sky-diving instructor at Altitude Express. As part of his job, he regularly participated in tandem skydives, strapped hip-to- hip and shoulder-to-shoulder with clients. In an environment where close physical proximity was common, Zarda's co-workers routinely referenced sexual orientation or made sexual jokes around clients, and Zarda sometimes told female clients about his sexual orientation to assuage any concern they might have about being strapped to a man for a tandem skydive. That June, Zarda told a female client with whom he was preparing for a tandem skydive that he was gay "and ha[d] an ex- husband to prove it." Although he later said this disclosure was intended simply to preempt any discomfort the client may have felt in being strapped to the body of an unfamiliar man, the client alleged that Zarda inappropriately touched her and disclosed his

sexual orientation to excuse his behavior. After the jump was successfully completed, the client told her boyfriend about Zarda's alleged behavior and reference to his sexual orientation; the boyfriend in turn told Zarda's boss, who fired shortly Zarda thereafter. Zarda denied inappropriately touching the client and insisted he was fired solely because of his reference to his sexual orientation.

One month later, Zarda filed a discrimination charge with the EEOC concerning his termination. Zarda claimed that "in addition to being discriminated against because of [his] sexual orientation, [he] was also discriminated against because of [his] gender." In particular, he claimed that "[a]ll of the men at [his workplace] made light of the intimate nature of being strapped to a member of the opposite sex," but that he was fired because he "honestly referred to [his] sexual orientation and did not conform to the straight male macho stereotype."

In September 2010, Zarda brought a lawsuit in federal court alleging, *inter alia* , sex stereotyping in violation of Title VII and sexual orientation discrimination in violation of New York law. Defendants moved for summary judgment arguing that Zarda's Title VII claim should be dismissed because, although "Plaintiff testifie[d] repeatedly that he believe[d] the reason he was terminated [was] because of his sexual orientation ... [,] under Title VII, a gender stereotype cannot be predicated on sexual orientation." In March 2014, the district court granted summary judgment to the defendants on the Title VII claim. As relevant here, the district court concluded that, although there was sufficient evidence to permit plaintiff to proceed with his claim for sexual orientation discrimination under New York law, plaintiff had failed to establish a prima facie case of gender stereotyping discrimination under Title VII.

While Zarda's remaining claims were still pending, the EEOC decided *Baldwin,* holding that "allegations of discrimination on the basis of sexual orientation necessarily state a claim of discrimination on the basis of sex." The Commission identified three ways to illustrate what it described as the "inescapable link between allegations of sexual orientation discrimination and sex discrimination." First, sexual orientation discrimination, such as suspending a lesbian employee for displaying a photo of her female spouse on her desk while not suspending a man for displaying a photo of his female spouse, "is sex discrimination because it necessarily entails treating an employee less favorably because of the employee's sex." Second, it is "associational discrimination" because "an employee alleging discrimination on the basis of sexual orientation is alleging that his or her employer took his or her sex into account by treating him or her differently for associating with a person of the same sex." Lastly, sexual orientation discrimination "necessarily involves discrimination based on gender stereotypes," most commonly "heterosexually defined gender norms." Shortly thereafter, Zarda moved to have his Title VII claim reinstated based on *Baldwin* . But, the district court denied the motion, concluding that *Simonton* remained binding precedent.

Zarda's surviving claims, which included his claim for sexual orientation discrimination under New York law, went to trial, where defendants prevailed. After judgment was entered for the defendants, Zarda appealed. As relevant here, Zarda argued that *Simonton* should be overturned because the EEOC's reasoning in *Baldwin* demonstrated that *Simonton* was incorrectly decided. By contrast, defendants argued that the court did not need to reach that issue because the jury found that they had not discriminated based on sexual orientation.

The panel held that "Zarda's [federal] sex-discrimination claim [was] properly before [it] because [his state law claim was tried under] a higher standard of causation than required by Title VII." However, the panel "decline[d] Zarda's invitation to revisit our precedent," which "can only be overturned by the entire Court sitting in banc." The Court subsequently ordered this rehearing en banc to revisit *Simonton* and *Dawson* 's holdings that claims of sexual orientation discrimination are not cognizable under Title VII.

DISCUSSION

I. JURISDICTION

We first address the defendants' challenge to our jurisdiction. Article III of the Constitution grants federal courts the authority to hear only "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1. As a result, "a federal court has neither the power to render advisory opinions nor 'to decide questions that cannot affect the rights of litigants in the case before them.' " The defendants argue that any decision on the merits would be an advisory opinion because Zarda did not allege sexual orientation discrimination in his EEOC charge or his federal complaint and therefore the question of whether Title VII applies to sexual orientation discrimination is not properly before us.

Irrespective of whether defendants' argument is actually jurisdictional, its factual premises are patently contradicted by both the record and the position defendants advanced below. Zarda's EEOC complaint explained that he was "making this charge because, in addition to being discriminated against because of [his] sexual orientation, [he] was also discriminated against because of [his] gender." Zarda specified that his supervisor "was hostile to any expression of [his] sexual orientation that did not conform to sex stereotypes," and alleged that he "was fired ... because ... [he] honestly referred to [his] sexual orientation and did not conform to the straight male macho stereotype." Zarda repeated this claim in his federal complaint, contending that he was "an openly gay man" who was "discharge[ed] because of a homophobic customer" and "because his behavior did not conform to sex stereotypes," in violation of Title VII.

Defendants plainly understood Zarda's complaint to have raised a claim for sexual orientation discrimination under Title VII. In their motion for summary judgment, defendants argued that Zarda's claim "relies on the fact that Plaintiff is homosexual, not that he failed to comply with male gender norms. Thus, Plaintiff merely attempts to bring a defective sexual orientation claim

under Title VII, which is legally invalid." The district court ultimately agreed.

Having interpreted Zarda's Title VII claim as one for sexual orientation discrimination for purposes of insisting that the claim be dismissed, defendants cannot now argue that there is no sexual orientation claim to prevent this Court from reviewing the basis for the dismissal. Both defendants and the district court clearly understood that Zarda had alleged sexual orientation discrimination under Title VII. As a result, Zarda's Title VII claim is neither unexhausted nor unpled, and so it may proceed.

II. SEXUAL ORIENTATION DISCRIMINATION

A. The Scope of Title VII

"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." The text of Title VII provides, in relevant part:

> It shall be an unlawful employment practice for an employer ... to fail or refuse to hire or to discharge ... or otherwise to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin ....

This "broad rule of workplace equality," "strike[s] at the entire spectrum of disparate treatment" based on protected characteristics, "regardless of whether the discrimination is directed against majorities or minorities." As a result, we have stated that "Title VII should be interpreted broadly to achieve equal employment opportunity."

In deciding whether Title VII prohibits sexual orientation discrimination, we are guided, as always, by the text and, in particular, by the phrase "because of ... sex." However, in interpreting this language, we do not write on a blank slate. Instead, we must construe the text in light of the entirety of the statute as well as relevant precedent. As defined by Title VII, an employer has engaged in "impermissible consideration of ... sex ... in employment practices" when "sex ... was a motivating factor for any employment practice," irrespective of whether the employer was also motivated by "other factors." Accordingly, the critical inquiry for a court assessing whether an employment practice is "because of ... sex" is whether sex was "a motivating factor."

Recognizing that Congress intended to make sex "irrelevant" to employment decisions, *Griggs* , the Supreme Court has held that Title VII prohibits not just discrimination based on sex itself, but also discrimination based on traits that are a function of sex, such as life expectancy, *Manhart*, and non-conformity with gender norms, *Price Waterhouse*. As this Court has recognized, "any meaningful regime of antidiscrimination law must encompass such claims" because, if an employer is " '[f]ree to add non-sex factors, the rankest sort of discrimination' " could be worked against employees by using traits that are associated with sex as a proxy for sex. Applying Title

VII to traits that are a function of sex is consistent with the Supreme Court's view that Title VII covers not just "the principal evil[s] Congress was concerned with when it enacted" the statute in 1964, but also "reasonably comparable evils" that meet the statutory requirements.

With this understanding in mind, the question before us is whether an employee's sex is necessarily a motivating factor in discrimination based on sexual orientation. If it is, then sexual orientation discrimination is properly understood as "a subset of actions taken on the basis of sex."

B. Sexual Orientation Discrimination as a Subset of Sex Discrimination

We now conclude that sexual orientation discrimination is motivated, at least in part, by sex and is thus a subset of sex discrimination. Looking first to the text of Title VII, the most natural reading of the statute's prohibition on discrimination "because of ... sex" is that it extends to sexual orientation discrimination because sex is necessarily a factor in sexual orientation. This statutory reading is reinforced by considering the question from the perspective of sex stereotyping because sexual orientation discrimination is predicated on assumptions about how persons of a certain sex can or should be, which is an impermissible basis for adverse employment actions. In addition, looking at the question from the perspective of associational discrimination, sexual orientation discrimination —which is motivated by an employer's opposition to romantic association between particular sexes—is discrimination based on the employee's own sex.

1. Sexual Orientation as a Function of Sex

a. "Because of ... sex"

We begin by considering the nature of sexual orientation discrimination. The term "sexual orientation" refers to "[a] person's predisposition or inclination toward sexual activity or behavior with other males or females" and is commonly categorized as "heterosexuality, homosexuality, or bisexuality." To take one example, "homosexuality" is "characterized by sexual desire for a person of the same sex." To operationalize this definition and identify the sexual orientation of a particular person, we need to know the sex of the person and that of the people to whom he or she is attracted. Because one cannot fully define a person's sexual orientation without identifying his or her sex, sexual orientation is a function of sex. Indeed sexual 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. Logically, because sexual orientation is a function of sex and sex is a protected characteristic under Title VII, it follows that sexual orientation is also protected.

Choosing not to acknowledge the sex-dependent nature of sexual orientation, certain *amici* contend that employers discriminating on the basis of sexual orientation can do so without reference to sex. In support of this assertion, they point to *Price Waterhouse* , where the Supreme Court

observed that one way to discern the motivation behind an employment decision is to consider whether, "if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be" the applicant or employee's sex. Relying on this language, these *amici* argue that a "truthful" response to an inquiry about why an employee was fired would be "I fired him because he is gay," not "I fired him because he is a man." But this semantic sleight of hand is not a defense; it is a distraction. 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. For purposes of Title VII, firing a man because he is attracted to men is a decision motivated, at least in part, by sex. More broadly, were this Court to credit *amici* 's argument, employers would be able to rebut a discrimination claim by merely characterizing their action using alternative terminology. Title VII instructs courts to examine employers' motives, not merely their choice of words. As a result, firing an employee because he is "gay" is a form of sex discrimination.

The argument has also been made that it is not "even remotely plausible that in 1964, when Title VII was adopted, a reasonable person competent in the English language would have understood that a law banning employment discrimination 'because of sex' also banned discrimination because of sexual orientation[.]" Even if that were so, the same could also be said of multiple forms of discrimination that are indisputably prohibited by Title VII, as the Supreme Court and lower courts have determined. Consider, for example, sexual harassment and hostile work environment claims, both of which were initially believed to fall outside the scope of Title VII's prohibition.

In 1974, a district court dismissed a female employee's claim for sexual harassment reasoning that "[t]he substance of [her] complaint [was] that she was discriminated against, not because she was a woman, but because she refused to engage in a sexual affair with her supervisor." The district court concluded that this conduct, although "inexcusable," was "not encompassed by [Title VII]." The D.C. Circuit reversed. Unlike the district court, it recognized that the plaintiff "became the target of her supervisor's sexual desires *because she was a woman* ." (emphasis added). As a result the D.C. Circuit held that "gender cannot be eliminated from [plaintiff's formulation of her claim] and that formulation advances a prima facie case of sex discrimination within the purview of Title VII" because "it is enough that gender is a factor contributing to the discrimination." Today, the Supreme Court and lower courts "uniformly" recognize sexual harassment claims as a violation of Title VII, notwithstanding the fact that, as evidenced by the district court decision in *Barnes* , this was not necessarily obvious from the face of the statute.

The Supreme Court has also acknowledged that a "hostile work environment," although it "do[es] not appear in the statutory text," violates Title VII by affecting the "psychological aspects of the workplace environment[.]"As Judge Goldberg, one of the early proponents of hostile work

environment claims, explained in a case involving national origin discrimination,

> [Title VII's] language evinces a Congressional intention to define discrimination in the broadest possible terms. 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.

Stated differently, because 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.

The Supreme Court gave voice to this principle of construction when it held that Title VII barred male-on-male sexual harassment, which "was assuredly not the principal evil Congress was concerned with when it enacted Title VII," and which few people in 1964 would likely have understood to be covered by the statutory text. But the Court was untroubled by these facts. "[S]tatutory prohibitions," it explained, "often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." Applying this reasoning to the question at hand, the fact that Congress might not have contemplated that discrimination "because of ... sex" would encompass sexual orientation discrimination does not limit the reach of the statute.

The dissent disagrees with this conclusion. It does not dispute our definition of the word "sex," nor does it argue that this word had a different meaning in 1964. Instead, it charges us with "misconceiv[ing] the fundamental public meaning of the language of" Title VII. at 143 (emphasis omitted). According to the dissent, the drafters included "sex" in Title VII to "secure the rights of women to equal protection in employment," and had no intention of prohibiting sexual orientation discrimination. We take no position on the substance of the dissent's discussion of the legislative history or the zeitgeist of the 1960s, but we respectfully disagree with its approach to interpreting Title VII as well as its conclusion that sexual orientation discrimination is not a "reasonably comparable evil," to sexual harassment and male-on-male harassment. Although legislative history most certainly has its uses, in ascertaining statutory meaning in a Title VII case, *Oncale* specifically rejects reliance on "the principal concerns of our legislators," —the centerpiece of the dissent's statutory analysis. Rather, *Oncale* instructs that the text is the lodestar of statutory interpretation, emphasizing that we are governed "by the provisions of our laws." The text before us uses broad language, prohibiting discrimination "because of ... sex," which Congress defined as making sex "a motivating factor." We give these words their full scope and conclude that, because sexual orientation discrimination is a function of sex, and is comparable to sexual harassment,

gender stereotyping, and other evils long recognized as violating Title VII, the statute must prohibit it.

b. "But for" an Employee's Sex

Our conclusion is reinforced by the Supreme Court's test for determining whether an employment practice constitutes sex discrimination. This approach, which we call the "comparative test," determines whether the trait that is the basis for discrimination is a function of sex by asking whether an employee's treatment would have been different "but for that person's sex." To illustrate its application to sexual orientation, consider the facts of the recent Seventh Circuit case addressing a Title VII claim brought by Kimberly Hively, a lesbian professor who alleged that she was denied a promotion because of her sexual orientation. Accepting that allegation as true at the motion-to-dismiss stage, the Seventh Circuit compared Hively, a female professor attracted to women (who was denied a promotion), with a hypothetical scenario in which Hively was a male who was attracted to women (and received a promotion). Under this scenario, the Seventh Circuit concluded that, as alleged, Hively would not have been denied a promotion but for her sex, and therefore sexual orientation is a function of sex. From this conclusion, it follows that sexual orientation discrimination is a subset of sex discrimination.

The government, drawing from the dissent in *Hively,* argues that this is an improper comparison. According to this argument, rather than "hold[ing] everything constant except the plaintiff's sex" the *Hively* majority's comparison changed "two variables—the plaintiff's sex and sexual orientation." In other words, the Seventh Circuit compared a lesbian woman with a heterosexual man. As an initial matter, this observation helpfully illustrates that sexual orientation is a function of sex. In the comparison, changing Hively's sex changed her sexual orientation. Case in point.

But the real issue raised by the government's critique is the proper application of the comparative test. In the government's view, the appropriate comparison is not between a woman attracted to women and a man attracted to women; it's between a woman and a man, both of whom are attracted to people of the same sex. Determining which of these framings is correct requires understanding the purpose and operation of the comparative test. Although the Supreme Court has not elaborated on the role that the test plays in Title VII jurisprudence, based on how the Supreme Court has employed the test, we understand that its purpose is to determine when a trait other than sex is, in fact, a proxy for (or a function of) sex. To determine whether a trait is such a proxy, the test compares a female and a male employee who both exhibit the trait at issue. In the comparison, the trait is the control, sex is the independent variable, and employee treatment is the dependent variable.

To understand how the test works in practice, consider *Manhart*. There, the Supreme Court evaluated the Los Angeles Department of Water's requirement that female employees make larger pension contributions than their male colleagues. This requirement was based on mortality data indicating that female

employees outlived male employees by several years and the employer insisted that "the different contributions exacted from men and women were based on the factor of longevity rather than sex." Applying "the simple test of whether the evidence shows treatment of a person in a manner which *but for* that person's sex would be different," the Court compared a woman and a man, both of whose pension contributions were based on life expectancy, and asked whether they were required to make different contributions. Importantly, because life expectancy is a sex-dependent trait, changing the sex of the employee (the independent variable) necessarily affected the employee's life expectancy and thereby changed how they were impacted by the pension policy (the dependent variable). After identifying this correlation, the Court concluded that life expectancy was simply a proxy for sex and therefore the pension policy constituted discrimination "because of ... sex."

We can also look to the Supreme Court's decision in *Price Waterhouse.* Although that case did not quote *Manhart* 's "but for" language, it involved a similar inquiry: in determining whether discrimination based on particular traits was rooted in sex stereotypes, the Supreme Court asked whether a female accountant would have been denied a promotion based on her aggressiveness and failure to wear jewelry and makeup "if she had been a man." Otherwise said, the Supreme Court compared a man and a woman who exhibited the plaintiff's traits and asked whether they would have experienced different employment outcomes. Notably, being aggressive and not wearing jewelry or makeup is consistent with gender stereotypes for men. Therefore, by changing the plaintiff's gender, the Supreme Court also changed the plaintiff's gender no conformity. The government's proposed approach to *Hively,* which would compare a woman attracted to people of the same sex with a man attracted to people of the same sex, adopts the wrong framing. To understand why this is incorrect, consider the mismatch between the facts in the government's comparison and the allegation at issue: Hively did not allege that her employer discriminated against women with same-sex attraction but not men with same-sex attraction. If she had, that would be classic sex discrimination against a subset of women. *See* Lead Dissent at 152 n.20. Instead, Hively claimed that her employer discriminated on the basis of sexual orientation. To address that allegation, the proper question is whether sex is a "motivating factor" in sexual orientation discrimination, or, said more simply, whether sexual orientation is a function of sex. But, contrary to the government's suggestion, this question cannot be answered by comparing two people with the same sexual orientation. That would be equivalent to comparing the gender non-conforming female plaintiff in *Price Waterhouse* to a gender non-conforming man; such a comparison would not illustrate whether a particular stereotype is sex dependent but only whether the employer discriminates against gender non-conformity in only one gender. Instead, just as *Price Waterhouse* compared a gender non-conforming woman to a gender conforming man, both of whom were aggressive and did not wear makeup or jewelry, the *Hively* court properly determined that sexual orientation is sex dependent by comparing a woman and a

man with two different sexual orientations, both of whom were attracted to women.

The government further counters that the comparative test produces false positives in instances where it is permissible to impose different terms of employment on men and women because "the sexes are not similarly situated." For example, the government posits that courts have rejected the comparative test when assessing employer policies regarding sex-segregated bathrooms and different grooming standards for men and women. Similarly, the lead dissent insists that our holding would preclude such policies if "[t]aken to its logical conclusion." Both criticisms are misplaced.

A plaintiff alleging disparate treatment based on sex in violation of Title VII must show two things: (1) that he was "discriminate[d] against ... with respect to his compensation, terms, conditions, or privileges of employment," and (2) that the employer discriminated "because of ... sex." The comparative test addresses the second prong of that test; it reveals whether an employment practice is "because of ... sex" by asking whether the trait at issue (life expectancy, sexual orientation, etc.) is a function of sex. In contrast, courts that have addressed challenges to the sex-specific employment practices identified by the government have readily acknowledged that the policies are based on sex and instead focused their analysis on the first prong: whether the policies impose "disadvantageous terms or conditions of employment." Whether sex-specific bathroom and grooming policies impose disadvantageous terms or conditions is a separate question from this Court's inquiry into whether sexual orientation discrimination is "because of ... sex," and has no bearing on the efficacy of the comparative test.

Having addressed the proper application of the comparative test, we conclude that the law is clear: To determine whether a trait operates as a proxy for sex, we ask whether the employee would have been treated differently "but for" his or her sex. In the context of sexual orientation, a woman who is subject to an adverse employment action because she is attracted to women would have been treated differently if she had been a man who was attracted to women. We can therefore conclude that sexual orientation is a function of sex and, by extension, sexual orientation discrimination is a subset of sex discrimination.

2. Gender Stereotyping

Viewing the relationship between sexual orientation and sex through the lens of gender stereotyping provides yet another basis for concluding that sexual orientation discrimination is a subset of sex discrimination. Specifically, this framework demonstrates that sexual orientation discrimination is almost invariably rooted in stereotypes about men and women.

Since 1978, the Supreme Court has recognized that "employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females," because Title VII "strike[s] at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." This is true of stereotypes

about both how the sexes are and how they should be.

In *Price Waterhouse*, the Supreme Court concluded that adverse employment actions taken based on the belief that a female accountant should walk, talk, and dress femininely constituted impermissible sex discrimination. Similarly, *Manhart* stands for the proposition that "employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females," and held that female employees could not, by virtue of their status as women, be discriminated against based on the gender stereotype that women generally outlive men. Under these principles, employees who experience adverse employment actions as a result of their employer's generalizations about members of their sex, or "as a result of their employer's animus toward their exhibition of behavior considered to be stereotypically inappropriate for their gender may have a claim under Title VII[.]"

Accepting that sex stereotyping violates Title VII, the "crucial question" is "[w]hat constitutes a gender-based stereotype." As demonstrated by *Price Waterhouse,* one way to answer this question is to ask whether the employer who evaluated the plaintiff in "sex-based terms would have criticized her as sharply (or criticized her at all) if she had been a man." Similarly, this Court has observed that the question of whether there has been improper reliance on sex stereotypes can sometimes be answered by considering whether the behavior or trait at issue would have been viewed more or less favorably if the employee were of a different sex.

Applying *Price Waterhouse* 's reasoning to sexual orientation, we conclude that when, for example, "an employer ... acts on the basis of a belief that [men] cannot be [attracted to men], or that [they] must not be," but takes no such action against women who are attracted to men, the employer "has acted on the basis of gender." This conclusion is consistent with *Hively* 's holding that same-sex orientation "represents the ultimate case of failure to conform" to gender stereotypes, and aligns with numerous district courts' observation that "stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women. ... The gender stereotype at work here is that 'real' men should date women, and not other men,"

This conclusion is further reinforced by the unworkability of *Simonton* and *Dawson* 's holding that sexual orientation discrimination is not a product of sex stereotypes. Lower courts operating under this standard have long labored to distinguish between gender stereotypes that support an inference of impermissible sex discrimination and those that are indicative of sexual orientation discrimination. Under this approach "a woman might have a Title VII claim if she was harassed or fired for being perceived as too 'macho' but not if she was harassed or fired for being perceived as a lesbian." In parsing the evidence, courts have resorted to lexical bean counting, comparing the relative frequency of epithets such as "ass wipe," "fag," "gay," "queer," "real man," and "fem" to determine whether discrimination is based on sex or sexual orientation. Claims of

gender discrimination have been "especially difficult for gay plaintiffs to bring," because references to a plaintiff's sexual orientation are generally excluded from the evidence, *Boutillier*, or permitted only when "the harassment consists of homophobic slurs directed at a *heterosexual*[.]" Unsurprisingly, many courts have found these distinctions unworkable, admitting that the doctrine is "illogical," and produces "untenable results," In the face of this pervasive confusion, we are persuaded that "the line between sex discrimination and sexual orientation discrimination is 'difficult to draw' because that line does not exist save as a lingering and faulty judicial construct." We now conclude that sexual orientation discrimination is rooted in gender stereotypes and is thus a subset of sex discrimination.

The government resists this conclusion, insisting that negative views of those attracted to members of the same sex may not be based on views about gender at all, but may be rooted in "moral beliefs about sexual, marital and familial relationships." But this argument merely begs the question by assuming that moral beliefs about sexual orientation can be dissociated from beliefs about sex. Because sexual orientation is a function of sex, this is simply impossible. Beliefs about sexual orientation necessarily take sex into consideration and, by extension, moral beliefs about sexual orientation are necessarily predicated, in some degree, on sex. For this reason, it makes no difference that the employer may not believe that its actions are based in sex. In *Manhart,* for example, the employer claimed its policy was based on longevity, not sex, but the Supreme Court concluded that, irrespective of the employer's belief, the longevity metric was predicated on assumptions about sex. The same can be said of sexual orientation discrimination.

To be clear, our conclusion that moral beliefs regarding sexual orientation are based on sex does not presuppose that those beliefs are necessarily animated by an invidious or evil motive. For purposes of Title VII, any belief that depends, even in part, on sex, is an impermissible basis for employment decisions. This is true irrespective of whether the belief is grounded in fact, as in *Manhart*, or lacks "a malevolent motive," Indeed, in *Johnson Controls,* the Supreme Court concluded that an employer violated Title VII by excluding fertile women from jobs that involved exposure to high levels of lead, which can adversely affect the development of a fetus. As the Court emphasized, "[t]he beneficence of an employer's purpose does not undermine the conclusion that an explicit gender-based policy is sex discrimination" under Title VII. Here, because sexual orientation is a function of sex, beliefs about sexual orientation, including moral ones, are, in some measure, "because of ... sex." The government responds that, even if discrimination based on sexual orientation reflects a sex stereotype, it is not barred by *Price Waterhouse* because it treats women no worse than men. We believe the government has it backwards. *Price Waterhouse,* read in conjunction with *Oncale*, stands for the proposition that employers may not discriminate against women or men who fail to conform to conventional gender norms. It follows that the employer in *Price Waterhouse* could not have defended itself by claiming that it fired a gender-non-

conforming man as well as a gender-non-conforming woman any more than it could persuasively argue that two wrongs make a right. To the contrary, this claim would merely be an admission that the employer has doubly violated Title VII by using gender stereotypes to discriminate against both men and women. By the same token, an employer who discriminates against employees based on assumptions about the gender to which the employees can or should be attracted has engaged in sex-discrimination irrespective of whether the employer uses a double-edged sword that cuts both men and women.

3. Associational Discrimination

The conclusion that sexual orientation discrimination is a subset of sex discrimination is further reinforced by viewing this issue through the lens of associational discrimination. Consistent with the nature of sexual orientation, in most contexts where an employer discriminates based on sexual orientation, the employer's decision is predicated on opposition to romantic association between particular sexes. For example, when an employer fires a gay man based on the belief that men should not be attracted to other men, the employer discriminates based on the employee's own sex.

This Court recognized associational discrimination as a violation of Title VII in *Holcomb v. Iona College*, a case involving allegations of racial discrimination. Holcomb, a white man, alleged that he was fired from his job as the assistant coach of a college basketball team because his employer disapproved of his marriage to a black woman. This Court concluded that Holcomb had stated a viable claim, holding that "an employer may violate Title VII if it takes action against an employee because of the employee's association with a person of another race." Although the Court considered the argument that the alleged discrimination was based on the race of Holcomb's wife rather than his own, it ultimately concluded that "where an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's *own* race."

Applying similar reasoning, the Fifth, Sixth, and Eleventh Circuits have reached the same conclusion in racial discrimination cases. Other circuits have indicated that associational discrimination extends beyond race to all of Title VII's protected classes. We agree and we now hold that the prohibition on associational discrimination applies with equal force to all the classes protected by Title VII, including sex.

This conclusion is consistent with the text of Title VII, which "on its face treats each of the enumerated categories exactly the same" such that "principles ... announce[d]" with respect to sex discrimination "apply with equal force to discrimination based on race, religion, or national origin," and vice versa. It also accords with the Supreme Court's application of theories of discrimination developed in Title VII race discrimination cases to claims involving discrimination based on sex.

As was observed in *Christiansen,* "[p]utting aside romantic associations," the notion that

employees should not be discriminated against because of their association with persons of a particular sex "is not controversial." If an employer disapproves of close friendships among persons of opposite sexes and fires a female employee because she has male friends, the employee has been discriminated against because of her own sex. "Once we accept this premise, it makes little sense to carve out same-sex [romantic] relationships as an association to which these protections do not apply." Applying the reasoning of *Holcomb,* if a male employee married to a man is terminated because his employer disapproves of same-sex marriage, the employee has suffered associational discrimination based on his own sex because "the fact that the employee is a man instead of a woman motivated the employer's discrimination against him."

In this scenario, it is no defense that an employer requires both men and women to refrain from same-sex attraction or relationships. In *Holcomb,* for example, the white plaintiff was fired for his marriage to a black woman. If the facts of *Holcomb* had also involved a black employee fired for his marriage to a white woman, would we have said that because both the white employee and black employee were fired for their marriages to people of different races, there was no discrimination "because of ... race"? Of course not. It is unthinkable that "tak[ing] action against an employee because of the employee's association with a person of another race," would be excused because two employees of different races were both victims of an anti- miscegenation workplace policy. The same is true of discrimination based on sexual orientation.

Although this conclusion can rest on its own merits, it is reinforced by the reasoning of *Loving v. Virginia*. In *Loving* , the Commonwealth of Virginia argued that anti-miscegenation statutes did not violate the Equal Protection Clause because such statutes applied equally to white and black citizens. The Supreme Court disagreed, holding that "equal application" could not save the statute because it was based "upon distinctions drawn according to race." Constitutional cases like *Loving* "can provide helpful guidance in [the] statutory context" of Title VII. Accordingly, we find that *Loving* 's insight—that policies that distinguish according to protected characteristics cannot be saved by equal application—extends to association based on sex.

Certain *amici* supporting the defendants disagree, arguing that applying *Holcomb* and *Loving* to same-sex relationships is not warranted because anti-miscegenation policies are motivated by racism, while sexual orientation discrimination is not rooted in sexism. Although these *amici* offer no empirical support for this contention, *amici* supporting Zarda cite research suggesting that sexual orientation discrimination has deep misogynistic roots. But the Court need not resolve this dispute because the *amici* supporting defendants identify no cases indicating that the scope of Title VII's protection against sex discrimination is limited to discrimination motivated by what would colloquially be described as sexism. To the contrary, this approach is squarely foreclosed by the Supreme Court's precedents. In *Oncale*, the Court explicitly rejected the argument that Title VII did not protect male employees

from sexual harassment by male co-workers, holding that "Title VII's prohibition on discrimination 'because of ... sex' protects men as well as women" and extends to instances where the "plaintiff and the defendant ... are of the same sex." This male-on-male harassment is well-outside the bounds of what is traditionally conceptualized as sexism. Similarly, as we have discussed, in *Manhart* the Court invalidated a pension scheme that required female employees to contribute more than their male counterparts because women generally live longer than men. Again, the Court reached this conclusion notwithstanding the fact that some people might not describe this policy as sexist. By extension, even if sexual orientation discrimination does not evince conventional notions of sexism, this is not a legitimate basis for concluding that it does not constitute discrimination "because of ... sex."

The fallback position for those opposing the associational framework is that associational discrimination can be based only on acts—such as Holcomb's act of getting married—whereas sexual orientation is a status. As an initial matter, the Supreme Court has rejected arguments that would treat acts as separate from status in the context of sexual orientation. In *Lawrence v. Texas,* the state argued that its "sodomy law [did] not discriminate against homosexual persons," but "only against homosexual conduct." Justice O'Connor refuted this argument, reasoning that laws that target "homosexual conduct" are "an invitation to subject homosexual persons to discrimination." More recently, in a First Amendment case addressing whether a public university could require student organizations to be open to all students, a religious student organization claimed that it should be permitted to exclude anyone who engaged in "unrepentant homosexual conduct," because such individuals were being excluded "on the basis of a conjunction of [their] conduct and [their] belief that the conduct is not wrong," not because of their sexual orientation. Drawing on *Lawrence* and *Bray v. Alexandria Women's Health Clinic* , the Supreme Court rejected the invitation to treat discrimination based on acts as separate from discrimination based on status. Although *amici* 's argument inverts the previous defenses of policies targeting individuals attracted to persons of the same sex by arguing that Title VII's prohibition of associational discrimination protects only acts, not status, their proposed distinction is equally unavailing. More fundamentally, *amici* 's argument is an inaccurate characterization of associational discrimination. First, the source of the Title VII claim is not the employee's associational act but rather the employer's discrimination, which is motivated by "disapprov[al] of [a particular type of] association." In addition, as it pertains to the employee, what is protected is not the employee's act but rather the employee's protected characteristic, which is a status. Accordingly, associational discrimination is not limited to acts; instead, as with all other violations of Title VII, associational discrimination runs afoul of the statute by making the employee's protected characteristic a motivating factor for an adverse employment action.

In sum, we see no principled basis for recognizing a violation of Title VII for associational discrimination based on race

but not on sex. Accordingly, we hold that sexual orientation discrimination, which is based on an employer's opposition to association between particular sexes and thereby discriminates against an employee based on their own sex, constitutes discrimination "because of ... sex." Therefore, it is no less repugnant to Title VII than anti-miscegenation policies.

C. Subsequent Legislative Developments

Although the conclusion that sexual orientation discrimination is a subset of sex discrimination follows naturally from existing Title VII doctrine, the *amici* supporting the defendants place substantial weight on subsequent legislative developments that they argue militate against interpreting "because of ... sex" to include sexual orientation discrimination. Having carefully considered each of *amici* 's arguments, we find them unpersuasive.

First, the government points to the Civil Rights Act of 1991, arguing that this amendment to Title VII ratified judicial decisions construing discrimination "because of ... sex" as excluding sexual orientation discrimination. Among other things, the 1991 amendment expressly "codif[ied] the concepts of 'business necessity' and 'job related' " as articulated in *Griggs*, and rejected the Supreme Court's prior decision on that topic in *Wards Cove Packing Co. v. Atonio.* According to the government, this amendment also implicitly ratified the decisions of the four courts of appeals that had, as of 1991, held that Title VII does not bar discrimination based on sexual orientation.

In advancing this argument, the government attempts to analogize the 1991 amendment to the Supreme Court's recent discussion of an amendment to the Fair Housing Act ("FHA"). In *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.* , the Court considered whether disparate-impact claims were cognizable under the FHA by looking to, *inter alia* , a 1988 amendment to the statute. The Court found it relevant that "all nine Courts of Appeals to have addressed the question" by 1988 "had concluded [that] the [FHA] encompassed disparate-impact claims." When concluding that Congress had implicitly ratified these holdings, the Court considered (1) the amendment's legislative history, which confirmed that "Congress was aware of this unanimous precedent," and (2) the fact that the precedent was directly relevant to the amendment, which "included three exemptions from liability that assume the existence of disparate-impact claims[.]"

The statutory history of Title VII is markedly different. When we look at the 1991 amendment, we see no indication in the legislative history that Congress was aware of the circuit precedents identified by the government and, turning to the substance of the amendment, we have no reason to believe that the new provisions it enacted were in any way premised on or made assumptions about whether sexual orientation was protected by Title VII. It is also noteworthy that, when the statute was amended in 1991, only three of the thirteen courts of appeals had considered whether Title VII prohibited sexual orientation discrimination. Mindful of this important context, this is not an instance where we can conclude that Congress was

aware of, much less relied upon, the handful of Title VII cases discussing sexual orientation. Indeed, the inference suggested by the government is particularly suspect given that the text of the 1991 amendment emphasized that it was "respond[ing] to Supreme Court decisions by *expanding* the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." For these reasons, we do not consider the 1991 amendment to have ratified the interpretation of Title VII as excluding sexual orientation discrimination.

Next, certain *amici* argue that by not enacting legislation expressly prohibiting sexual orientation discrimination in the workplace Congress has implicitly ratified decisions holding that sexual orientation was not covered by Title VII. According to the government's *amicus* brief, almost every Congress since 1974 has considered such legislation but none of these bills became law.

This theory of ratification by silence is in direct tension with the Supreme Court's admonition that "subsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress," particularly when "it concerns, as it does here, a proposal that does not become law." This is because "[i]t is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of [a particular] statutory interpretation." After all, "[t]here are many reasons Congress might not act on a decision ..., and most of them have nothing at all to do with Congress' desire to preserve the decision." For example, Congress may be unaware of or indifferent to the status quo, or it may be unable "to agree upon how to alter the status quo." These concerns ring true here. We do not know why Congress did not act and we are thus unable to choose among the various inferences that could be drawn from Congress's inaction on the bills identified by the government. Accordingly, we decline to assign congressional silence a meaning it will not bear.

Drawing on the dissent in *Hively,* the government also argues that Congress considers sexual orientation discrimination to be distinct from sex discrimination because it has expressly prohibited sexual orientation discrimination in certain statutes but not Title VII. While it is true that Congress has sometimes used the terms "sex" and "sexual orientation" separately, this observation is entitled to minimal weight in the context of Title VII.

The presumptions that terms are used consistently and that differences in terminology denote differences in meaning have the greatest force when the terms are used in "the same act." By contrast, when drafting separate statutes, Congress is far less likely to use terms consistently, and these presumptions are entitled to less force where, as here, the government points to terms used in different statutes passed by different Congresses in different decades. Moreover, insofar as the government argues that mention of "sexual orientation" elsewhere in the U.S. Code is evidence that "because of ... sex" should not be interpreted to include "sexual orientation," our race discrimination jurisprudence demonstrates that this is not dispositive. We have held that Title VII's

prohibition on race discrimination encompasses discrimination on the basis of ethnicity, notwithstanding the fact that other federal statutes now enumerate race and ethnicity separately. The same can be said of sex and sexual orientation because discrimination based on the former encompasses the latter.

In sum, nothing in the subsequent legislative history identified by the *amici* calls into question our conclusion that sexual orientation discrimination is a subset of sex discrimination and is thereby barred by Title VII.

III. SUMMARY

Since 1964, the legal framework for evaluating Title VII claims has evolved substantially. Under *Manhart,* traits that operate as a proxy for sex are an impermissible basis for disparate treatment of men and women. Under *Price Waterhouse,* discrimination on the basis of sex stereotypes is prohibited. Under *Holcomb*, building on *Loving*, it is unlawful to discriminate on the basis of an employee's association with persons of another race. Applying these precedents to sexual orientation discrimination, it is clear that there is "no justification in the statutory language ... for a categorical rule excluding" such claims from the reach of Title VII.

Title VII's prohibition on sex discrimination applies to any practice in which sex is a motivating factor. As explained above, sexual orientation discrimination is a subset of sex discrimination because sexual orientation is *defined* by one's sex in relation to the sex of those to whom one is attracted, making it impossible for an employer to discriminate on the basis of sexual orientation without taking sex into account. Sexual orientation discrimination is also based on assumptions or stereotypes about how members of a particular gender should be, including to whom they should be attracted. Finally, sexual orientation discrimination is associational discrimination because an adverse employment action that is motivated by the employer's opposition to association between members of particular sexes discriminates against an employee on the basis of sex. Each of these three perspectives is sufficient to support this Court's conclusion and together they amply demonstrate that sexual orientation discrimination is a form of sex discrimination.

Although sexual orientation discrimination is "assuredly not the principal evil that Congress was concerned with when it enacted Title VII," "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils." In the context of Title VII, the statutory prohibition extends to all discrimination "because of ... sex" and sexual orientation discrimination is an actionable subset of sex discrimination. We overturn our prior precedents to the contrary to the extent they conflict with this ruling.

***

Zarda has alleged that, by "honestly referr[ing] to his sexual orientation," he failed to "conform to the straight male macho stereotype." For this reason, he has alleged a claim of discrimination of the kind we now

hold cognizable under Title VII. The district court held that there was sufficient evidence of sexual orientation discrimination to survive summary judgment on Zarda's state law claims. Even though Zarda lost his state sexual orientation discrimination claim at trial, that result does not preclude him from prevailing on his federal claim because his state law claim was tried under "a higher standard of causation than required by Title VII." Thus, we hold that Zarda is entitled to bring a Title VII claim for discrimination based on sexual orientation.

CONCLUSION

Based on the foregoing, we **VACATE** the district court's judgment on the Title VII claim and **REMAND** for further proceedings consistent with this opinion. We **AFFIRM** the judgment of the district court in all other respects.

JACOBS, *Circuit Judge*, Concurring:

I concur in Parts I and II.B.3 of the opinion of the Court (Associational Discrimination) and I therefore concur in the result. Mr. Zarda does have a sex discrimination claim under Title VII based on the allegation that he was fired because he was a man who had an intimate relationship with another man. I write separately because, of the several justifications advanced in that opinion, I am persuaded by one; and as to associational discrimination, the opinion of the Court says somewhat more than is necessary to justify it. Since a single justification is sufficient to support the result, I start with associational discrimination, and very briefly explain thereafter why the other grounds leave me unconvinced.

I

Supreme Court law and our own precedents on race discrimination militate in favor of the conclusion that sex discrimination based on one's choice of partner is an impermissible basis for discrimination under Title VII. This view is an extension of existing law, perhaps a cantilever, but not a leap.

First: this Circuit has already recognized associational discrimination as a Title VII violation. In *Holcomb v. Iona Coll.,* we considered a claim of discrimination under Title VII by a white man who alleged that he was fired because of his marriage to a black woman. We held that "an employer may violate Title VII if it takes action against an employee because of the employee's association with a person of another race . . . The reason is simple: where an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's *own* race."

Second: the analogy to same-sex relationships is valid because Title VII "on its face treats each of the enumerated categories exactly the same"; thus principles announced in regard to sex discrimination "apply with equal force to discrimination based on race, religion, or national origin." And, presumably, vice versa.

Third: There is no reason I can see why associational discrimination based on sex would not encompass association between persons of the same sex. In *Oncale v. Sundowner Offshore Servs., Inc., a* case in which a man alleged same-sex harassment, the Supreme Court stated that Title VII

prohibits "'discriminat[ion] . . . because of . . . sex'" and that Title VII "protects men as well as women."

This line of cases, taken together, demonstrates that discrimination based on same-sex relationships is discrimination cognizable under Title VII notwithstanding that the sexual relationship is homosexual.

Zarda's complaint can be fairly read to allege discrimination based on his relationship with a person of the same sex. The allegation is analogous to the claim in *Holcomb*, in which a person of one race was discriminated against on the basis of race because he consorted with a person of a different race. In each instance, the basis for discrimination is disapproval and prejudice as to who is permitted to consort with whom, and the common feature is the sorting: one is the mixing of race and the other is the matching of sex.

This outcome is easy to analogize to *Loving v. Virginia*. While *Loving* was an Equal Protection challenge to Virginia's miscegenation law, the law was held unconstitutional because it impermissibly drew distinctions according to race. In the context of a person consorting with a person of the same sex, the distinction is similarly drawn according to sex, and is therefore unlawful under Title VII.

Amicus Mortara argues that race discrimination aroused by couples of different race is premised on animus against one of the races (based on the idea of white supremacy), and that discrimination against homosexuals is obviously not driven by animus against men or against women. But it cannot be that the protections of Title VII depend on particular races; there are a lot more than two races, and Title VII likewise protects persons who are multiracial. Mr. Mortara may identify analytical differences; but to persons who experience the racial discrimination, it is all one.

Mr. Mortara also argues that discrimination based on homosexual acts and relationships is analytically distinct from discrimination against homosexuals, who have a proclivity on which they may or may not act. Academics may seek to know whether discrimination is illegal if based on same-sex attraction itself: they have jurisdiction over interesting questions, and we do not. But the distinction is not decisive. In any event, the distinction between act and attraction does not arise in this case because Mr. Zarda's termination was sparked by his avowal of a same-sex relationship.

A ruling based on Mr. Zarda's same-sex relationship resolves this appeal; good craft counsels that we go no further. Much of the rest of the Court's opinion amounts to woke dicta.

II

The opinion of the Court characterizes its definitional analysis as "the most natural reading of Title VII." Not really. "Sex," which is used in series with "race" and "religion," is one of the words least likely to fluctuate in meaning. I do not think I am breaking new ground in saying that the word "sex" as a personal characteristic refers to the male and female of the species. Nor can there

be doubt that, when Title VII was drafted in 1964, "sex" drew the distinction between men and women. "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."

In the opinion of the Court, the word "sex" undergoes modification and expansion. Thus the opinion reasons: "[l]ogically, because sexual orientation is a function of sex and sex is a protected characteristic under Title VII, it follows that sexual orientation is also protected." It is undeniable that sexual orientation is a "function of sex" in the (unhelpful) sense that it cannot be defined or understood without reference to sex. But surely that is because it has to do with sex--as so many things do. *Everything* that cannot be understood without reference to sex does not amount to sex itself as a term in Title VII. So it seems to me that all of these arguments are circular as well as unnecessary.

III

The opinion of the Court relies in part on a comparator test, asking whether the employee would have been treated differently "but for" the employee's sex. But the comparator test is an evidentiary technique, not a tool for textual interpretation. "[T]he ultimate issue" for a court to decide in a Title VII case "is the reason for the individual plaintiff's treatment, not the relative treatment of different groups within the workplace." The opinion of the Court builds on the concept of homosexuality as a subset of sex, and this analysis thus merges in a fuzzy way with the definitional analysis. But when the comparator test is used for textual interpretation, it carries in train ramifications that are sweeping and unpredictable: think fitness tests for different characteristics of men and women, not to mention restrooms.

IV

The opinion of the Court relies on the line of cases that bars discrimination based on sexual stereotype: the manifestation of it or the failure to conform to it. There are at least three reasons I am unpersuaded.

Anti-discrimination law should be explicable in terms of evident fairness and justice, whereas the analysis employed in the opinion of the Court is certain to be baffling to the populace.

The Opinion posits that heterosexuality is just another sexual convention, bias, or stereotype--like pants and skirts, or hairdos. This is the most arresting notion in the opinion of the Court. Stereotypes are generalizations that are usually unfair or defective. Heterosexuality and homosexuality are both traits that are innate and true, not stereotypes of anything else.

If this case did involve discrimination on the basis of sexual stereotype, it would have been remanded to the District Court on that basis, as was done in *Christiansen v. Omnicom Grp., Inc.* The reason it could not be remanded on that basis is that the record does not associate Mr. Zarda with any sexual stereotyping. The case arises from his verbal disclosure of his sexual orientation during his employment as a skydiving instructor, and that is virtually all we know about him. It

should not be surprising that a person of any particular sexual orientation would earn a living jumping out of airplanes; but Mr. Zarda cannot fairly be described as evoking somebody's sexual stereotype of homosexual men. So this case does not present the (settled) issue of sexual stereotype, which I think is the very reason we had to go in banc in order to decide this case. As was made clear as recently as March 2017, "being gay, lesbian, or bisexual, standing alone, does not constitute nonconformity with a gender stereotype that can give rise to a cognizable gender stereotyping claim."

CABRANES, *Circuit Judge*, concurring:

I concur only in the judgment of the Court. It will take the courts years to sort out how each of the theories presented by the majority applies to other Title VII protected classes: "race, color, religion, . . . [and] national origin."

This is a straightforward case of statutory construction. Title VII of the Civil Rights Act of 1964 prohibits discrimination "because of . . . sex." Zarda's sexual orientation is a function of his sex. Discrimination against Zarda because of his sexual orientation therefore *is* discrimination because of his sex, and is prohibited by Title VII.

That should be the end of the analysis

SACK, *Circuit Judge*, concurring in the judgment, and in parts I (Jurisdiction), II.A (The Scope of Title VII), II:B.3 (Associational Discrimination), and II:C (Subsequent Legislative Developments) of the opinion for the Court:

We decide this appeal in the context of something of a revolution in American law respecting gender and sex. It appears to reflect, *inter alia*, many Americans' evolving regard for and social acceptance of gay and lesbian persons. We are now called upon to address questions dealing directly with sex, sexual behavior, and sexual taboos, a discussion fraught with moral, religious, political, psychological, and other highly charged issues. For those reasons (among others), I think it is in the best interests of us all to tread carefully; to say no more than we must; to decide no more than is necessary to resolve this appeal. This is not for fear of offending, but for fear of the possible consequences of being mistaken in one unnecessary aspect or another of our decision.

In my view, the law of this Circuit governing what is referred to in the majority opinion as "associational discrimination" — discrimination against a person because of his or her association with another — is unsettled. What was embraced by this Court in *Simonton v. Runyon*, seems to have both been overtaken by, and to be inconsistent with, our later panel decision in *Holcomb v. Iona College*. Choosing between the two approaches, as I think we must, I agree with the majority that *Holcomb* is right and that *Simonton* is therefore wrong. It is principally on that basis that I concur in the judgment of the Court.

My declination to join other parts of the majority opinion does not signal my disagreement with them. Rather, inasmuch as, in my view, this appeal can be decided on the simpler and less fraught theory of

associational discrimination, I think it best to stop there without then considering other possible bases for our judgment.

LOHIER, *Circuit Judge*, concurring:

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

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

LYNCH, *Circuit Judge*, dissent:

Speaking solely as a citizen, I would be delighted to awake one morning and learn that Congress had just passed legislation adding sexual orientation to the list of grounds of employment discrimination prohibited under Title VII of the Civil Rights Act of 1964. I am confident that one day — and I hope that day comes soon — I will have that pleasure.

I would be equally pleased to awake to learn that Congress had secretly passed such legislation more than a half century ago — until I actually woke up and realized that I must have been still asleep and dreaming. Because we all know that Congress did no such thing.

I

Of course, today's majority does not contend that Congress literally prohibited sexual orientation discrimination in 1964. It is worth remembering the historical context of that time to understand why any such contention would be indefensible.

The Civil Rights Act as a whole was primarily a product of the movement for equality for African-Americans. It grew out of the demands of that movement, and was opposed by segregationist white members of Congress who opposed racial equality. Although the bill, even before it included a prohibition against sex discrimination, went beyond race to prohibit discrimination based on religion and national origin, there is no question that it would not have been under consideration at all but for the national effort to reckon to some degree with America's heritage of race-based slavery and government-enforced segregation.

It is perhaps difficult for people not then alive to understand that before the Civil Rights Act of 1964 became law, an employer could post a sign saying "Help Wanted; No Negroes Need Apply" without violating any federal law — and many employers did. Even the original House bill, introduced with the support of President Kennedy's Administration in 1963, did not prohibit racial discrimination by private employers. Language prohibiting employment discrimination by private employers on the grounds of "race, color, religion or national origin" was added later by a House subcommittee.

Movement on the bill was slow. It was only after the March on Washington in the summer of 1963, the assassination of President Kennedy in November of that year, and President Johnson's strong support for a civil rights bill that prohibited racial discrimination in employment, that the legislation made progress in Congress. But the private employment discrimination provision, like other sections of the bill prohibiting racial discrimination in public accommodations and federally funded programs, was openly and bitterly opposed by a large contingent of southern members of Congress. Its passage was by no means assured when the floor debates in the House began.

From the moment President Kennedy proposed the Civil Rights Act in 1963, women's rights groups, with the support of some members of Congress, had urged that sex discrimination be included as a target of the legislation. The movements in the United States for gender and racial equality have not always marched in tandem — although there was some overlap between abolitionists and supporters of women's suffrage, suffragists often relied on the racially offensive argument that it was outrageous that white women could not vote when black men could. But by the 1960s, many feminist advocates consciously adopted arguments parallel to those of the civil rights movement, and there was growing recognition that the two causes were linked in fundamental ways.

Women's rights groups had been arguing for laws prohibiting sex discrimination since at least World War II, and had been gaining recognition for the agenda of the women's rights movement in other arenas. In addition to supporting (at least rhetorically) civil

rights for African-Americans, President Kennedy had taken tentative steps towards support of women's rights as well. In December 1961, he created the President's Commission on the Status of Women, chaired until her death by Eleanor Roosevelt. Among other goals, the Commission was charged with developing recommendations for "overcoming discriminations in . . . employment on the basis of sex," and suggesting "services which will enable women to continue their role []as wives and mothers while making a maximum contribution to the world around them."

The Commission's report highlighted the increasing role of women in the workplace, noting (in an era when the primacy of women's role in child-rearing and home-making was taken for granted) that even women with children generally spent no more than a decade or so of their lives engaged in full-time child care, allowing a significant portion of women's lives to be dedicated to education and employment. Accordingly, the Commission advocated a variety of steps to improve women's economic position. While those recommendations did not include federal legislation prohibiting employment discrimination on the basis of sex, they did include a commitment to equal opportunity in employment by federal contractors and proposed such equality as a goal for private employers — as well as proposing other innovations, such as paid maternity leave and universal high-quality public child care, that have yet to become the law of the land.

Nevertheless, the notion that women should be treated equally at work remained controversial. By 1964, only two states, Hawaii and Wisconsin, prohibited sex discrimination in employment. Although decades had passed since the Supreme Court announced in *Muller v. Oregon*, that laws limiting the hours that women could work did not violate the Fourteenth Amendment, but rather were an appropriate accommodation for women's fragile constitutions and more pressing maternal obligations, state laws "protecting" women from the rigors of the workplace remained commonplace.

Accordingly, when Representative Howard W. Smith of Virginia, a diehard opponent of integration and federal legislation to enforce civil rights for African-Americans, proposed that "sex" be added to the prohibited grounds of discrimination in the Civil Rights Act, there was reason to suspect that his amendment was an intentional effort to render the Act so divisive and controversial that it would be impossible to pass. That might not have been the case, however. Like those early suffragettes who were ambivalent about, or hostile to, racial equality, Smith also had a prior history of support for (presumably white) women's equality. For example, he had been a longstanding supporter of a constitutional amendment guaranteeing equal rights to women.

Whatever Smith's subjective motivations for proposing it, the amendment was adamantly opposed by many northern liberals on the ground that it would undermine support for the Act as a whole. Indeed, the *New York Times* ridiculed the amendment, suggesting that, among other alleged absurdities, it would require Radio City Music Hall to hire male Rockettes, and concluding that "it

would have been better if Congress had just abolished sex itself."

But despite its contested origins, the adoption of the amendment prohibiting sex discrimination was not an accident or a stunt. Once the amendment was on the floor, it was aggressively championed by a coalition comprising most of the (few) women members of the House. Its subsequent adoption was consistent with a long history of women's rights advocacy that had increasingly been gaining mainstream recognition and acceptance.

Discrimination against gay women and men, by contrast, was not on the table for public debate. In those dark, pre-Stonewall days, same-sex sexual relations were criminalized in nearly all states. Only three years before the passage of Title VII, Illinois, under the influence of the American Law Institute's proposed Model Penal Code, had become the first state to repeal laws prohibiting private consensual adult relations between members of the same sex.

In addition to criminalization, gay men and women were stigmatized as suffering from mental illness. In 1964, both the American Psychiatric Association and the American Psychological Association regrettably classified homosexuality as a mental illness or disorder. As the Supreme Court recently explained, "[f]or much of the 20th century . . . homosexuality was treated as an illness. When the American Psychiatric Association published the first Diagnostic and Statistical Manual of Mental Disorders in 1952, homosexuality was classified as a mental disorder, a position adhered to until 1973." It was not until two years later, in 1975, that the American Psychological Association followed suit and "adopted the same position [as the American Psychiatric Association], urging all mental health professionals to work to dispel the stigma of mental illness long associated with homosexual orientation." Because gay identity was viewed as a mental illness and was, in effect, defined by participation in a criminal act, the employment situation for openly gay Americans was bleak.

Consider the rules regarding employment by the federal government. Starting in the 1940s and continuing through the 1960s, thanks to a series of executive orders repealing long-standing discriminatory policies, federal employment opportunities for African-Americans began to open up significantly. In sharp contrast, in 1953 President Eisenhower signed an executive order *excluding* persons guilty of "sexual perversion" from government employment. During the same period, gay federal employees, or employees even suspected of being gay, were systematically hounded out of the service as "security risks" during Cold-War witchhunts.

Civil rights and civil liberties organizations were largely silent. In an influential book about the political plight of gay people, Edward Sagarin, writing under the pseudonym Donald Webster Cory, sharply criticized the silence of the bar. For instance, he described the response to the abusive tactics used against members of the military discharged for homosexual conduct as follows: "And who raises a voice in protest against such discrimination? No one. Where was the American Civil Liberties Union?

Nowhere." To the extent that civil rights organizations did begin to engage with gay rights during the early 1960s, they did so through the lens of sexual liberty, rather than equality, grouping the prohibition of laws against same-sex relations with prohibitions of birth control, abortion, and adultery. Even by the mid-1960s, the ACLU was identified by *Newsweek* as the only group "apart from the homophile organizations" that opposed laws criminalizing homosexual acts.

Given the criminalization of same-sex relationships and arbitrary and abusive police harassment of gay and lesbian citizens, nascent gay rights organizations had more urgent concerns than private employment discrimination. As late as 1968, four years *after* the passage of Title VII, the North American Conference of Homophile Organizations proposed a "Homosexual Bill of Rights" that demanded five fundamental rights: that private consensual sex between adults not be a crime; that solicitation of sex acts not be prosecuted except on a complaint by someone other than an undercover officer; that sexual orientation not be a factor in granting security clearances, visas, or citizenship; that homosexuality not be a barrier to service in the military; and that sexual orientation not affect eligibility for employment *with federal, state, or local governments*. Those proposals, which pointedly did not include a ban on private sector employment discrimination against gays, evidently had little traction with many Americans at the time. The first state to prohibit employment discrimination on the basis of sexual orientation even in the public sector was Pennsylvania, by executive order of the governor, in 1975 — more than a decade after the Civil Rights Act had become law. It was not until 1982 that Wisconsin became the first state to ban both public and private sector discrimination based on sexual orientation. Notably, as discussed more fully below, these states did so by explicit legislative action adding "sexual orientation" to pre-existing anti-discrimination laws that already prohibited discrimination based on sex; they did not purport to "recognize" that sexual orientation discrimination was merely an aspect of already-prohibited discrimination based on sex.

In light of that history, it is perhaps needless to say that there was no discussion of sexual orientation discrimination in the debates on Title VII of the Civil Rights Act. If some sexist legislators considered the inclusion of sex discrimination in the bill something of a joke, or perhaps a poison pill to make civil rights legislation even more controversial, evidently no one thought that adding sexual orientation to the list of forbidden categories was worth using even in that way. Nor did those who opposed the sex provision in Title VII include the possibility that prohibiting sex discrimination would also prevent sexual orientation discrimination in their parade of supposed horribles. When Representative Emanuel Celler of New York, floor manager for the Civil Rights Bill in the House, rose to oppose Representative Smith's proposed amendment, he expressed concern that it would lead to such supposed travesties as the elimination of "protective" employment laws regulating working conditions for women, drafting women for military service, and revisions of rape and alimony laws. He did not reference the prohibition of sexual

orientation discrimination. The idea was nowhere on the horizon.

II

I do not cite this sorry history of opposition to equality for African-Americans, women, and gay women and men, and of the biases prevailing a half-century ago, to argue that the private intentions and motivations of the members of Congress can trump the plain language or clear implications of a legislative enactment. (Still less, of course, do I endorse the views of those who opposed racial equality, ridiculed women's rights, and persecuted people for their sexual orientation.) Although Chief Judge Katzmann has observed elsewhere that judicial warnings about relying on legislative history as an interpretive aid have been overstated, I agree with him, and with my other colleagues in the majority, that the implications of legislation flatly prohibiting sex discrimination in employment, duly enacted by Congress and signed by the President, cannot be cabined by citing the private prejudices or blind spots of those members of Congress who voted for it. The above history makes it obvious to me, however, that the majority misconceives the fundamental *public* meaning of the language of the Civil Rights Act. 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. By prohibiting discrimination against people based on their sex, it did not, and does not, prohibit discrimination against people because of their sexual orientation.

A

To start, the history of the overlapping movements for equality for blacks, women, and gays, and the differing pace of their progress, as outlined in the previous section, tells us something important about what the language of Title VII must have meant to any reasonable member of Congress, and indeed to any literate American, when it was passed — what Judge Sykes has called the "original *public* meaning" of the statute. That history tells us a great deal about why the legislators who constructed and voted for the Act used the specific language that they did.

The words used in legislation are used for a reason. Legislation is adopted in response to perceived social problems, and legislators adopt the language that they do to address a social evil or accomplish a desirable goal. The words of the statute take meaning from that purpose, and the principles it adopts must be read in light of the problem it was enacted to address. The words may indeed cut deeper than the legislators who voted for the statute fully understood or intended: as relevant here, a law aimed at producing gender equality in the workplace may require or prohibit employment practices that the legislators who voted for it did not yet understand as obstacles to gender equality. Nevertheless, it remains a law aimed at *gender* inequality, and not at other forms of discrimination that were understood at the time, and continue to be understood, as a different kind of prejudice, shared not only by some of those who opposed the rights of

women and African-Americans, but also by some who believed in equal rights for women and people of color.

The history I have cited is not "legislative history" narrowly conceived. It cannot be disparaged as a matter of attempts by legislators or their aides to influence future judicial interpretation — in the direction of results they could not convince a majority to support in the overt language of a statute — by announcing to largely empty chambers, or inserting into obscure corners of committee reports, explanations of the intended or unintended legal implications of a bill. Nor am I seeking to infer the unexpressed wishes of all or a majority of the hundreds of legislators who voted for a bill without addressing a particular question of interpretation. Rather, I am concerned with what principles Congress committed the country to by enacting the words it chose. I contend that these principles can be illuminated by an understanding of the central public meaning of the language used in the statute at the time of its enactment.

If the specifically *legislative* history of the "sex amendment" is relatively sparse in light of its adoption as a floor amendment, the broader *political and social* history of the prohibition of sex discrimination in employment is plain for all to read. The history of the 20th century is, among other things, a history of increasing equality of men and women. Recent events remind us of how spotty that equality remains, and how inequality persists even with respect to the basic right of women to physical security and control of their own bodies. But the trend is clear, and it is particularly emphatic in the workplace.

That history makes it equally clear that the prohibition of discrimination "based on sex" was intended to secure the rights of women to equal protection in employment. Put simply, the addition of "sex" to a bill to prohibit employers from "discriminat[ing] against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, . . . or national origin," was intended to eliminate workplace inequalities that held women back from advancing in the economy, just as the original bill aimed to protect African-Americans and other racial, national, and religious minorities from similar discrimination. The language of the Act itself would have been so understood not only by members of Congress, but by any politically engaged citizen deciding whether to urge his or her representatives to vote for it. As Judge Sykes noted in her dissent in the Seventh Circuit's encounter with the same issue we face today, citing a 1960s dictionary, "In common, ordinary usage in 1964 — and now, for that matter — the word 'sex' means biologically *male* or *female*; it does not also refer to sexual orientation." On the verge of the adoption of historic legislation to address bigotry against African-Americans on the basis of race, women in effect stood up and said "us, too," and Congress agreed.

The majority cites judicial interpretations of Title VII as prohibiting sexual harassment, and allowing hostile work environment claims, in an effort to argue that the expansion they are making simply follows in

this line. But the fact that a prohibition on discrimination against members of one sex may have unanticipated consequences when courts are asked to consider carefully whether a given practice does, in fact, discriminate against members of one sex in the workplace does not support extending Title VII by judicial construction to protect an entirely different category of people. It is true that what *counts* as discrimination against members of one sex may not have been fully fleshed out in the minds of supporters of the legislation, but it is easy enough to illustrate how the language of a provision enacted to accomplish the goal of equal treatment of the sexes compels results that may not have been specifically intended by its enacters.

To begin with, just as laws prohibiting racial discrimination, adopted principally to address some of the festering national wrongs done to African-Americans, protect members of *all* races, including then-majority white European-Americans, the prohibition of sex discrimination by its plain language protects men as well as women, whether or not anyone who voted on the bill specifically considered whether and under what circumstances men could be victims of gender-based discrimination. That is not an expansion of Title VII, but is a conclusion mandated by its text: Congress deliberately chose to protect women and minorities not by prohibiting discrimination against "African-Americans" or "Jews" or "women," but by neutrally prohibiting discrimination against any individual "based on race, . . . religion, [or] sex." That choice of words is clearly intentional, and represents a commitment to a principle of equal treatment of races, religions, and sexes that is important, even if the primary intended beneficiaries of the legislation — those most in need of its protection — are members of the races, religions, and gender that have suffered the most from *in*equality in the past.

Other interpretations of the statute that may not have occurred to members of the overwhelmingly male Congress that adopted it seem equally straightforward. Perhaps it did not occur to some of those male members of Congress that sexual harassment of women in the workplace was a form of employment discrimination, or that Title VII was inconsistent with a "Mad Men" culture in the office. But although a few judges were slow to recognize this point, as soon as the issue began to arise in litigation, courts quickly recognized that for an employer to expect members of one sex to provide sexual favors as a condition of employment from which members of the other sex are exempt, or to view the only value of female employees as stemming from their sexualization, constitutes a fundamental type of discrimination in conditions of employment based on sex.

The reason why any argument to the contrary would fail is not a matter of simplistic application of a formal standard, along the lines of "well, the employer wouldn't have asked the same of a man, so it's sex discrimination." Sexual exploitation has been a principal obstacle to the equal participation of women in the workplace, and whether or not individual legislators intended to prohibit it when they cast their votes for Representative Smith's amendment, both the literal language of that amendment *and* the

elimination of the social evil at which it was aimed make clear that the statute must be read to prohibit it.

The same goes for other forms of "hostile environment" discrimination. The history of resistance to racial integration illustrates why. Employers forced to take down their "whites only" signs could not be permitted to retreat to the position that "you can make me hire black workers, but you can't make me welcome them." Making black employees so *un*welcome that they would be deterred from seeking or retaining jobs previously reserved for whites *must be* treated as an instance of prohibited racial discrimination — and the same clearly goes for sex discrimination. The Supreme Court recognized that point, in exactly those terms:

> The phrase "terms, conditions or privileges of employment" in Title VII is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination. . . . Nothing in Title VII suggests that a hostile environment based on discriminatory sexual harassment should not be likewise prohibited.

But such interpretations of employment "discrimination against any individual . . . based on sex" do not say anything about whether discrimination based on *other* social categories is covered by the statute. Just as Congress adopted broader language than discrimination "against women," it adopted narrower language than "discrimination based on personal characteristics or classifications unrelated to job performance." Title VII does not adopt a broad principle of equal protection in the workplace; rather, its language singles out for prohibition discrimination based on particular categories and classifications that have been used to perpetuate injustice — but not all such categories and classifications. That is not a matter of abstract justice, but of political reality. Those groups that had succeeded by 1964 in persuading a majority of the members of Congress that unfair treatment of them ought to be prohibited were included; those who had not yet achieved that political objective were not.

Thus, if Representative Smith's amendment had been defeated, Title VII would still be a landmark prohibition of the kinds of race-, religion-, and national origin-based employment discrimination that had historically disadvantaged blacks, Jews, Catholics, or Mexican-Americans. But it would not have protected women, and a subsequent shift in popular support for such protection would not have changed that fact, without legislative action. Similarly, the statute did not protect those discriminated against, similarly unfairly, on the basis of age or disability; that required later legislation.

None of this, of course, is remotely to suggest that employment discrimination on the basis of sexual orientation is somehow not invidious and wrong. But not everything that is offensive or immoral or economically inefficient is illegal, and if the view that a practice is offensive or immoral or economically inefficient does not command sufficiently broad and deep political support to produce legislation prohibiting it, that

practice will remain legal. In the context of private-sector employment, racial discrimination was just as indefensible before 1964 as it is today, but it was not illegal. Discrimination against women, as President Kennedy's commission understood, was just as unfair, and just as harmful to our economy, before Title VII prohibited it as it is now, but if Congress had not adopted Representative Smith's amendment, it would have remained legal. Employment discrimination against older workers, and against qualified individuals with disabilities, imposed unfair burdens on those categories of individuals in 1964, yet it remained legal after the Civil Rights Act of 1964 became law, because Congress did not at that time choose to prohibit such discrimination. Congress is permitted to choose what types of social problems to attack and by which means. The majority says that "we have stated that 'Title VII should be interpreted broadly to achieve equal employment opportunity,'" but of course that dictum appeared in the context of a discussion of racial discrimination. Congress, in fact, did not legislate in 1964 "broadly to achieve equal employment opportunity" for *all* Americans, but instead opted to prohibit only certain categories of unfair discrimination. It did not then prohibit, and alas has not since prohibited, discrimination based on sexual orientation.

B

The majority's linguistic argument does not change the fact that the prohibition of employment discrimination "because of . . . sex" does not protect gays and lesbians. Simply put, discrimination based on sexual orientation is not the same thing as discrimination based on sex. As Judge Sykes explained,

> [t]o a fluent speaker of the English language — then and now — the ordinary meaning of the word "sex" does not fairly include the concept of "sexual orientation." The two terms are never used interchangeably, and the latter is not subsumed within the former; there is no overlap in meaning. . . . The words plainly describe different traits, and the separate and distinct meaning of each term is easily grasped. More specifically to the point here, discrimination "because of sex" is not reasonably understood to include discrimination based on sexual orientation, a different immutable characteristic. Classifying people by sexual orientation is different than classifying them by sex.

Of course, the majority does not really dispute this common-sense proposition. It does not say that "sex discrimination" in the ordinary meaning of the term is literally the same thing as "sexual orientation discrimination." Rather, the majority argues that discrimination based on sex encompasses discrimination against gay people because discrimination based on sex encompasses any distinction between the sexes that an employer might make for any reason. The argument essentially reads "discriminate" to mean pretty much the same thing as "distinguish." And indeed, there are recognized English uses of "discriminate," particularly when followed with "between"

or "from," that imply nothing invidious, but merely mean "to perceive, observe or note [a] difference," or "[t]o make or recognize a distinction." For example, a person with perfect pitch is capable of discriminating a C from a C-sharp. But in the language of civil rights, a different and stronger meaning applies, that references *invidious* distinctions: "To treat a person or group in an unjust or prejudicial manner, esp[ecially] on the grounds of race, gender, sexual orientation, etc.; frequently with *against*."

And that is indeed the sense in which Title VII uses the word: the statute prohibits such practices as "fail[ing] or refus[ing] to hire or to discharge" persons on account of their race or sex or other protected characteristic, or "otherwise to discriminate *against* any individual" with respect to employment terms. In other words, it is an oversimplification to treat the statute as prohibiting any distinction *between* men and women in the workplace, still less any distinction that so much as requires the employer to *know* an employee's sex in order to be applied, the law prohibits discriminating *against* members of one sex or the other in the workplace.

That point may have little bite in the context of racial discrimination. The different "races" are defined legally and socially, and not by actual biological or genetic differences — both Hitler's Nuremberg laws and American laws imposing slavery and segregation had to define, arbitrarily, how much ancestry of a particular type consigned persons to a disfavored category, since there is no scientific or genetic basis for distinguishing a "Jew" or a "member of the colored race" from anyone else. And since no biological factor can support any job qualification based on race, courts have taken the view that to distinguish *is*, for the most part, to discriminate against. But in the area of sex discrimination, where the groups to be treated equally do have potentially relevant biological differences, not every distinction between men and women in the workplace constitutes discrimination against one gender or the other. The distinctions that were prohibited, however, in either case, are those that operate to the disadvantage of (principally) the disfavored race or sex. That is the social problem that the statute aimed to correct.

Opponents of Title VII, and later of the Equal Rights Amendment ("ERA"), were fond of conjuring what they thought of as unthinkable or absurd consequences of gender equality. Some of those proved not so unthinkable or absurd at all. Workplace "protective" legislation that applied only to women soon fell by the wayside, despite Representative Cellar's fears, without adverse consequences. But other distinctions based on sex remain, and their legality is either assumed, or at a minimum requires more thought than just "but that's a distinction based on sex, so it's illegal."

Distinctions based on personal privacy, for example, remain in place. When opponents of the ERA, like Senator Ervin, argued that under the ERA "there can be no exception for elements of publically [*sic*] imposed sexual segregation on the basis of privacy between men and women," that objection was derided by Senator Marlow Cook of Kentucky as the "potty" argument. Title VII too does not

prohibit an employer from having separate men's and women's toilet facilities. Nor does it prohibit employer policies that differentiate between men and women in setting requirements regarding hair lengths. Thus, in *Longo v. Carlisle DeCoppet & Co.*, we held that a policy "requiring short hair on men and not on women" did not violate Title VII.

Dress codes provide a more complicated example. It is certainly arguable that some forms of separate dress codes further stereotypes harmful to workplace equality for women; requiring female employees to wear "Hooters"-style outfits but male employees doing the same work to wear suit and tie would not stand scrutiny. But what of a pool facility that requires different styles of bathing suit for male and female lifeguards? Judge Cabranes's concurrence would seem to prohibit that practice, but I believe, and I expect Judge Cabranes would agree, that a pool that required both male and female lifeguards to wear a uniform consisting only of trunks would violate Title VII, while one that prescribed trunks for men and a bathing suit covering the breasts for women would not.

More controversial distinctions, such as different fitness requirements for men and women applying for jobs involving physical strength, have also been upheld. In a recent case, the Fourth Circuit rejected the notion that Title VII prohibits gender-normed physical fitness benchmarks pursuant to which male FBI agent trainees must perform 30 push-ups, while female trainees need only do 14. In upholding this distinction, the court noted that of "the few decisions to confront the use of gender-normed physical fitness standards in the Title VII context, none has deemed such standards to be unlawful," because courts have recognized that some physiological differences between men and women "impact their relative abilities to demonstrate the same levels of physical fitness," Thus, the court in *Bauer* recognized that to distinguish between the sexes is not always to discriminate against one or the other. Indeed, a *failure* to impose distinct fitness requirements for men and women may be found to violate Title VII, if it has a disparate impact on one sex and the employer cannot justify the requirement as a business necessity. Taken to its logical conclusion, though, the majority's interpretation of Title VII would do away with this understanding of the Act.

These examples suffice to illustrate two points relevant to the supposedly simple interpretation of sex-based discrimination relied upon by the majority. First, it is not the case that any employment practice that can only be applied by identifying an employee's sex is prohibited. Second, neither can it be the case that any discrimination that would be prohibited if race were the criterion is equally prohibited when gender is used. Obviously, Title VII does not permit an employer to maintain racially segregated bathrooms, nor would it allow different-colored or different-designed bathing costumes for white and black lifeguards. Such distinctions would smack of racial subordination, and would impose degrading differences of treatment on the basis of race. Precisely the same distinctions between men and women would not.

Nor does the example of "discrimination based on traits that are a function of sex, such as life expectancy," help the majority's cause. Discrimination of that sort, as the majority notes, could permit gross discrimination against female employees "by using traits that are associated with sex as a proxy for sex." That is certainly so as to "traits that are a function of sex," such as pregnancy or the capacity to become pregnant. But it is not so as to discrimination based on sexual orientation. Same-sex attraction is not "a function of sex" or "associated with sex" in the sense that life expectancy or childbearing capacity are. A refusal to hire gay people cannot serve as a covert means of limiting employment opportunities for men or for women as such; a minority of both men and women are gay, and discriminating against them discriminates against *them*, as gay people, and does not differentially disadvantage employees or applicants of either sex. That is not the case with other forms of "sex-plus" discrimination that single out for disfavored status traits that are, for example, common to women but rare in men.

C

That "because of . . . sex" did not, and still does not, cover sexual orientation, is further supported by the movement, in both Congress and state legislatures, to enact legislation protecting gay men and women against employment discrimination. This movement, which has now been successful in twenty-two states — including all three in our Circuit — and the District of Columbia, has proceeded by expanding the categories of prohibited discrimination in state anti-discrimination laws. In none of those states did the prohibition of sexual orientation discrimination come by judicial interpretation of a pre-existing prohibition on gender-based discrimination to encompass discrimination on the basis of sexual orientation. Similarly, the Executive Branch has prohibited discrimination against gay men and lesbians in federal employment by adding "sexual orientation" to previously protected grounds. Finally, the same approach has been reflected in the repeated (but so far unsuccessful) introduction of bills in Congress to add "sexual orientation" to the list of prohibited grounds of employment discrimination in Title VII.

The Department of Justice argues, relying on *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.,* that Congress ratified judicial interpretations of "sex" in Title VII as excluding sexual orientation when it amended the Civil Rights Act in 1991 and failed to overrule judicial decisions holding that the sex discrimination provision of Title VII did not cover sexual orientation discrimination. In *Inclusive Communities*, the Supreme Court held that disparate-impact claims are cognizable under the Fair Housing Act ("FHA"). In so holding, the Court found it relevant that Congress had amended the FHA after nine Courts of Appeals had held that the FHA allowed for disparate-impact claims, and did not alter the text of the Act in a way that would make it clear that disparate-impact claims were not contemplated by the FHA. Furthermore, the Court found it significant that the legislative history of the FHA amendment made it clear that Congress was aware of those Court of Appeals decisions. The majority dismisses this

argument because at the time of the 1991 amendment to the Civil Rights Act, only three Courts of Appeals had ruled that Title VII did not cover sexual orientation, and Congress did not make clear, in the legislative history of the 1991 amendment, that it was aware of this precedent.

In light of the clear textual and historical meaning of the sex provision that I have discussed above, I do not find it necessary to rely heavily on the more technical argument that strives to interpret the meaning of statutes by congressional actions and omissions that might be taken as ratifying Court of Appeals decisions. But I do think it is worth noting that the Supreme Court also found it relevant, in *Inclusive Communities*, that Congress had *rejected* a proposed amendment "that would have eliminated disparate-impact liability for certain zoning decisions." Here, while only three Courts of Appeals may have ruled on the issue by 1991, over twenty-five amendments had been proposed to add sexual orientation to Title VII between 1964 and 1991. All had been rejected. In fact, two amendments were proposed in 1991, one in the House and one in the Senate, Civil Rights Amendments Act of 1991, S. 574, 102d Congress; Civil Rights Amendments Act of 1991, H.R. 1430, 102d Congress, and neither of those amendments found its way into the omnibus bill that overruled other judicial interpretations of the Civil Rights Act. Moreover, in addition to the three Courts of Appeals that had ruled on the issue, the EEOC — the primary agency charged by Congress with interpreting and enforcing Title VII — had also held, by 1991, that sexual orientation discrimination fell "outside the purview of Title VII."

Thus, to the extent that we can infer the awareness of Congress at all, the continual attempts to add sexual orientation to Title VII, as well as the EEOC's determination regarding the meaning of sex, should be considered, in addition to the three appellate court decisions, as evidence that Congress was unquestionably aware, in 1991, of a general consensus about the meaning of "because of . . . sex," and of the fact that gay rights advocates were seeking to change the law by adding a new category of prohibited discrimination to the statute.

Although the Supreme Court has rightly cautioned against relying on legislative inaction as evidence of congressional intent, because "several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change," surely the proposal and rejection of over fifty amendments to add sexual orientation to Title VII means something. . And it is pretty clear what it does *not* mean. It is hardly reasonable, in light of the EEOC and judicial consensus that sex discrimination did not encompass sexual orientation discrimination, to conclude that Congress rejected the proposed amendments because senators and representatives believed that Title VII "already incorporated the offered change." There may be many reasons why each proposal ultimately failed, but it cannot reasonably be claimed that the basic reason that Congress did not pass such an amendment year in and year out was anything other than that there was not yet the political will to do so.

This last point requires one further disclaimer. As with the social *pre*-history of Title VII, these later developments are not referenced in a dubious effort to infer the specific intentions of the members of Congress who voted for the Smith amendment in 1964, nor are they referenced to infer the specific intent of each Congress that was faced with proposed sexual orientation amendments. The point, rather, is that race, gender, and sexual orientation discrimination have been consistently perceived in the political world, and by the American population as a whole, as different practices presenting different social and political issues. At different times over the last few generations, the recognition of each as a problem to be remedied by legislation has been controversial, with the movements to define each form of discrimination as illegal developing at a different pace and for different reasons, and being opposed in each case by different coalitions for different reasons. To recognize this fact is to understand that discrimination against persons based on sex has had, in law and in politics, a meaning that is separate from that of discrimination based on sexual orientation.

In short, Title VII's prohibition of employment discrimination against individuals on the basis of their sex is aimed at employment practices that differentially disadvantage men vis-à-vis women or women vis-à-vis men. That is what the language of the statute means to an ordinary "fluent speaker of the English language," that is the social practice that Congress chose to legislate against, and in light of that understanding, certain laws and practices that distinguish between men and women have been found to violate Title VII, and certain others have not. Discrimination against persons whose sexual orientation is homosexual rather than heterosexual, however offensive such discrimination may be to me and to many others, is not discrimination that treats men and women differently. The simplistic argument that discrimination against gay men and women is sex discrimination because targeting persons sexually attracted to others of the same sex requires *noticing* the gender of the person in question is not a fair reading of the text of the statute, and has nothing to do with the type of unfairness in employment that Congress legislated against in adding "sex" to the list of prohibited categories of discrimination in Title VII.

III

The majority opinion goes on to identify two other arguments in support of its holding: (1) that sexual orientation discrimination is actually "gender stereotyping" that constitutes discrimination against individuals based on their sex, and (2) that such discrimination constitutes prohibited "associational discrimination" analogous to discriminating against employees who are married to members of a different race.

These arguments have the merit of attempting to link discrimination based on sexual orientation to the social problem of gender discrimination at which Title VII is aimed. But just as the "differential treatment" argument attempts to shoehorn sexual orientation discrimination into the statute's verbal template of discrimination based on sex, these arguments attempt a similar (also

unsuccessful) maneuver with lines of case law. While certain Supreme Court cases identify clear-cut examples of sex or race discrimination that may have a superficial similarity to the practice at issue here, the majority mistakes that similarity for a substantive one.

A

Perhaps the most appealing of the majority's approaches is its effort to treat sexual orientation discrimination as an instance of sexual stereotyping. The argument proceeds from the premises that "sex stereotyping violates Title VII," and that "same-sex orientation 'represents the ultimate case of failure to conform' to gender stereotypes," and concludes that an employer who discriminates against gay people is therefore "sex stereotyping" and thus violating Title VII. But like the other arguments adopted by the majority, this approach rests more on verbal facility than on social reality.

In unpacking the majority's syllogism, it is first necessary to address what we mean by "sex stereotyping" that "violates Title VII." Invidious stereotyping of members of racial, gender, national, or religious groups is at the heart of much employment discrimination. Most employers do not entertain, let alone admit to, older forms of racialist or other discriminatory ideologies that hold that members of certain groups are inherently or genetically inferior and undeserving of equal treatment. Much more common are assumptions, not always even conscious, that associate certain negative traits with particular groups. A perception that women, for example, are not suited to executive positions, or are less adept at the mathematical and practical skills demanded of engineers, can be a significant hindrance to women seeking such positions, even when a particular woman is demonstrably qualified, or indeed even where empirical data show that on average women perform as well as or better than men on the relevant tasks. Refusing to hire or promote someone because of that sort of gender (or racial, or ethnic, or religious) stereotyping is not a separate form of sex (or race, or ethnic, or religious) discrimination, but is precisely discrimination in hiring or promotion based on sex (or race, or ethnicity, or religion). It treats applicants or employees not as individuals but as members of a class that is disfavored for purposes of the employment decision by reason of a trait stereotypically assigned to members of that group as a whole. For the most part, then, the kind of stereotyping that leads to discriminatory employment decisions that violate Title VII is the assignment of traits that are negatively associated with job performance (dishonesty, laziness, greed, submissiveness) to members of a particular protected class.

Clearly, sexual orientation discrimination is not an example of that kind of sex stereotyping; an employer who disfavors a male job applicant whom he believes to be gay does not do so because the employer believes that most men are gay and therefore unsuitable. Rather, he does so because he believes that most *gay* people (whether male or female) have some quality that makes them undesirable for the position, and that because this applicant is gay, he must also possess that trait. Although that is certainly stereotyping, and invidiously so, it does not

stereotype a group protected by Title VII, and is therefore not (yet) illegal.

But as the majority correctly points out, that is not the only way in which stereotyping can be an obstacle to protected classes of people in the workplace. The stereotyping discussed above involves beliefs about how members of a particular protected category *are*, but there are also stereotypes (or more simply, beliefs) about how members of that group *should be*. In the case of sex discrimination in particular, stereotypes about how women ought to look or behave can create a double bind. For example, a woman who is perceived through the lens of a certain "feminine" stereotype may be assumed to be insufficiently assertive for certain positions by contrast to men who, viewed through the lens of a "masculine" stereotype, are presumed more likely to excel in situations that demand assertiveness. At the same time, the employer may fault a woman who behaves as assertively as a male comparator for being *too* aggressive, thereby failing to comply with societal expectations of femininity.

That is the situation that a plurality of the Supreme Court identified in *Price Waterhouse v. Hopkins*, the key case the majority relies on for its "sex stereotyping" argument. As that opinion pointed out, "[a]n employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind." The two horns of the dilemma described in *Price Waterhouse* have slightly different, yet equally problematic, sexist foundations: a female employee or applicant may be prejudiced by a negative assumption that women *aren't* or *can't be* sufficiently dominant for a position that requires leadership or strength or aggression, but when a woman unquestionably does show the putatively desired traits, she is held back because of the different but related notion that women *shouldn't be* aggressive or dominant. The latter is not an assumption about how *most* women *are*, it is a normative belief about how*all* women *should be*.

I fully accept the conclusion that that kind of discrimination is prohibited, and that it imposes different conditions of employment on men and on women. Not only does such discrimination require women to behave differently in the workplace than men, but it also actively deters women from engaging in kinds of behavior that are required for advancement to certain positions, and thus effectively bars them from such advancement. The key element here is that one sex is systematically disadvantaged in a particular workplace. In that circumstance, sexual stereotyping is sex discrimination.

But as Judge Sykes points out in her *Hively* dissent, the homophobic employer is not deploying a stereotype about men or about women to the disadvantage of either sex. Such an employer is expressing disapproval of the behavior or identity of a class of people that includes both men and women. That disapproval does not stem from a desire to discriminate against either sex, nor does it result from any sex-specific stereotype, nor does it differentially harm either men or women vis-à-vis the other sex.

Rather, it results from a distinct type of objection to anyone, of whatever gender, who is identified as homosexual. The belief on which it rests is not a belief about what men or women ought to be or do; it is a belief about what *all* people ought to be or do — to be heterosexual, and to have sexual attraction to or relations with only members of the opposite sex. That does not make workplace discrimination based on this belief better or worse than other kinds of discrimination, but it does make it something different from sex discrimination, and therefore something that is not prohibited by Title VII.

B

The "associational discrimination" theory is no more persuasive. That theory rests on cases involving race discrimination. Many courts have found that Title VII prohibits discrimination in cases in which, as in our case of *Holcomb v. Iona College*, a white plaintiff alleged that he was fired because he was married to a person of a different race.

It would require absolute blindness to the history of racial discrimination in this country not to understand what is at stake in such cases, and why such allegations unmistakably state a claim of discrimination against an individual employee on the basis of race. Anti-miscegenation laws constituted a bulwark of the structure of institutional racism that is the paradigm of invidious discrimination in this country. African-Americans were condemned first to slavery, and then to second-class citizenship and virtual apartheid, on the basis of an ideology that regarded them as inferior. Such an ideology is incompatible with fraternization, let alone marriage and reproduction, between African-Americans and whites. A prohibition on "race-mixing" was thus grounded in bigotry against a particular race and was an integral part of preserving the rigid hierarchical distinction that denominated members of the black race as inferior to whites.

Thus, as the Supreme Court noted in striking down Virginia's law prohibiting marriage between a white person and a person of color, the Supreme Court of Virginia had upheld the statute because Virginia defined its "legitimate" purposes as "'preserv[ing] the racial integrity of [the state's] citizens,' and [] prevent[ing] 'the corruption of blood,' 'a mongrel breed of citizens,' and 'the obliteration of racial pride,'" purposes the Court correctly identified and rejected as "obviously an endorsement of the doctrine of White Supremacy." The racist hostility to "race-mixing" extended well beyond a prohibition against interracial marriage. The beatings of "freedom riders" attempting to integrate interstate bus lines in the South in the early 1960s, inflicted on white as well as black participants in the protests, demonstrated that racial bigotry against African-Americans manifested itself in direct attacks not only on African-Americans, but also on whites who associated with African-Americans as equals. The entire system of "separate but equal" segregation in both state-owned and private facilities and places of public accommodation was designed, as Charles Black made plain in a classic deconstruction of the legal fiction of "separate but equal," to confine black people to "a position of inferiority." Thus, the associational discrimination reflected in

cases such as *Loving* and *Holcomb* was a product of bigotry against a single race by another. That discrimination is expressly prohibited in employment by Title VII.

Workplace equality for racial minorities is thus blatantly incompatible with a practice that ostracizes, demeans, or inflicts adverse conditions on white employees for marrying, dating, or otherwise associating with, people of color. The prohibition of that kind of discrimination is not simply a matter of noting that, in order to effectuate it, the employer must identify the races of the employee and the person(s) with whom he or she associates. Just as sexual harassment against female employees presents a serious obstacle to the full and equal participation of women in the workplace, discrimination against members of a favored race who so much as associate with persons of another race reflects a deep-seated bigotry against the disfavored race(s) that Title VII undertakes to banish from the workplace. The principle was well stated by the Sixth Circuit in a case cited by the majority, *Barrett v. Whirlpool Corporation*:

> Title VII protects individuals who, though not members of a protected class, are victims of discriminatory animus toward protected third persons with whom the individuals associate.

Discrimination on the basis of sexual orientation, however, is not discrimination of the sort at issue in *Holcomb* and *Barrett*. In those cases, the plaintiffs alleged that they were discriminated against because the employer was biased — that is, had a "discriminatory animus" — *against members of the race with whom the plaintiffs associated*. There is no allegation in this case, nor could there plausibly be, that the defendant discriminated against Zarda because it had something against *men*, and therefore discriminated not only against men, but also against anyone, male or female, who associated with them. I have no trouble assuming that the principle of *Holcomb* and *Barrett* applies beyond the category of race discrimination: an employer who fired or refused to promote an Anglo-American, Christian employee because she associated with Latinos or Jews would presumably run afoul of that principle just as much as one whose animus ran against black Americans. Such an employer would clearly be discriminating against the employee on the basis of her friends' ethnicity or religion — in the formulation from the *Barrett* opinion, that employer would be victimizing an employee out of "discriminatory animus toward protected third persons with whom the [employee] associate[d]."

It is more difficult to imagine realistic hypotheticals in which an employer discriminated against anyone who so much as associated with men or with women, though I suppose academic examples of such behavior could be conjured. But whatever such a case might look like, discrimination against gay people is not it. Discrimination against gay men, for example, plainly is not rooted in animus toward "protected third persons with whom [they] associate." An employer who practices such discrimination is hostile to gay men, not to men in general; the animus runs not, as in the race and

religion cases discussed above, against a "protected group" to which the employee's associates belong, but against an (alas) *unprotected* group to which they belong: other gay men.

The majority tries to rebut this straightforward distinction in various ways. First, it notes — but declines to rely on — academic "research suggesting that sexual orientation discrimination has deep misogynistic roots." It is certainly plausible to me that the "deep roots" of hostility to homosexuals are in some way related to the same sorts of beliefs about the proper roles of men and women in family life that underlie at least some employment discrimination against women. It may also be that the "roots" of all forms of discrimination against people who are different in some way from a socially defined dominant group can be found in similar psychological processes of discomfort with change or difference, or with "authoritarian personality traits"— or that there are other links among different forms of prejudice. And it can plausibly be argued that homosexual men have historically been derided because they were seen as abdicating their masculinity, and therefore the advantage they have over women.

But the majority is right not to go searching for such roots, whatever they might be, because legislation is not typically concerned, and Title VII manifestly is not concerned, with defining and eliminating the "deep roots" of biased attitudes. Congress legislates against concrete behavior that represents a perceived social problem. Title VII does not prohibit "misogyny" or "sexism," nor does it undertake to revise individuals' ideas (religious or secular) about how families are best structured. Rather, it prohibits overt acts: discrimination in hiring, promotion, and the terms and conditions of employment based on sex. Similarly, states, like those in our Circuit, that have prohibited discrimination based on sexual orientation do not seek to eradicate disapproval of homosexual practices (whether rooted in religious belief or misogyny or some other theory, or caused by some conditioned or other visceral reaction). People may believe what they like, but they may not discriminate in employment against those whose characteristics or behaviors place them within the ambit of a protected category. Unlike those states, though, Congress has not enacted such a prohibition, and the fact that some of us believe that sexual orientation discrimination is unfair for much the same reasons that we disapprove of sex discrimination does not change that reality.

Second, the majority suggests that my analysis of associational discrimination is "squarely foreclosed by" cases like *Oncale*. It is not. As noted above, I do not maintain that Title VII prohibits only those practices that its framers might have been principally concerned with, or only what was "traditionally," seen as sex discrimination. To reiterate: sexual harassment plays a large role in hindering women's entry into, and advancement in, the workplace, and thus it is no surprise that courts have interpreted Title VII to prohibit it. And because Title VII protects both men and women from such practices, it does not matter whether the victim is male or female. Sexual harassment in the workplace quite literally imposes conditions of employment on one sex that are

not imposed on the other, and it does not matter whether the employer who perpetrates such discriminatory disadvantage is male or female, or of the same or different sex than the employee. The victim of discrimination in such situations is selected by his or her sex, and the disadvantage is imposed on him or her by reason of his or her membership in the protected class. It is not a question of what is "traditionally conceptualized as sexism." It is a question of the public meaning of the words adopted by Congress in light of the social problem it was addressing when it chose those words.

C

In the end, perhaps all of these arguments, on both sides, boil down to a disagreement about how discrimination on the basis of sexual orientation should be conceptualized. Whether based on linguistic arguments or associational theories or notions of stereotyping, the majority's arguments attempt to draw theoretical links between one kind of discrimination and another: to find ways to reconceptualize discrimination on the basis of sexual orientation as discrimination on the basis of sex. It is hard to believe that there would be much appetite for this kind of recharacterization if the law expressly prohibited sexual orientation discrimination, or that any opponent of sexual orientation discrimination would oppose the addition of sexual orientation to the list of protected characteristics in Title VII on the ground that to do so would be redundant or would express a misunderstanding of the nature of discrimination against men and women who are gay. I believe that the vast majority of people in our society — both those who are hostile to homosexuals and those who deplore such hostility — understand bias against or disapproval of those who are sexually attracted to persons of their own sex as a distinct type of prejudice, and not as merely a form of discrimination against either men or women on the basis of sex.

The majority asserts that discrimination against gay people is nothing more than a subspecies of discrimination against one or the other gender. Discrimination against gay men and lesbians is wrong, however, because it denies the dignity and equality of gay men and lesbians, and not because, in a purely formal sense, it can be said to treat men differently from women. It is understandable that those who seek to achieve legal protection for gay people victimized by discrimination search for innovative arguments to classify workplace bias against gays as a form of discrimination that is already prohibited by federal law. But the arguments advanced by the majority ignore the evident meaning of the language of Title VII, the social realities that distinguish between the kinds of biases that the statute sought to exclude from the workplace from those it did not, and the distinctive nature of anti-gay prejudice. Accordingly, much as I might wish it were otherwise, I must conclude that those arguments fail.

IV

The law with respect to the rights of gay people has advanced considerably since 1964. Much of that development has been by state legislation. As noted above, for example, twenty-two states now prohibit, by

explicit legislative pronouncement, employment discrimination on the basis of sexual orientation. But other advances have come by means of Supreme Court decisions interpreting the Constitution. Perhaps the most striking advance, from the vantage of the early 1960s, has been the legalization of same-sex marriage as a matter of constitutional law.

Nothing that I have said in this opinion should be interpreted as expressing any disagreement with the line of cases running from *Lawrence v. Texas*, through *Obergefell v. Hodges*. But those cases provide no support for the plaintiff's position in this case, or for the method of interpretation utilized by the majority.

For one thing, it is noteworthy that none of the Supreme Court's landmark constitutional decisions upholding the rights of gay Americans depend on the argument that laws disadvantaging homosexuals constitute merely a species of the denial of equal protection of the laws on the basis of gender, or attempt to assimilate discrimination against gay people to the kinds of sex discrimination that were found to violate equal protection in cases like *Frontiero v. Richardson*, *Craig v. Boren*, and *Orr v. Orr*, in the 1970s. Instead, the Court's gay rights cases were based on the guarantee of "liberty" embodied in the Fourteenth Amendment.

There is also a more fundamental difference. The Supreme Court's decisions in this area are based on the Constitution of the United States, rather than a specific statute, and the role of the courts in interpreting the Constitution is distinctively different from their role in interpreting acts of Congress. There are several reasons for this.

First, the entire point of the Constitution is to delimit the powers that have been granted by the people to their government. Our Constitution creates a republican form of government, in which the democratically elected representatives of the majority of the people are granted the power to set policy. But the powers of those representatives are constrained by a written text, which prevents a popular majority — both in the federal Congress and, since the Civil War Amendments, in state legislatures — from violating certain fundamental rights. As every law student reads in his or her first-year constitutional law class, "[t]he powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." To the extent that the courts exercise a non-democratic or counter-majoritarian power, they do so in the name of those rights. Particular exercises of that power, including the gay rights decisions of this new millennium, may be controversial, and fierce disagreements exist over the legitimacy of various methods of constitutional interpretation. And it is *not* controversial that the power to assess the constitutionality of legislation must be exercised with restraint, and with a due deference to the judgments of elected officials who themselves have taken an oath to defend the Constitution. But it has long been generally accepted that the courts have a special role to play in defending the liberties enshrined in the Constitution against encroachment even by the people's elected representatives.

Within the limits imposed by constitutional principles, however, the will of the majority, as expressed in legislation adopted by the people's representatives, governs. As the Supreme Court has instructed, the role of courts with respect to statutes is simply "to apply the statute as it is written — even if we think some other approach might accord with good policy." Just last Term, a unanimous Supreme Court foreclosed judicial efforts to "update" statutes, declaring that, although "reasonable people can disagree" whether, following the passage of time, "Congress should reenter the field and alter the judgments it made in the past[,] . . . the proper role of the judiciary in that process . . . [is] to apply, not amend, the work of the People's representatives." In interpreting statutes, courts must not merely show deference or restraint; their obligation is to do their best to understand, in a socially and politically realistic way, what decisions the democratic branches of government have embodied in the language they voted for (and what they have not), and to interpret statutes accordingly in deciding cases.

Second, the rights conferred by the Constitution are written in broad language. As the great Chief Justice Marshall commented, our Constitution is "one of enumeration, and not of definition." Examples are easily cited: The Constitution does not contain a list of specific punishments that are too cruel to be imposed; it prohibits, in general language, "cruel and unusual punishments." It does not enact a code of police procedure that explains exactly what kinds of searches the police may conduct, under what particular circumstances; it prohibits "unreasonable searches and seizures." It does not, as relevant here, identify particular types of discriminatory actions by state governments that it undertakes to forbid; it demands that those governments provide to all people within our borders "the equal protection of the laws."

Legislation, in contrast, can and often does set policy in minute detail. It does not necessarily concern itself with deep general principles. Rather, legislators are entitled to pick and choose which problems to address, and how far to go in addressing them. Within the limits of constitutional guarantees, Congress is given "wide latitude" to legislate, *City of Boerne*, but courts must struggle to define those limits by giving coherent meaning to broad constitutional principles. The majestic guarantee of equal protection in the Fourteenth Amendment is a very different kind of pronouncement than the prohibition, in Title VII, of specific kinds of discrimination, by a specified subset of employers, based on clearly defined categories. The language of the Constitution thus allows a broader scope for interpretation.

Third, and following in part from above, the Constitution requires some flexibility of interpretation, because it is intended to endure; it was deliberately designed to be difficult to amend. It is difficult to amend because the framers believed that certain principles were foundational and, for practical purposes, all but eternal, and should not be subject to the political winds of the moment. A constitution is, to quote Chief Justice Marshall yet again, "framed for ages to come, and is designed to approach immortality as nearly as human institutions

can approach it." The choice of broad language reflects the framers' goal: they did not choose to prohibit "cruel and unusual punishments," rather than listing prohibited punishments, simply to save space, on the assumption that future courts could consult extra-constitutional sources to identify what particular penalties they had in mind; they did so in order to enshrine a general principle, leaving its instantiation and elaboration to future interpreters.

Those enduring principles would not, could not, endure if they were incapable of adaptation — at times via judicial interpretation — to new social circumstances, as well as new understandings of old problems. That idea is not new. In 1910, the Supreme Court wrote, in the context of the Eighth Amendment, that "[t]ime works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. More recently, in *Obergefell*, the Court noted that "in interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged."

Legislation, on the other hand, is not intended to last forever. It must be consistent with constitutional principles, and ideally it will be inspired by a principled concept of ordered liberty. But it nevertheless remains the domain of practical political compromise. Congress and the state legislatures are in frequent session, and are capable — notwithstanding criticisms of "gridlock" and praise of "checks and balances" — of acting to repeal, extend, or modify prior enactments. In interpreting the Constitution, courts speak to the ages; in interpreting legislation, federal courts speak to — and essentially for — Congress, which can always correct our mistakes, or revise legislation in light of changing political and social realities.

Finally, the Constitution, as noted above, is designed, with very limited exceptions, to govern the government. The commands of equal protection and respect for liberties that can only be denied by due process of law tell us how a government must behave when it regulates the people who created it. Legislation, however, generally governs the people themselves, in their relation with each other.

The question of how the government, acting at the behest of a possibly temporary political majority, is permitted to treat the people it governs, is a different question, and is answered by reference to different principles, than the question of what obligations should be imposed on private citizens. The former question must ultimately be answered by courts under the principles adopted in the Constitution. The latter is entrusted primarily to the legislative process. Courts interpreting statutes are not in the business of imposing on private actors new rules that have not been embodied in legislative decision. It is for that reason that segregation in public facilities was struck down by constitutional command, long before segregation of private facilities was prohibited by federal legislation adopted by Congress. Whether or not the Fifth and Fourteenth Amendments have something to

say about whether *the state and federal governments* may discriminate in employment against gay Americans — a question that is not before us, and about which I express no view — it is the prerogative of Congress or a state legislature to decide whether private employers may do so.

In its *amicus* submission, the EEOC quite reasonably asks whether it is just that a gay employee can be married on Sunday, and fired on Monday — discriminated against at his or her job for exercising a right that is protected by the Constitution. I would answer that it is not just. But at the same time, I recognize that the law does not prohibit every injustice. The Constitution protects the liberty of gay people to marry against deprivation by their government, but it does not promise freedom from discrimination by their fellow citizens. That is hardly a novel proposition: absent Title VII, the same injustice could have been inflicted on the Lovings themselves. The Constitution protected them against *governmental* discrimination, but (except for specific vestiges of slavery prohibited by the Thirteenth Amendment) only an act of Congress can prohibit one individual from discriminating against another in housing, public accommodations, and employment. It is well to remember that whether to prohibit race and sex discrimination was a controversial political question in 1964. Imposing an obligation on private employers to treat women and minorities fairly required political organizing and a political fight.

At the end of the day, to paraphrase Chief Justice Marshall, in interpreting statutes we must never forget that it is *not* a Constitution we are expounding. When interpreting an act of Congress, we need to respect the choices made by Congress about which social problems to address, and how to address them. In 1964, Congress — belatedly — prohibited employment discrimination based on race, sex, religion, ethnicity, and national origin. Many states have similarly recognized the injustice of discrimination on the basis of sexual orientation. In doing so, they have called such discrimination by its right name, and taken a firm and explicit stand against it. I hope that one day soon Congress will join them, and adopt that principle on a national basis. But it has not done so yet.

For these reasons, I respectfully, and regretfully, dissent.

LIVINGSTON, *Circuit Judge*, dissenting:

I dissent for substantially the reasons set forth in Sections I, II, and III of Judge Lynch's opinion, and I join in those sections. I share in the commitment that all individuals in the workplace be treated fairly, and that individuals not be subject to workplace discrimination on the basis of their sexual orientation, just as on the basis of their "race, color, religion, sex, [and] national origin." I cannot conclude, however, as the majority does, that sexual orientation discrimination is a "subset" of sex discrimination, et passim, and is therefore included among the prohibited grounds of workplace discrimination listed in Title VII.

The majority's efforts founder on the simple question of how a reasonable reader,

competent in the language and its use, would have understood Title VII's text when it was written — on the question of its public meaning at the time of enactment. The majority acknowledges the argument "that it is not 'even remotely plausible that in 1964, when Title VII was adopted, a reasonable person competent in the English language would have understood that a law banning employment discrimination 'because of sex' also banned discrimination because of sexual orientation.'" It does not contest the point, however, but seeks merely to justify its departure from ordinary, contemporary meaning by claiming that "[e]ven if that [is] so," its approach no more departs from the ordinary meaning of words in their contemporary context than supposedly occurred when sexual harassment and hostile work environment claims were first recognized by courts. But as Judge Lynch has cogently explained, that is simply not the case. The majority does not discover a "plain" yet hidden meaning in Title VII, sufficiently obscure as to wholly elude every appellate court, including this one, until the Seventh Circuit's decision in *Hively v. Ivy Tech Cmty. Coll. of Ind.*, last year. Instead, it *sub silentio* abandons our usual approach to statutory interpretation.

Because Sections I, II, and III of Judge Lynch's dissent are sufficient to answer the statutory question that this case presents, I do not go further to address the subject of constitutional interpretation, and do not join in Section IV. I agree with Judge Lynch, however, that constitutional and statutory interpretation should not be confused: that while courts sometimes may be called upon to play a special role in defending constitutional liberties against encroachment by *government*, in statutory interpretation, courts "are not in the business of imposing on private actors new rules that have not been embodied in legislative decision." To do so chips away at the democratic and rule-of-law principles on which our system of governance is founded — the very principles we rely on to secure the legitimacy and the efficacy of our laws, including antidiscrimination legislation.

The Supreme Court said unanimously, just last Term, that the proper role of the judiciary in statutory interpretation is "to apply, not amend, the work of the People's representatives," even when reasonable people might believe that "Congress should reenter the field and alter the judgments it made in the past." "[I]t is for Congress, not the courts, to write the law," and where "Congress' . . . decisions are mistaken as a matter of policy, it is for Congress to change them. We should not legislate for them."

This hornbook separation-of-powers principle and the reasons behind it need not be elaborated here, for both should be well known to every law student. Together, they explain why judges interpreting statutes do their best to discern the ordinary, contemporary, common meaning of the statute's language. This is the law that was enacted through the democratic process, and the law we are to apply.

This approach does not always yield results that satisfy the judge charged with the task of statutory interpretation. It has not done so today. But I cannot faithfully join in the majority's opinion. I agree with

Judge Lynch that when Title VII was written and, indeed, today, "bias against or disapproval of those who are sexually attracted to persons of their own sex" was and is viewed "as a distinct type of prejudice," and not as a subcategory of "discrimination against either men or women on the basis of sex." Dissenting Op. at 56. Accordingly, and agreeing with him that in interpreting an act of Congress, we must "respect the choices made by Congress about which social problems to address, and how to address them," I respectfully dissent.

RAGGI, *Circuit Judge*, dissenting:

A majority of the court today extends Title VII's prohibition of employment discrimination "because of . . . sex," to discrimination based on sexual orientation. I respectfully dissent substantially for the reasons stated by Judge Lynch in Parts I, II, and III of his dissenting opinion and by Judge Livingston in her dissenting opinion.

"Supreme Court to Decide Whether Landmark Civil Rights Law Applies to Gay and Transgender Workers"

The New York Times

Adam Liptak

April 22, 2019

The Supreme Court announced on Monday that it would decide whether the Civil Rights Act of 1964 guarantees protections from workplace discrimination to gay and transgender people in three cases expected to provide the first indication of how the court's new conservative majority will approach L.G.B.T. rights.

The Equal Employment Opportunity Commission has said the 1964 act does guarantee the protections. But the Trump administration has taken the opposite position, saying that the landmark legislation that outlawed discrimination based on race, religion, national origin and, notably, sex, cannot fairly be read to apply to discrimination based on sexual orientation or transgender status.

The three cases the court accepted are the first concerning L.G.B.T. rights since the retirement last summer of Justice Anthony M. Kennedy, a champion of gay rights. His replacement by the more conservative Justice Brett M. Kavanaugh could shift the court's approach to cases concerning gay men, lesbians and transgender people.

Most federal appeals courts have interpreted Title VII of the Civil Rights Act to exclude sexual orientation discrimination. But two of them, in New York and Chicago, recently issued decisions ruling that discrimination against gay men and lesbians is a form of sex discrimination.

The Supreme Court agreed to hear the case from New York, Altitude Express Inc. v. Zarda, No. 17-1623, along with one from Georgia that came to the opposite conclusion, Bostock v. Clayton County, Ga., No. 17-1618.

The New York case was brought by a skydiving instructor, Donald Zarda, who said he was fired because he was gay. His dismissal followed a complaint from a female customer who had voiced concerns about being tightly strapped to Mr. Zarda during a tandem dive. Mr. Zarda, hoping to reassure the customer, told her that he was "100 percent gay."

Mr. Zarda sued under Title VII and lost the initial rounds. He died in a 2014 skydiving accident, and his estate pursued his case.

Last year, a divided 13-judge panel of the United States Court of Appeals for the Second Circuit allowed the lawsuit to proceed. Writing for the majority, Chief Judge Robert A. Katzmann concluded

that "sexual orientation discrimination is motivated, at least in part, by sex and is thus a subset of sex discrimination."

In dissent, Judge Gerard E. Lynch wrote that the words of Title VII did not support the majority's interpretation.

"Speaking solely as a citizen," he wrote, "I would be delighted to awake one morning and learn that Congress had just passed legislation adding sexual orientation to the list of grounds of employment discrimination prohibited under Title VII of the Civil Rights Act of 1964. I am confident that one day — and I hope that day comes soon — I will have that pleasure."

"I would be equally pleased to awake to learn that Congress had secretly passed such legislation more than a half-century ago — until I actually woke up and realized that I must have been still asleep and dreaming," Judge Lynch wrote. "Because we all know that Congress did no such thing."

The arguments in the Second Circuit had a curious feature: Lawyers for the federal government appeared on both sides. One lawyer, representing the E.E.O.C., said Title VII barred discrimination against gay people. Another, representing the Trump administration, took the contrary view.

The Georgia case was brought by a child welfare services coordinator who said he was fired for being gay. The 11th Circuit, in Atlanta, ruled against him in a short, unsigned opinion that cited a 1979 decision that had ruled that "discharge for homosexuality is not prohibited by Title VII."

The justices also agreed to decide the separate question of whether Title VII bars discrimination against transgender people. The case, R.G. & G.R. Harris Funeral Homes v. Equal Employment Opportunity Commission, No. 18-107, concerns Aimee Stephens, who was fired from a Michigan funeral home after she announced in 2013 that she was a transgender woman and would start working in women's clothing.

"What I must tell you is very difficult for me and is taking all the courage I can muster," she wrote to her colleagues. "I have felt imprisoned in a body that does not match my mind, and this has caused me great despair and loneliness."

Ms. Stephens had worked at the funeral home for six years. Her colleagues testified that she was able and compassionate.

Two weeks after receiving the letter, the home's owner, Thomas Rost, fired Ms. Stephens. Asked for the "specific reason that you terminated Stephens," Mr. Rost said: "Well, because he was no longer going to represent himself as a man. He wanted to dress as a woman."

The United States Court of Appeals for the Sixth Circuit, in Cincinnati, ruled for Ms. Stephens. Discrimination against transgender people, the court said, was barred by Title VII.

"It 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," the court said, adding, "Discrimination 'because of sex' inherently includes

discrimination against employees because of a change in their sex."

John J. Bursch, a lawyer with Alliance Defending Freedom, which represents the funeral home, said the appeals court had impermissibly revised the federal law.

"Neither government agencies nor the courts have authority to rewrite federal law by replacing 'sex' with 'gender identity' — a change with widespread consequences for everyone," Mr. Bursch said in a statement. "The funeral home wants to serve families mourning the loss of a loved one, but the E.E.O.C. has elevated its political goals above the interests of the grieving people that the funeral home serves."

James D. Esseks, a lawyer with the American Civil Liberties Union, which represents Ms. Stephens and Mr. Zarda's estate, said the cases concern elementary principles of fairness.

"Most of America would be shocked if the Supreme Court said it was legal to fire Aimee because she's transgender or Don because he is gay," Mr. Esseks said in a statement. "Such a ruling would be disastrous, relegating L.G.B.T.Q. people around the country to a second-class citizen status."

There is a second issue in Ms. Stephens's case, one that could allow her to win however the Supreme Court might rule on whether Title VII applies to discrimination against transgender people. In 1989, the court said discrimination against workers because they did not conform to gender stereotypes was a form of sex discrimination.

The Sixth Circuit ruled for Ms. Stephens on that ground, too, saying she had been fired "for wishing to appear or behave in a manner that contradicts the funeral home's perception of how she should behave or appear based on her sex."

All three cases present the question of how courts should interpret statutes whose drafters might not have contemplated the sweep of the language they wrote.

In January, in a minor arbitration case, Justice Neil M. Gorsuch wrote that courts should ordinarily interpret statutes as they were understood at the time of their enactment. In a concurring opinion, Justice Ruth Bader Ginsburg said that was not always so.

"Congress," she wrote, "may design legislation to govern changing times and circumstances." Quoting from an earlier decision, she added: "Words in statutes can enlarge or contract their scope as other changes, in law or in the world, require their application to new instances or make old applications anachronistic."

"On L.G.B.T. Rights, the Supreme Court Asks the Question"

The New York Times

Linda Greenhouse

April 25, 2019

It was no snap judgment.

That's one thing that is clear about the order the Supreme Court issued on Monday adding to its docket three cases on whether current federal law protects L.G.B.T. employees from being fired for their sexual orientation or transgender identity.

The court had the three petitions under active review beginning in early January, and the cases were taken up 11 times at the justices' weekly private conference. Three or four "relistings" would not be particularly noteworthy these days. A typical reason for such a delay is that a petition has failed to attract the necessary four votes and some justices are writing a dissent to explain why their colleagues should have agreed to take the case. But 11 conferences, ending not with a dissenting opinion but with a grant of review, is highly unusual.

So something else is clear about Monday's order: If the court didn't make a snap judgment, neither should we when it comes to understanding what just happened and what might come next. I was surprised to see predictions of doom being offered by progressive court watchers. "The absolute worst case scenario," Ian Millhiser warned on Think Progress. The cases "could demolish sex discrimination law as we know it," Mark Joseph Stern wrote on Slate.

I don't mean to single out two writers whose consistently smart Supreme Court analysis I admire. I understand the progressive concern that the court might conclude that judges lack a legitimate basis for retrospectively writing "sexual orientation" or "transgender" into Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment "because of" an individual's sex (along with race, religion and national origin). If the court were to conclude that the statute's meaning is controlled by what those who voted for it 55 years ago thought they were doing, it would eviscerate its own precedents interpreting Title VII generously to cover, for example, sexual harassment, not only of women by men but also between members of the same sex.

But here's the thing: The court indicated on Monday that it is not going to do that. In granting review of the transgender case, R.G. & G.R. Harris Funeral Homes v. Equal Employment Opportunity Commission, the justices rejected the questions posed to them by the employer, which lost in the lower court and consequently is the petitioner in this case. The employer, a small chain of funeral homes in Michigan that dismissed a longtime employee who was transitioning from male

to female, is represented by Alliance Defending Freedom, a prominent Christian-right litigating organization. These were the questions the group told the justices were presented by the appeal:

"1. Whether the word 'sex' in Title VII's prohibition on discrimination 'because of sex' meant 'gender identity' and included 'transgender status' when Congress enacted Title VII in 1964.

"2. Whether Price Waterhouse v. Hopkins prohibits employers from applying sex-specific policies according to their employee's sex rather than their gender identity."

And here is the single question that the justices have chosen to answer instead:

"Whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under Price Waterhouse v. Hopkins."

The difference between the two approaches to the case is clear. The answer to Alliance Defending Freedom's first question is obviously "no" — gender identity wasn't on the screen for Congress or for most of society in 1964. On the basis of that question, the transgender plaintiff, Aimee Stephens, loses.

The group's second question requires a bit more explanation, but the answer would take the court to the same place. The funeral home had a dress code for its funeral directors that required men to wear business suits and women to wear jackets and skirts. When Anthony Stephens, soon to become Aimee, informed that funeral home's owner that part of the transition process would involve dressing and appearing as a woman before gender reassignment surgery, the owner replied, "This is not going to work out." The owner later testified that he fired Anthony Stephens because "he was no longer going to represent himself as a man. He wanted to dress as a woman."

There is a body of employment law holding that differential dress codes for men and women don't ordinarily amount to sex discrimination. So if that's the question for the Supreme Court, Aimee Stephens loses on that score as well.

Both versions of the questions, from the Alliance Defending Freedom and the court, invoke the case of Price Waterhouse v. Hopkins. This 1989 decision expanded the concept of discrimination to hold that an employer who penalizes an employee who doesn't conform to a stereotypical idea of the proper appearance or behavior for that person's gender can be found to violate Title VII. The precedent has played an important role in litigation on behalf of gay men and lesbians, and it will play an important one in this case as well. The court's rephrased question makes it clear that the justices read Price Waterhouse as encompassing a broad view of stereotyping, well beyond the dress code issue. That was the view taken by the United States Court of Appeals for the Sixth Circuit in its ruling on behalf of Ms. Stephens. By discriminating against a transgender employee, the appeals court said, an employer is necessarily "imposing its stereotypical notions of how sexual organs and gender identity ought to align."

I have no inside information about what went on at the court during the prolonged consideration of this case. But I believe that there was an extended negotiation among the justices, aimed at crafting questions that would open up the case rather than skew it in the employer's direction.

I'm reminded of something that happened a quarter-century ago when another potential landmark case, Planned Parenthood v. Casey, reached the court. The petition was filed in late 1991 by abortion-rights advocates who believed that the court, following the retirements of its leading liberal justices, was about to overturn Roe v. Wade. The advocates' calculation was that if this was going to be the outcome, it would be better for it to happen quickly and decisively, in time for the 1992 presidential election to become a referendum on the right to abortion and to awaken what polls showed to be a large silent majority favoring abortion rights. So they asked the court to decide a broad question: Was Roe v. Wade still good law?

The court refused to put itself to that all-or-nothing test. Instead, it rewrote the question to address specifically the constitutionality of the three Pennsylvania abortion restrictions that were at issue. As I later learned from internal court correspondence when I was writing a biography of Justice Harry Blackmun, the author of Roe v. Wade, the instigator of this change was Justice David Souter, who said he wanted to rephrase the question "in such a way as to *avoid* overruling Roe." Justice Souter, who was then one of two justices recently appointed by President George H.W. Bush, went on to provide a crucial vote as one of the five justices who preserved the right to abortion.

The times, the cases and the court are different now, of course. But the Casey story shows us that the justices are capable of taking great care not to permit overly zealous advocacy to back them into a corner.

The other two Title VII cases the court granted on Monday are Bostock v. Clayton County, Ga. and Altitude Express v. Zarda. The justices did not reword the questions in either of these cases. The wording in both is straightforward and to the point. The Bostock petition asks "Whether discrimination against an employee because of sexual orientation constitutes prohibited employment discrimination 'because of … sex' within the meaning of Title VII. …" The Altitude Express petition's question is only slightly different: "Whether the prohibition in Title VII of the Civil Rights Act of 1964 … against employment discrimination 'because of … sex' encompasses discrimination based on an individual's sexual orientation."

These petitions also spent four months being listed for conference after conference. My guess is that they were simply being carried along while the justices were negotiating about how to proceed with the transgender case. These cases clearly merited review. The employer had won in the Bostock case in the United States Court of Appeals for the 11th Circuit, while the gay employee had won in the Altitude Express case in the United States Court of Appeals for the Second Circuit. This is the type of division over the core meaning of a federal statute that the Supreme Court

views as its obligation to resolve. While the court granted review in both cases, it has consolidated them for a single one-hour argument, probably in November and probably on the same day as the transgender case.

And what happens then? I offer my analysis less as a prediction than a caution against jumping to conclusions. But if the court is true both to the direction of its sex-discrimination precedents and to ordinary uses of the English language, all three cases ought to be easy wins for the plaintiffs. No need to rely on me; ask Judge José A. Cabranes of the Second Circuit. He is one of the judiciary's more prominent conservatives and a judge whose opinions get the attention of conservatives on the Supreme Court. In the Second Circuit sexual orientation case, he concurred with the majority in finding that the plaintiff, Donald Zarda, had a valid Title VII claim.

"This is a straightforward case of statutory construction," Judge Cabranes wrote. "Title VII of the Civil Rights Act of 1964 prohibits discrimination 'because of sex.' Zarda's sexual orientation is a function of his sex. Discrimination against Zarda because of his sexual orientation therefore *is* discrimination because of his sex, and is prohibited by Title VII."

"Supreme Court to Rule on Gay, Transgender Employment Rights"

The Wall Street Journal

Jess Bravin and Brent Kendall

April 22, 2019

The Supreme Court will hear three cases concerning whether gay and transgender people are protected from discrimination on the job, marking the first major LGBT rights issue to reach the court since its 2015 opinion legalizing same-sex marriage.

Lower courts have differed sharply on whether the 1964 Civil Rights Act, which prohibits sex discrimination, necessarily covers sexual orientation or gender identity. Congress, unlike some two dozen states, hasn't explicitly added those classifications to federal antidiscrimination laws.

The court's calendar all but ensures decisions will come in the late spring or early summer of 2020, injecting a significant social issue—and likely the makeup of the Supreme Court itself—into the presidential election season.

With four liberal justices expected to read LGBT-rights claims more broadly, the focus will be on the court's conservative wing, recently bolstered by two Trump appointees vetted by the president's social-conservative allies.

That places the spotlight squarely on Justice Brett Kavanaugh, whose predecessor, Justice Anthony Kennedy, led a closely divided court through a series of landmark opinions culminating with the constitutional recognition of same-sex marriage. Justice Kavanaugh, 54 years old, once clerked for Justice Kennedy, who enthusiastically promoted the younger jurist's career.

Justice Kavanaugh didn't face such matters during his years as a judge on a lower court, but conservatives have tended to interpret antidiscrimination laws narrowly, typically resolving ambiguities in employers' favor.

Important as the issues are across the political spectrum, the Supreme Court has appeared in no hurry to confront them in recent years. All three appeals were filed last year and lingered on the court's agenda for months beyond the typical case. At the end, the justices may have had little choice, as lower courts have issued conflicting decisions.

Two of the court's new cases involve gay people who allege they were fired because of their sexual orientation.

In one, the New York-based Second U.S. Circuit Court of Appeals overruled its own precedents to allow the late Donald Zarda, a skydiving instructor, to sue his former employer. Mr. Zarda said he sometimes told female customers he was gay to ease their potential discomfort in being strapped together with a man for a tandem dive. One client alleged Mr. Zarda touched her

inappropriately and disclosed his sexual orientation as a way to excuse his behavior, a claim he denied. Mr. Zarda was fired in 2010 and died in an accident in 2014.

Chief Judge Robert Katzmann wrote that the Zarda estate should be permitted to pursue its lawsuit. "Sexual orientation discrimination is predicated on assumptions about how persons of a certain sex can or should be," he wrote. Because it "is motivated by an employer's opposition to romantic association between particular sexes," it qualifies as "discrimination based on the employee's own sex."

The second case comes from the Atlanta-based 11th Circuit, which rejected discrimination claims by a gay man fired from his job as child-welfare services coordinator for the juvenile court system in Clayton County, Ga. Gerald Lynn Bostock alleged his sexual orientation, as well as his participation in a gay recreational softball league, led to his termination.

Last year, a three-judge panel issued a brief unsigned opinion based on a footnote from a 1979 decision by an earlier court stating that "discharge for homosexuality is not prohibited." That footnote, in turn, relied on an earlier opinion siding with an insurance company that in 1969 turned down a male job applicant because of his "effeminate characteristics."

The employers in both the New York and Georgia cases deny they fired the workers because they were gay, but argue that Title VII—the employment provision of the Civil Rights Act that prohibits discrimination based on "race, color, religion, sex, or national origin"—doesn't address sexual orientation.

The cases also highlight a reversal in the federal government's view of gay rights. The Obama-era Justice Department argued that federal civil-rights law protected workers against sexual-orientation discrimination. The Trump administration takes the opposite position.

The third case accepted on Monday concerns a transgender worker and will be considered separately from the other two. Aimee Stephens alleges a Detroit funeral home fired her as a funeral director after she said she was transitioning and would no longer present as male after six years with the company. The employer, R.G. & G.R. Harris Funeral Homes Inc., said the change in Ms. Stephens's gender presentation would violate its dress code and disrupt the grieving process for clients.

Last year, the Sixth Circuit, in Cincinnati, allowed the U.S. Equal Employment Opportunity Commission to sue on Ms. Stephens's behalf.

"Neither government agencies nor the courts have authority to rewrite federal law by replacing 'sex' with 'gender identity'—a change with widespread consequences for everyone," said an attorney for the employer, John Bursch of Alliance Defending Freedom, an evangelical advocacy group. "The EEOC has elevated its political goals above the interests of the grieving people that the funeral home serves."

“What happened to me was wrong, it was hurtful and it harmed my family. I hope the Supreme Court will see that firing me because I’m transgender was discrimination,” Ms. Stephens said in a statement released by the ACLU, which represents her.

The high court is likely to hear oral arguments in the fall, with decisions expected by July 2020.

The court’s series of gay-rights landmark opinions, all written by Justice Kennedy, began in 1996 with a decision striking down a Colorado ballot measure that had invalidated local laws protecting gay people from discrimination and prohibited such protections in the future.

In 2003, the court struck down a Texas statute criminalizing gay sex, overruling a 1986 decision that upheld sodomy laws. In 2013, the court voided a federal ban on benefits to legally married same-sex couples. That decision paved the way for Obergefell v. Hodges, the court’s 2015 ruling recognizing same-sex marriages under the Constitution.

The late Justice Antonin Scalia, a conservative stalwart, dissented every time. But in 1998, he wrote one opinion that gay-rights advocates cite as a major precedent in their favor. The court’s unanimous ruling allowed a male employee on an oil rig to sue for sex discrimination by other men who harassed him in ways suggesting they thought he was gay.

While few lawmakers in 1964 may have expected the Title VII to cover such conduct, “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils,” Justice Scalia wrote.

"Court to take up LBGT rights in the workplace"

SCOTUS Blog

Amy Howe

April 22, 2019

[Excerpt; some sections omitted]

The Supreme Court announced today that it will weigh in next term on whether federal employment discrimination laws protect LGBT employees. After considering a trio of cases — two claiming discrimination based on sexual orientation and the third claiming discrimination based on transgender status — at 11 consecutive conferences, the justices agreed to review them. Until today, the cases slated for oral argument next term had been relatively low-profile, but this morning's announcement means that the justices will have what will almost certainly be blockbuster cases on their docket next fall, with rulings to follow during the 2020 presidential campaign.

In *Altitude Express v. Zarda*, the justices will decide whether federal laws banning employment discrimination protect gay and lesbian employees. The petition for review was filed by a New York skydiving company, now known as Altitude Express. After the company fired Donald Zarda, who worked as an instructor for the company, Zarda went to federal court, where he contended that he was terminated because he was gay – a violation of (among other things) Title VII of the Civil Rights Act of 1964, which bars discrimination "because of sex."

The trial court threw out Zarda's Title VII claim, reasoning that Title VII does not allow claims alleging discrimination based on sexual orientation. But the full U.S. Court of Appeals for the 2nd Circuit reversed that holding, concluding that Title VII does apply to discrimination based on sexual orientation because such discrimination "is a subset of sex discrimination."

Altitude Express took its case to the Supreme Court last year, asking the justices to weigh in. In 2017, the justices had denied review of a similar case, filed by a woman who alleged that she had been harassed and passed over for a promotion at her job as a hospital security officer in Georgia because she was a lesbian. However, that case came to the court in a somewhat unusual posture: Neither the hospital nor the individual employees named in the lawsuit had participated in the proceedings in the lower courts, and they had told the Supreme Court that they would continue to stay out of the case even if review were granted, which may have made the justices wary about reviewing the case on the merits.

Altitude Express' case will be consolidated for one hour of oral argument with the second case involving the rights of gay and lesbian employees: *Bostock v. Clayton County,*

Georgia. The petitioner in the case, Gerald Bostock, worked as a child-welfare-services coordinator in Clayton County, Georgia. Bostock argued that after the county learned that he was gay, it falsely accused him of mismanaging public money so that it could fire him – when it was in fact firing him because he was gay.

Bostock went to federal court, arguing that his firing violated Title VII. The county urged the court to dismiss the case, arguing that Title VII does not apply to discrimination based on sexual orientation. The district court agreed, and the U.S. Court of Appeals for the 11th Circuit upheld that ruling

"Title VII and LGBT Discrimination: The Path to the High Court"

Law360

Melissa Legault

April 30, 2019

After 11 private conferences during which the U.S. Supreme Court justices debated whether to hear the cases, the Supreme Court granted certiorari[1] in three cases involving the extent of protection — if any — provided by Title VII of the Civil Rights Act of 1964 against employment-based discrimination on the basis of sexual orientation and gender identity. The court consolidated the two sexual orientation cases, Altitude Express v. Zarda and Bostock v. Clayton County, Georgia, and allocated a total of one hour for oral argument for both cases.

In the gender identity case, R.G. & G.R. Harris Funeral Homes Inc. v. U.S. Equal Employment Opportunity Commission et al., the court limited its consideration to the question of whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) pursuant to the theory of sex stereotyping announced in Price Waterhouse v. Hopkins.[2]

The current federal stance on Title VII and LGBT discrimination is conflicting, to say the least. The court's rulings in these cases will provide employers with some much-needed clarity regarding whether federal law requires that their discrimination policies protect gay and transgender individuals.

Background

Under Title VII, it is illegal for an employer to discriminate against an employee "because of ... sex." The statute does not on its face prohibit sexual orientation or gender identity discrimination, and circuit courts are split as to whether Title VII's protection against sex-based discrimination also prohibits sexual orientation discrimination, with the Second and Seventh Circuits of the view that Title VII prohibits sexual orientation- based discrimination and the Eleventh and Fifth Circuits reaching the opposite conclusion.

In Zarda, a male skydiving instructor whose employment was allegedly terminated because of his sexual orientation filed a Title VII claim against his employer. The U.S. Court of Appeals for the Second Circuit held that the plaintiff was wrongfully terminated from his job, stating that, "because sexual orientation is a function of sex and sex is a protected characteristic under Title VII, it follows that sexual orientation is also protected."

The Second Circuit's decision was in line with the U.S. Court of Appeals for the Seventh Circuit's 2007 holding in Hively v. Ivy Tech Community College where that court held that discrimination on the basis of sexual orientation violates Title VII. A few

months after Zarda was decided, the U.S. Court of Appeals for the Eleventh Circuit reached a contrary conclusion in Bostock, relying on previous circuit precedent.

The last of the trio, Harris Funeral Homes, contemplates whether Title VII implicitly prohibits gender identity discrimination. In that case, the U.S. Court of Appeals for the Sixth Circuit became the first federal circuit court of appeals to recognize transgender discrimination as a form of prohibited sex-based discrimination under Title VII, relying heavily on the reasoning in Zarda.

In addition to the trio of cases currently before the court, other circuit courts have recently grappled with the issue of whether Title VII protects against LGBT discrimination. For instance, the issue of sexual orientation discrimination is currently before the U.S. Court of Appeals for the Eighth Circuit. The court heard oral argument on April 17, 2019, in Horton v. Midwest Geriatric Management LLC, a case brought by a man who was offered a job as vice president of sales and marketing, only to have the offer rescinded after the company discovered that he is gay.

Further, on April 19, 2019, the U.S. Court of Appeals for the Fifth Circuit deepened the circuit split in Bonnie O'Daniel v. Industrial Services Solutions et al. and held that Title VII does not prohibit employers from terminating the employment of straight workers because of their sexuality, reaffirming the circuit's long- standing position that Title VII does not protect against sexual orientation discrimination. In that case, the plaintiff claimed that her employer terminated her employment because of her sexual orientation (heterosexual) after she made a transphobic comment on Facebook.

The Fifth Circuit rejected the plaintiff's Title VII retaliation claim, holding that, based on the circuit's

"unbroken and unequivocal precedents, it is not 'reasonable' in the Fifth Circuit to infer that Title VII embraces an entirely new category of persons protected for their sexual orientation." The court also dismissed the plaintiff's claim that her former employer violated state law by suppressing her free expression on grounds that the law does not cover private employers.

This decision comes shortly after the same circuit's decision in Wittmer v. Phillips 66 Company. In that discrimination case involving a transgender plaintiff, the Fifth Circuit ruled in favor of the employer without addressing the question of whether Title VII protects against LGBT discrimination; however, U.S. Circuit Judge James Ho, who was nominated by President Donald Trump, wrote a lengthy and detailed concurrence analyzing the issue and concluded that Title VII does not provide such protections.

In his concurrence, Judge Ho opined that "[o]nly the Supreme Court can resolve this circuit split." With its decision to grant certiorari in this trio of cases, the Supreme Court has chosen to do just that. The court will hear arguments in these cases next term, meaning employers can expect to see a decision by June 2020. Until then, this issue will continue to be closely watched by the

nation, with government agencies, Congress and employers weighing in on the debate.

Federal Agencies Muddied the Waters

The fall of 2018 brought a wave of federal agency activity regarding LGBT discrimination protection. For example, in October 2018, a U.S. Department of Health and Human Services memo garnered national attention for defining "sex" to exclude transgenderism.

The memo defines "sex" as "a person's status as male or female based on immutable biological traits identifiable by or before birth." In other words, HHS wants to rely on birth certificates as the main identifier of an individual's sex, a policy that would essentially abolish federal recognition and protection of transgender individuals. The memo requests that other federal agencies — including the U.S. Department of Justice, U.S. Department of Education and U.S. Department of Labor — alter their own understanding of the word "sex" to match HHS' proposed definition.

Shortly after the HHS memo became public, the DOJ, appearing before the Supreme Court on behalf of the federal government, urged the court in a brief[3] to postpone consideration of Harris Funeral Homes until it decides whether to review Zarda and Bostock because the Sixth Circuit relied heavily on Zarda in concluding that Title VII prohibits transgender discrimination.

Further, the DOJ contended, consistent with the HHS memo, that Title VII does not prohibit employers from discriminating against employees based on gender identity. Not all agencies agree with HHS' and the DOJ's interpretation of Title VII. Specifically, in response to the other agencies' proclamations on the topic, the acting chair of the EEOC, Victoria Lipnic (who was appointed by Trump in 2017), announced that the EEOC plans to continue prosecuting transgender discrimination claims in accordance with the agency's stated policies.

The Legislative Branch Weighs In

On March 13, 2019, the House Democrats, spearheaded by Rep. David Cicilline, an openly gay congressman from Rhode Island, reintroduced a bill to expand LBGT discrimination protections. The Equality Act, first introduced in 2015, would change existing civil rights legislation to ban discrimination against LGBT individuals in employment, housing and public accommodations, among other areas.

Further, the proposed bill would bar reliance on the Religious Freedom Restoration Act as justification of sexual orientation and transgender discrimination. The act is currently being considered in various committee hearings and a floor vote is expected in the House by early summer 2019. Although the bill has a chance to pass in the House, which has a Democratic majority, it is unlikely that it would pass in the Republican-controlled Senate.

The American Public Shows Increasing Support of LGBT Rights

A recent poll[4] from the Public Religion Research Institute, or PRRI, indicates that a majority of Americans in every religion,

party and U.S. state supports policies that protect against gender identity and sexual orientation discrimination.

Further, nearly 200 companies — including Amazon, Apple, PepsiCo, Twitter and Uber — have decided to take the issue into their own hands and signed the Business Statement for Transgender Equality[5] opposing "any administrative and legislative efforts to erase transgender protections through reinterpretation of existing laws and regulations." Even without federal protections in place, corporate America has chosen to instill its own protections for employees, with over 80% of Fortune 500 companies prohibiting LGBT discrimination in their employment policies. Moreover, many of these companies have publicly supported the proposed Equality Act now before Congress.

On March 27, 2019, some of America's most influential companies weighed in on this issue at the state level. In a letter,[6] companies like Amazon, Google and IBM warned Texas legislators against a pair of bills that the companies deem discriminatory, explaining that they would "continue to oppose any unnecessary, discriminatory, and divisive measures that would damage Texas' reputation" including "policies that explicitly or implicitly allow for the exclusion of LGBTQ people, or anyone else."

Conclusion

Considering the court's current makeup and recent decisions in other employment cases, it is uncertain how the nine justices will ultimately rule on whether Title VII prohibits sexual orientation and gender identity discrimination, but pundits largely believe that the conservative majority will take a narrow view in interpreting the extent of Title VII's sex-based discrimination prohibitions. Until the court provides clarity on these questions, it is important for employers to remember that, although there are currently no express federal protections against sexual orientation or transgender discrimination, many state and local governments prohibit such discrimination.

In fact, over 20 states and Washington, D.C., have explicit laws prohibiting LGBT-related discrimination. Employers are encouraged to consult with counsel to ensure compliance with state and local laws regarding transgender and sexual orientation discrimination in the workplace. In addition, employers should continue to use best practices whenever making adverse hiring and employment decisions and should adequately document performance deficiencies or other legitimate concerns regarding applicants and employees, so they are able to establish an independent, nondiscriminatory reason for their employment decisions.

“This landmark ruling could bring logic to civil rights laws”

CNN

Caroline Polisi

February 27, 2018

The most important and culturally significant legal battles are often waged through piecemeal victories won at a glacial pace -- two steps forward, one step back. The federal Defense of Marriage Act, which was enacted by Congress in 1996 in an attempt to curb states from legally recognizing same-sex marriage, was not ruled unconstitutional by the Supreme Court until 2013.

Consequently, the unwieldy machine that is "the law," inevitably lags behind the zeitgeist and develops idiosyncrasies that are confusing at best, and illogical at worst.

The United States Court of Appeals for the Second Circuit this week took a bold step toward correcting this landscape in the area of employment discrimination law, which in many jurisdictions illogically holds that discrimination based on sexual orientation is distinct from, rather than an example of, sex discrimination.

In Zarda v. Altitude Express, the Second Circuit ruled with a resounding 10-3 majority that Title VII of the Civil Rights Act of 1964 prohibits not only sex discrimination based on gender-nonconformity, but also includes a prohibition on discrimination on the basis of sexual orientation. Shockingly to some, this is a controversial decision, and it is not the law of the land throughout the United States. In fact, the Justice Department's official position is that the Civil Rights Act should not be construed to protect LGBT individuals, and they filed a brief asserting so in the Zarda case.

Enacted by Congress in 1964, Title VII makes it an "unlawful employment practice for an employer ... to fail or refuse to hire or to discharge ... or otherwise to discriminate against any individual with respect to his (or her) compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin ..."

The shorthand courts use when analyzing Title VII sex-discrimination claims is that a plaintiff alleging disparate treatment in violation of Title VII must show that he or she was discriminated against "because of ... sex."

The first landmark interpretation of this language by the Supreme Court came in 1989 in Price Waterhouse v. Hopkins, which paved the way for what we now consider a "gender stereotyping" claim -- when an employee is discriminated against for failing to fit into a gender-conforming mold. The female plaintiff in Price Waterhouse was

denied a promotion because of her nonconformity with stereotypes about how a woman "should" act. She was told to "walk more femininely, talk more femininely, dress more femininely, wear makeup, have her hair styled, and wear jewelry," and was criticized for being too "macho." The decision now stands for the principle that employers cannot legally discriminate against employees for failing to adhere to traditional gender norms.

The controversy in this latest Title VII litigation still lies where it always does: in the text of the statute itself. Those who wrote amicus briefs against the plaintiff in Zarda -- including the Trump Justice Department -- argue that Title VII was never meant to afford the LGBT community protection, and to do so now would be an impermissible expansion of legislative intent. Never mind that the Supreme Court has repeatedly admonished against this kind of argument, or that we now live in a world in which a woman could marry her same-sex partner one day, only to be fired for it the next (an absurdity pointed out specifically by the majority opinion in Zarda). According to the Second Circuit, for the purposes of Title VII protections, discrimination based on sex and discrimination based on sexual orientation is a distinction without a difference; both are included in the statute's prohibitions.

Gay, lesbian, and bisexual employees' personal experiences bear out the necessity of this ruling. It's likely that there will be significant overlap between the specific hostility on display against a targeted employee; if one were to draw a Venn diagram of motivation, "sex discrimination" and "sexual orientation discrimination" would often overlap. Social psychologists have repeatedly demonstrated that animus against gender nonconformity is inextricably linked with animus against sexual orientation nonconformity. Because these types of discrimination are often indistinguishable in the mind of the offender, it is certainly beyond the capacity of the court process to decipher such nuances; they must therefore both be included in the protections of the law.

Take the case of Brian Prowel, who was continually harassed at his factory job in Western Pennsylvania, including repeatedly being called "Princess," "Rosebud," "fag," and "faggot." In his case, the Third Circuit noted that even though it was allowing Mr. Prowel's Title VII claims to proceed under a sex-discrimination theory, it was very possible that his harassment had more to do with his "sexual orientation" than his "effeminacy."

In keeping with the pace of our cultural understanding of sex discrimination, in 2015, the Equal Employment Opportunity Commission held, for the first time, that "sexual orientation is inherently a 'sex-based consideration;' accordingly an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII." For many, this was a crucial step in the evolution of our legal doctrine, which can and should change with the times.

But it may take many more years before this issue finally makes it to the Supreme Court. Until that time, there will be a "circuit split"

on the issue, in which different jurisdictions will adhere to different standards. Currently only two Circuits (the Second and Seventh), those governing the states of New York, Connecticut, Vermont, Illinois, Indiana, and Wisconsin, have affirmatively held that discrimination based on sexual orientation is prohibited under the Civil Rights Act.

The Supreme Court declined to review a different case addressing the same issue last year, but some speculate that Zarda may prompt the Court to look at the issue anew. One can only hope that it makes the logical conclusion that discrimination based on sexual orientation is and should be prohibited under Title VII as discrimination "based on ... sex."

"Two new petitions call on SCOTUS to decide workplace protections for gays, lesbians"

Reuters

Alison Frankel

May 31, 2018

The U.S. Supreme Court doesn't have to explain or justify its decisions to accept or reject requests for review, but a pair of newly filed petitions present an awfully strong case that the moment has come for the justices to decide whether gay and lesbian employees are protected from workplace discrimination under Title VII of the Civil Rights Act.

One petition was filed by Altitude Express, a New York skydiving outfit accused of firing instructor Donald Zarda after he told a customer he was gay. In February, you may recall, the 2nd U.S. Circuit Court of Appeals held that Zarda's estate could bring Title VII claims against Altitude Express because the law's prohibition against sex discrimination encompasses discrimination based on sexual orientation. To simplify ruthlessly: The 2nd Circuit, like the en banc 7th Circuit in 2017's Hively v. Ivy Tech said its conclusion was the logical outgrowth of the Supreme Court's prohibition on gender stereotyping in 1989's Price Waterhouse v. Hopkins and recognition in 1998's Oncale v. Sundowner Offshore Services that Title VII protects both men and women from discrimination.

Altitude Express, represented by Saul Zabell of Zabell & Associates, said the 7th and 2nd Circuits' decisions "departed from more than 50 years of established precedent" from every other federal appellate court to have ruled on the scope of Title VII protection for gay and lesbian employees. Its petition called on the Supreme Court to step in to resolve the circuit split.

The exact same call comes from a second Supreme Court petition filed this week – this one from an employee denied the right to sue his employer under Title VII for anti-gay discrimination. Gerald Bostock claims he was fired from his job as a child welfare services coordinator for a Georgia county's juvenile court system when his employer found out he is gay. On May 10, a three-judge panel at the 11th Circuit ruled in an unpublished, per curiam decision that Bostock cannot sue Clayton County under Title VII because the law does not bar discrimination based on sexual orientation. Bostock's lawyer, Brian Sutherland of Buckley Beal**,** had simultaneously asked the 11th Circuit to reconsider en banc its binding precedent on the scope of Title VII protection. The 11th Circuit denied that request when it issued its per curiam decision. Sutherland then hustled to get his petition to the Supreme Court a mere two weeks later.

Sutherland and his client are asking the Supreme Court to confirm that the 11th Circuit was wrong and the 2nd and 7th Circuits correctly interpreted its precedent in Hopkins and Oncale. "The court must grant the writ of certiorari in this case not only to resolve the circuit split and prevent further erosion of Price Waterhouse and Oncale by the lower courts struggling with how to apply them, but also because justice demands the unequivocal determination that discrimination against an employee because of sexual orientation is discrimination "because of ... sex" in violation of Title VII," the petition said.

In other words, both an employer and an employee are asking the justices to resolve entrenched appellate disagreement – based on competing interpretations of the Supreme Court's own precedent - about workplace rights of gays and lesbians. Both petitions also highlight disagreement within President Trump's own administration about whether Title VII shields gay and lesbian employees from discrimination. In the 2nd Circuit's en banc consideration of the Zarda case, the Equal Employment Opportunity Commission sided with Zarda's estate, reiterating arguments the EEOC pioneered in a 2015 case that informed the 7th Circuit's Hively opinion. The Justice Department submitted a competing amicus brief, arguing that discrimination on the basis of sexual orientation is different from discrimination based on sex. If even the government can't agree on the scope of Title VII protection, the briefs said, the Supreme Court must provide clarity.

None of this is a guarantee, of course, that the justices will grant either or both when they conference on the petitions in September, after their summer break. Last December, the Supreme Court denied a petition for review of a different 11th Circuit ruling on Title VII and sexual orientation, 2017's Evans v. Georgia Regional, despite an already-existing split between the 7th and 11th Circuits. On the other hand, the Evans case presented the procedural complication - the defendant, a hospital, disputed the 11th Circuit's jurisdiction and refused to participate in the appeals court or at the Supreme Court – that may have compromised it as a vehicle to decide an issue with broad nationwide implications. And the circuit split has only deepened since the justices turned down the Evans case, with the en banc 2nd Circuit ruling in Zarda and the 11th Circuit decision in Bostock.

"It's time," said Bostock counsel Sutherland. "The more time that goes by without clarity from the Supreme Court, the more confusion there will be in the lower courts."

Donald Zarda's estate, meanwhile, will oppose Supreme Court review, according to its lawyer**,** Gregory Antollino. "I think more circuits need to weigh in," he told me, citing a pending Title VII discrimination suit by a gay employee at the 8th Circuit. "There have to be more than three circuits before the Supreme Court jumps in."

Clayton County, the defendant in the Bostock case, was represented at the 11th Circuit by Freeman Mathis & Gary.

"11th Circ. Draws Judge's Ire With En Banc Review Refusal"

Law360

Kat Green

July 18, 2018

The full Eleventh Circuit on Wednesday declined to hear whether a gay Clayton County, Georgia, government employee was discriminated against, prompting one of its judges to pen a blistering dissent that proclaimed her peers relied on "the precedential equivalent of an Edsel with a missing engine."

Ostensibly, Wednesday's order was a routine one-liner in which the appeals court reported that, after a vote of its judges, it had decided not to take up an appeal by Gerald Lynn Bostock, a former child welfare services worker who claimed his firing was discriminatory under Title VII of the Civil Rights Act of 1964.

But it came together with a six-page dissent from U.S. Circuit Judge Robin Rosenbaum, who excoriated her fellow judges for keeping in place the underlying panel decision — which affirmed the lower court's finding that Title VII doesn't protect gay and lesbian individuals — saying the court was relying on a 39-year-old precedent that has since been abrogated by a U.S. Supreme Court ruling.

"I cannot explain why a majority of our Court is content to rely on the precedential equivalent of an Edsel with a missing engine, when it comes to an issue that affects so many people," Judge Rosenbaum wrote. "I continue to firmly believe that Title VII prohibits discrimination against gay and lesbian individuals because they fail to conform to their employers' views when it comes to whom they should love."

She said that, her personal opinion aside, she was dissenting for the "even more basic reason" that regardless how the court does eventually rule on the issue, it should at least permit the parties to fight it out in court so the judges can have a "reasoned and principled explanation for our position on this issue — something we have never done."

She noted that the Second and Seventh Circuits in recent months have taken up the same issue en banc, and that the Eleventh should be no different. The Seventh Circuit became the first federal appellate court in the country to extend Title VII protections to sexual orientation with a decision in April 2017, and the Second Circuit broke with its own precedent to find the same in February of this year, according to decisions in those cases.

In the instant suit, Bostock said that he had been working as a child welfare services coordinator for the southern Atlanta

metropolitan area county when he started playing in a gay recreational softball league. After several comments from people at work, he was subjected to an internal audit on the funds he managed, according to filings in the case.

That audit, Bostock alleged, was a pretext for discrimination against him for his sexual orientation and his failure to conform to a gender stereotype, and the termination that followed was not because of the audit's findings but because he was gay, he said.

He filed suit in August 2016, but Clayton County won dismissal of the case after it argued that the Civil Rights Act doesn't protect gay and lesbian employees in those contexts, according to filings in the case.

On appeal, the three-judge Eleventh Circuit panel cited the Fifth Circuit's 1979 ruling in Blum v. Gulf Oil Corp. in which that court held that "discharge for homosexuality is not prohibited by Title VII," saying that because the Eleventh Circuit has cited that precedent in the past, it cannot now overrule that finding without an intervening Supreme Court or en banc decision.

In her dissent, Judge Rosenbaum noted that an intervening decision has actually been issued, in the form of the high court's 1989 decision in Price Waterhouse v. Hopkins , in which the court found that former accounting firm employee Ann Hopkins was discriminated against when she was denied partnership because she didn't fit the firm's picture of how a female employee should look and act.

Judge Rosenbaum wrote that Price Waterhouse abrogated Blum and requires the conclusion that Title VII prohibits discrimination against gay and lesbian people because their sexual preferences don't conform to their employers views of who their partners should be, according to the dissent filed Wednesday.

At the very least, she said, the eight million or more people who publicly identify as gay or lesbian in America are affected by such policies, so the "legitimacy of the law demands we explain ourselves."

Bostock has already filed a petition for certification of the issue to the U.S. Supreme Court. The high court in December declined to review an Eleventh Circuit ruling in a similar case, in which worker Jameka Evans accused Georgia Regional Hospital of discriminating against her because she's a lesbian and doesn't dress in line with feminine stereotypes.

Bostock's attorney Brian J. Sutherland of Buckley Beal LLP said his team agrees with Judge Rosenbaum's view that the issue is one of extraordinary importance, not only for his client, but also for all the other gay and lesbian people working in America.

"We certainly hope that the Supreme Court will grant Mr. Bostock's petition and answer this important question that the Eleventh Circuit declined again to consider en banc," he told Law360 on Wednesday.

A representative for Clayton County didn't immediately respond to a request for comment late Wednesday.

Bostock is represented by Brian J. Sutherland and Thomas J. Mew IV of Buckley Beal LLP.

Clayton County is represented by Jack R. Hancock and William H. Buechner Jr. of Freeman Mathis & Gary LLP.

The case is Gerald Lynn Bostock v. Clayton County Board of Commissioners et al., case number 17-13801, in the U.S. Court of Appeals for the Eleventh Circuit.

"11th Circuit Joins Others in Holding Sexual Orientation Discrimination Not Covered Title VII"

Schiff Hardin

Julie Furer Stahr

March 21, 2017

Joining nearly all other federal circuit courts, the U.S. Court of Appeals for the Eleventh Circuit has held that Title VII does not cover discrimination based on sexual orientation. *Evans v. Georgia Regional Hospital*, 2017 WL 943925 (11th Cir. March 10, 2017). While closing the door on Title VII sexual orientation discrimination claims, the court re-affirmed that other theories of sex discrimination, such as gender non-conformity and same-sex discrimination, remain actionable.

Jameka Evans, who is a lesbian, was a security guard at Georgia Regional Hospital. Evans alleged that she was denied equal pay and work, harassed, and physically assaulted. According to Evans, it was evident that she identified with the male gender due to such things as her wearing a male uniform, haircut and shoes. Furthermore, she claims she was subjected to a hostile work environment because her status as a gay female did not comport with her superiors' gender stereotypes. According to Evans, she had doors closed on her, she was subjected to scheduling problems and shift changes, and her work equipment was tampered with. She also claimed a less qualified employee was promoted to become her supervisor, who then also began to harass her. Evans eventually resigned.

Evans filed suit against the hospital and others, claiming she was discriminated against based on her sexual orientation and gender non-conformity, and retaliated against after she complained. Her claims were initially addressed by a magistrate judge. With respect to Evans's claim of discrimination based on her sexual orientation (her status as a gay female), the magistrate judge determined that Title VII "was not intended to cover discrimination against homosexuals." The magistrate judge further concluded that her gender non-conformity claim was "just another way to claim discrimination based on sexual orientation," no matter how it was titled, and thus that claim too was barred. The magistrate judge also recommended dismissal of the retaliation claim; because sexual orientation discrimination is not prohibited under Title VII, Evans did not allege opposition to an unlawful employment practice when she complained. Over Evans' objection, the district court adopted the magistrate's recommendation in full and dismissed the case.

Evans appealed to the Eleventh Circuit. The court first held that Evans' gender non-

conformity claim should not have been dismissed. A gender non-conformity claim is not "just another way to claim discrimination based on sexual orientation," according to the court, but rather is a separate cause of action available under Title VII. Although Evans' complaint did not plead facts sufficient to suggest that her decision to present herself in a masculine manner led to any adverse employment actions, the court allowed Evans to amend her complaint to try to sufficiently plead these facts.

The court next addressed the sexual orientation discrimination claim. Citing legal precedent, the court held that Title VII does not permit such a claim: "[W]e are bound to follow a binding precedent in this Circuit unless and until it is overruled by this court en banc or by the Supreme Court." Evans argued that the U.S. Supreme Court has already held that both same-sex discrimination claims, and gender non-conformity discrimination claims, are allowed under Title VII, and that these decisions should also include within their purview sexual orientation-based claims. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998). The Eleventh Circuit did not agree, finding that those Supreme Court decisions were not sufficiently on-point to interfere with established legal precedent. In doing so, the court's opinion notes the decisions from all other federal circuits (except D.C.) holding that sexual orientation discrimination is not actionable under Title VII. While the law in the D.C. Circuit is less clear, indications can be found in earlier decisions that the court is trending in the same direction.

What Now?

The near-unanimous exclusion of sexual orientation protection under federal law may or may not be significant for employers, depending on the jurisdiction. Initially, as noted in this case, non-traditional sex discrimination theories can overlap making it difficult to decipher, certainly at the management and human resources level, what type of conduct may or may not be prohibited under federal law. Moreover, in many states, sexual orientation discrimination is expressly prohibited at the state and local level, and employers in these jurisdictions can face similar or even greater legal penalties than under federal law. Thus, the practical effect of the roadblock under Title VII may be a rise in state court claims in some states by employees seeking to bring sexual orientation-based claims. For all these reasons, the sensible approach from both a legal and personnel perspective is to continue to strive for respect and fairness for all employees.

"2nd Circuit demolishes key DOJ argument against workplace protection for gays"

Reuters

Alison Frankel

February 26, 2018

The en banc 2nd U.S. Circuit Court of Appeals stood up against workplace prejudice on Monday, ruling in Zarda v. Altitude Express that the Civil Rights Act bars discrimination based on employees' sexual orientation. The 2nd Circuit's decision deepens an existing circuit split on whether Title VII of the Civil Rights Act, which bars on sex discrimination, encompasses discrimination based on sexual orientation. The 10 judges in the 2nd Circuit majority in Zarda lined up with the en banc 7th Circuit in 2017's Hively v. Ivy Tech Community College - and against a divided three-judge panel at the 11th Circuit, which said in 2017's Evans v. Georgia Regional Hospital that Title VII does not protect gay and lesbian workers. Three judges dissented.

There's no guarantee when, if ever, the U.S. Supreme Court will step in. The justices denied a petition last year for review of the 11th Circuit's decision, which had a weird procedural defect because the hospital insisted it was never properly served so the appellate courts didn't have jurisdiction. The community college defendant in the 7th Circuit case didn't petition the Supreme Court, and it's not clear whether Altitude Express, a skydiving company accused of firing Donald Zarda after it learned he was gay, will ask the justices to take its case. Altitude counsel Saul Zabell of Zabell & Associates told my Reuters colleague Dan Wiessner that he actually agreed with the 2nd Circuit on the scope of Title VII protection for gay and lesbian employees, but that his client didn't discriminate against Zarda based on his sexual orientation.

But if the justices eventually have to decide whether discrimination against gay and lesbian employees is a form of sex discrimination – and therefore a violation of Title VII protections – the 2nd Circuit's decision will be important not just for its affirmation that sex discrimination encompasses discrimination against gays and lesbians but also for its demolition of the lead argument to the contrary. As I've said, the 7th Circuit's Hively ruling, which was, in turn, based on the Equal Employment Opportunity Commission's 2015 ruling in Foxx v. Baldwin, shrewdly used Supreme Court precedent to show why workplace bias against gays and lesbians is a form of sex discrimination. The 2nd Circuit in Zarda explained why Hively critics, led by the U.S. Justice Department, are promoting a misguided framework.

The critics' argument, as the Justice Department laid it out in an amicus brief in the Zarda case is that workplace sex

discrimination is defined by disparate treatment of male and female employees. If an employer, for instance, pays a woman less than a man with the same experience, that's discrimination. The test, according to this theory, is to compare workers who are the same in every way except for their gender. And to figure out if sex discrimination encompasses prejudice against gays and lesbians, this theory goes, you don't ask whether employers treat lesbian employees differently than straight women and gay employees different than straight men but whether employers treats gays and lesbians similarly.

In other words, according to proponents of this theory, discrimination based on sexual orientation is only sex discrimination if an employer is biased against gays or lesbians – but not if it's equally inhospitable to men and women who are attracted to people of the same sex.

"The but-for 'comparison can't do its job of ruling in sex discrimination as the actual reason for the employer's decision … if we're not scrupulous about holding everything constant except the plaintiff's sex,'" the Justice Department wrote in its Zarda amicus brief, quoting 7th Circuit Judge Diane Sykes' dissent in the Hively case. "The EEOC and the 7th Circuit majority fail to hold everything else constant because their hypothetical changes both the employee's sex (from male to female) and his sexual orientation (from gay to straight). The proper comparison would be to change the employee's sex (from male to female) but to keep the sexual orientation constant (as gay)."

The 2nd Circuit majority in Zarda said the government is pushing the wrong comparison: The correct test doesn't compare gay men to lesbians but rather considers disparate treatment between lesbian employees and heterosexual male employees; or gay men to heterosexual women.

The court looked at the Supreme Court's 1978 decision in City of Los Angeles v. Manhart, which struck down a city water department rule requiring female employees to contribute more than men to the employee pension fund because women live longer. The justices concluded that life expectancy was a proxy for sex, so the rule violated Title VII. Similarly, in 1989's Price Waterhouse v. Hopkins the Supreme Court used a comparison test to conclude Title VII protects employees who don't conform to gender stereotypes, in the case of a female auditor who claimed she didn't make partner because she was as brusque and aggressive as male counterparts.

Based on that precedent, the 2nd Circuit said, the question to be answered in the comparison test isn't whether employers treat gays and lesbians the same way but whether sexual orientation is a function of sex, like life expectancy or "ladylike" behavior. Using the test advocated by the government (and Judge Sykes in her Hively dissent) "would not illustrate whether a particular stereotype is sex dependent but only whether the employer discriminates against gender non-

conformity in only one gender," the 2nd Circuit said. "Instead, just as Price Waterhouse compared a gender non-conforming woman to a gender conforming man, both of whom were aggressive and did not wear makeup or jewelry, the Hively court properly determined that sexual orientation is sex dependent by comparing a woman and a man with two different sexual orientations, both of whom were attracted to women."

The law, according to the 2nd Circuit, leads to an inescapable destination: "To determine whether a trait operates as a proxy for sex, we ask whether the employee would have been treated differently 'but for' his or her sex," wrote Chief Judge Robert Katzmann for the majority. "In the context of sexual orientation, a woman who is subject to an adverse employment action because she is attracted to women would have been treated differently if she had been a man who was attracted to women. We can therefore conclude that sexual orientation is a function of sex and, by extension, sexual orientation discrimination is a subset of sex discrimination."

The Justice Department, as you probably recall, muscled into the Zarda case without an invitation. The 2nd Circuit had asked the EEOC to submit an amicus brief in the private dispute. The EEOC, operating at the time with a Democratic majority, sides with Zarda and its own precedent from the 2015 Baldwin case. The Justice Department broke with tradition to assert a competing argument in a case in which the EEOC appeared as an amicus.

DOJ's reward for meddling is the 2nd Circuit's very firm rejection of its lead argument. That doesn't mean, of course, that the government can't or won't continue to push its comparison test theory in other circuits or, if it comes to that, the Supreme Court. Justice, moreover, has other arguments for why the prohibition on sex discrimination doesn't cover gay and lesbian employees, most notably Congress's refusal to shield gays and lesbians against prejudice in the workplace.

As Judge Gerard Lynch wrote Monday in the lead dissent to the 2nd Circuit's majority opinion in Zarda, it would sure be great if Congress were suddenly to pass such a law. (He said he was speaking as a private citizen; as a judge, he said, he was constrained to conclude that Title VII, as written, "did not, and does not, prohibit discrimination against people because of their sexual orientation.") But absent congressional action, it's up to the courts to decide the scope of the law – and Title VII's aegis is expanding.

"Legal doctrine evolves," the Zarda majority said. "Applying (Supreme Court) precedents to sexual orientation discrimination, it is clear that there is 'no justification in the statutory language ... for a categorical rule excluding' such claims from the reach of Title VII.

"2nd Circuit (again) finds anti-gay discrimination legal under Title VII"

Washington Blade

Chris Johnson

April 18, 2017

In a case filed by a now deceased gay skydiver who alleged sexual-orientation discrimination in the workforce, the U.S. Second Circuit Court of Appeals on Tuesday declined to accept the legal argument that anti-gay discrimination is prohibited under current federal civil rights law.

In a 13-page decision, the three-judge panel cites a 2000 decision in the Simonton case, a 2nd Circuit ruling that determined Title VII of the Civil Rights Act of the 1964, which bars sex discrimination in the workforce, doesn't apply to sexual orientation. As a result of that precedent, the panel concludes Title VII cannot be applied in the pending case, named Zarda v. Altitude Express.

The unanimous ruling concludes that precedent "can only be overturned by the entire Court sitting en banc," which would require consideration of the case by the full court as opposed to the three-judge panel.

It's the second time within a month the 2nd Circuit has found sexual-orientation discrimination is permitted under federal civil rights law. Last month in the case Christiansen v. Omnicom Group, a different three-judge panel found that precedent precluded the court from determining that anti-gay bias is illegal, although the judges still ruled in favor of the plaintiff on the basis that the nature of the discrimination he faced was sex stereotyping.

The decision stands in contrast to the recent groundbreaking "en banc" decision by the U.S. Seventh Circuit Court of Appeals that determined anti-gay discrimination in the workforce amounts to sex discrimination under current law. A growing number of trial courts and the U.S. Equal Employment Opportunity Commission have also reached that conclusion.

The 2nd Circuit case was filed by Donald Zarda, a gay skydiver who alleged he was terminated from his position at Altitude Express for disclosing his sexual orientation to his client. In response, the company maintained the client "had various complaints about Zarda's behavior" other than disclosure of his sexual orientation and he was fired because "he failed to provide an enjoyable experience for a customer." According to media reports, the client accused him of fondling her in mid-air.

According to the ruling, Zarda died in a skydiving accident before the case went to trial, and two executors of his estate have replaced him as plaintiff. Zarda's obituary

states he died in Switzerland in 2014 as he was pursuing European Union citizenship.

At trial court, Zarda contended his firing was illegal both under Title VII and New York state law, which explicitly bars discrimination on the basis of sexual orientation. The trial court rejected his Title VII claim and also ruled in favor of Altitude Express under state law, saying Zarda didn't meet the burden of proof he could keep his job if only he wasn't gay.

The Second Circuit determines Zarda may be qualified for relief under Title VII because federal law has a less stringent "motivating-factor" test of causation, but nonetheless the judges say they can't rule for him because of precedent within the circuit.

Although judges in the Christiansen case granted the plaintiff relief on the basis that he suffered discrimination on sex-stereotyping claims, the Second Circuit in the Zarda case determines it cannot reach a similar conclusion.

"That route is unavailable to Zarda, since, as explained above, the district court found that Zarda failed to establish the requisite proximity between his termination and his failure to conform to gender stereotypes, and Zarda did not challenge that determination on appeal," the decision says. "Consequently, Zarda may receive a new trial only if Title VII's prohibition on sex discrimination encompasses discrimination based on sexual orientation — a result foreclosed by Simonton."

The three-judge panel consists of U.S. Circuit Judge Dennis Jacobs, a George H.W. Bush appointee; U.S. Circuit Judge Robert Sack, a Clinton appointee; and U.S. Senior Judge Gerard Lynch, an Obama appointee.

Gregory Antollino, the New York-based attorney representing the Zarda estate, told the Washington Blade his legal team intends to file for "en banc" review of the decision before the full Second Circuit.

"Trump's Battle Over LGBT Discrimination is Just Beginning"

The Atlantic

Emma Green

July 28, 2017

LGBT issues have been all over the news this week. On Wednesday, President Trump announced a ban on transgender Americans serving in the military. That evening, the Department of Justice made another significant move in the fight over LGBT rights, albeit with less flash than a tweet storm: It filed an amicus brief in a major case, *Zarda v. Altitude Express,* arguing that it's not illegal to fire an employee based on his or her sexual orientation under federal law.

LGBT advocates were quick to decry the DOJ's position as bigotry. But there's a deeper context here: The brief was a throw-down in nuanced fight about the nature of the administrative state. During the Obama years, federal agencies slowly began expanding their interpretation of sex discrimination, which is prohibited by a number of civil-rights laws. The Equal Opportunity Employment Commission, the independent agency focused on workplace discrimination, arguably pushed the definition of sex discrimination further than any other regulatory body. In 2015, the EEOC ruled that Title VII, the civil-rights statute that protects workers, covers bias based on sexual orientation; it took a similar position in *Zarda*. Critics argued that this interpretation reads something into the law that isn't there and accused the Obama administration of enforcing its political agenda through executive fiat. In effect, that's exactly what Trump's DOJ argued in its brief.

While this case will ultimately be decided by the courts, it's a sign of conflict ahead in the long-brewing battle over LGBT rights and the meaning of sex discrimination. It also shows the limits of executive action in contested areas of law. The Obama administration may have believed gay people should be protected by federal civil-rights statutes, but it may prove challenging to make that interpretation stick now that a new party controls Washington.

In 2010, a skydiving instructor named Donald Zarda lost his job with Altitude Express, Inc., after he told a client about his sexual orientation. As a three-judge panel of the Second Circuit noted in its ruling on the case this spring, "Zarda often informed female clients of his sexual orientation—especially when they were accompanied by a husband or boyfriend—in order to mitigate any awkwardness that might arise from the fact that he was strapped tightly to the woman." Zarda sued, arguing in part that Altitude Express violated Title VII by firing Zarda based on his sexual orientation. He lost in district court and on initial appeal. Now,

the case is being heard by the full Second Circuit.

Enter the battling briefs. In June, the EEOC weighed in supporting Zarda, arguing that sexual-orientation-based discrimination is by definition based on sex and involves sex stereotyping, which has long been prohibited by the Supreme Court. A month later, the DOJ filed a brief making the exact opposite argument. "The sole question here is whether, as a matter of law, Title VII reaches sexual-orientation discrimination," the department wrote. "It does not, as has been settled for decades. Any efforts to amend Title VII's scope should be directed to Congress rather than the courts."

In other words, the government has two opposing opinions on one case, and two opposite interpretations of how the same law should be applied. "It is super wacky, yes," said Justin Levitt, an associate dean and professor of law at Loyola Law School in Los Angles. "It is very unusual. The federal government usually makes great efforts to be on the same page of this sort of thing."

Neither the DOJ nor the EEOC is a party in the case—both agencies were essentially offering advice to the court on what to do. That's part of what makes the battling briefs significant: The DOJ chose to take up this fight when it didn't have to.

"This Justice Department felt strongly enough that they took the affirmative step to weigh in to undercut the EEOC's position," said Vanita Gupta, the president and CEO of the Leadership Conference on Civil and Human Rights. "That likely required a high degree of vetting at a very high level in the Justice Department." Gupta led the Justice Department's civil-rights division during the final years of the Obama administration.

The sex-discrimination provision of federal civil-rights laws has always been controversial, but it has become even more charged in recent years. Cases on this topic regularly bubble up through the court system, and some have made it to the top: This spring, the Supreme Court planned to take up a high-profile case concerning a transgender student in Virginia, but punted when the Trump administration back-pedaled the Obama administration's previous guidance on how to deal with this kind of issue in schools. Court battles over how to interpret "sex discrimination" have become a proxy war over LGBT rights.

Unfortunately, there is not a high wall between law and politics sometimes. That's the case on both sides here," said Michael Harper, a professor of law at Boston University. "This is a question of statutory interpretation. … Whether the statute *should* [prohibit LGBT discrimination] and whether the statute *does*are two different questions."

LGBT-rights advocates argue that DOJ-style reasoning is straightforwardly incorrect and fundamentally grounded in prejudice. When the *Zarda* brief came out, the Human Rights Campaign called it "a shameful retrenchment of an outmoded interpretation that forfeits faithful interpretation of current law to achieve a politically driven and legally

specious result." Former Attorney General Eric Holder weighed in on Twitter:

> Trump team within 24 hours reverses Obama DOJ positions for gays seeking employment and trans people seeking to serve. This is 2017 not 1617
>
> — Eric Holder (@EricHolder) July 27, 2017

But according to Harper, the law is not so settled. This "is a fine legal brief," he said. "It makes good legal arguments." When lawmakers passed Title VII in 1964, they weren't thinking of sexual orientation, the DOJ brief argues. Until very recently, courts of appeal and the EEOC agreed. Efforts to pass explicit protections for gay, lesbian, and bisexual workers have also always failed in Congress, effectively ratifying legislators' intent to keep the law the way it is. "One can take this position … without being bigoted or prejudiced," Harper said.

While politics might have motivated the arguments in the Trump administration's brief—they "play to the political beliefs, and I would say prejudice, of their base," Harper said—"that doesn't make them bad legal arguments."

Levitt, who previously led the Department of Justice's efforts on workplace discrimination as a deputy-assistant attorney general in its civil-rights division, disagreed.

"It is not a crazy liberal [argument] … to say that what the words of the statute mean aren't bound to what was in the heads of the legislature that passed it," he said. While the sex-discrimination issue is part of an important debate about administrative law, it's not an option to put off interpreting and enforcing statutes while waiting on Congress to pass clearer legislation, he said: "You have to interpret statutes somehow."

The downside of that approach is that elections regularly boot parties out of power. If one administration has taken an aggressive stance on a controversial issue, it's inevitable that their opponents will reverse course when they get in office. "There are limits, when the administration changes, to what the executive can do without Congress," said Harper. "To have secure change, you have to have congressionally passed legislation." Even though the circumstances of the DOJ's brief were unusual, the context was unsurprising. "I can't say that I'm altogether shocked," said Gupta. "I'm disappointed, obviously."

In this particular case, the Second Circuit will decide who's right, but there's drama ahead. "This isn't a good look for the federal government. It is unusual and conflict-seeking," said Levitt. "The decision to independently file does not reflect a lot of respect for another federal agency with a whole lot of enforcement power."

The EEOC isn't obliged to change how it does business just because the DOJ has weighed in, Levitt said: It has binding authority in disputes raised by federal-government employees, and it can continue offering advice based on its current interpretation of Title VII in other cases. What's more likely to happen is a war of attrition. The two agencies "will stand

fuming at each other" until the Second Circuit decides *Zarda*, Levitt said, and after that, the "fuming will continue."

It's impossible to know how this legal throw-down will affect the relationship between the Department of Justice and the EEOC, Levitt said, but the commission surely can't be happy that another agency stepped on its turf. There will be "a lot of frostier emails," he said. "I'm sure about that."