No. 17-1623

IN THE

Supreme Court of the United States

ALTITUDE EXPRESS, INC., AND RAY MAYNARD,

Petitioners,

v.

MELISSA ZARDA AND WILLIAM MOORE, JR.,
CO-INDEPENDENT EXECUTORS OF THE ESTATE OF
DONALD ZARDA,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

OPENING BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether discrimination based on an individual's sexual orientation is a form of sex discrimination that violates Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1).

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OPENING BRIEF FOR RESPONDENTS

Respondents Melissa Zarda and William Moore, Jr., co-independent executors of the estate of Donald Zarda, respectfully request that this Court affirm the judgment of the court of appeals.

OPINIONS BELOW

The en banc opinion of the United States Court of Appeals for the Second Circuit (Pet. App. 1-140) is published at 883 F.3d 100. This opinion superseded the panel opinion of the same court (Pet. App. 141-53), which is published at 855 F.3d 76. The oral opinion of the district court granting in part and denying in part petitioner's motion for summary judgment (Pet. App. 158-76) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 26, 2018. J.A. 18. Petitioner filed a petition for writ of certiorari on May 29, 2018, which the Court granted on April 22, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

Section 703 of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2, provides in pertinent part:

(a) Employer practices.

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of

such individual's race, color, religion, sex, or national origin; . . .

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion.

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer . . . [to] employ any individual . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . . .

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

INTRODUCTION

Title VII protects American workers from discrimination because of their sex. It strikes at the entire spectrum of sex-based disparate treatment. As this Court has insisted from the very outset, Title VII forbids an employer from denying a person equal employment opportunities because of the employer's view of how persons of that sex should act.

Donald Zarda alleged that Altitude Express fired him from his job as a skydiving instructor in an exercise of precisely the kind of sex-based decision making that Title VII condemns. Zarda was gay—that is, he was a man attracted to other men. He brought suit under Title VII, alleging that he was fired because he did not conform to the sex stereotype that men should be attracted only to women.

Firing a man because he is attracted to other men is like refusing to hire a woman because she has school-age children, failing to promote a woman because she is too "macho," or countenancing the sexual harassment of a man who is perceived by his coworkers to be vulnerable. This Court has already held that Title VII reached the conduct about which Ida Phillips, Ann Hopkins, and Joseph Oncale complained. Just as their cases each involved claims of discrimination "because of sex," so too does Donald Zarda's.[1]

STATEMENT OF THE CASE

1. Respondent Donald Zarda worked as a skydiving instructor for petitioner Altitude Express, Inc. One of his responsibilities was taking customers on "tandem skydives," during which instructor and client are strapped together "hip-to-hip and shoulder-to-shoulder." Pet. App. 11. "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

[1] To avoid the distraction of irrelevant ellipses, we use the phrase "because of sex" rather than "because of . . . sex" when referring to the prohibition contained in Section 703(a)(1).

orientation to assuage any concern they might have about being strapped to a man for a tandem skydive." *Id.*; *see also id.* at 180 (providing examples of these comments).

In June 2010, Zarda participated in a tandem skydive with a young woman who came to Altitude Express for a pair of skydives with her boyfriend. Pet. App. 11. Zarda mentioned that he was gay as they prepared for the dive. *Id.* Several days later, Altitude Express fired Zarda. When Zarda later sought unemployment benefits, Altitude Express told the New York Department of Labor that he had been discharged "for shar[ing] inappropriate information with [customers] regarding his personal life." C.A. Jt. App. 626; *see also* Pet. App. 167.[2]

Zarda filed a discrimination charge with the EEOC the following month. Pet. App. 177. He claimed that he had been "discriminated against because of [his] gender." *Id.* at 178. He explained that he had been fired because he "did not conform [his] appearance and behavior to sex stereotypes." *Id.* In particular, he alleged he had been fired because he "honestly referred to [his] sexual orientation and did not conform to the straight male macho stereotype." *Id.* at 180.

2. After receiving his right-to-sue letter, Zarda filed suit in federal court. He alleged that his discharge violated Title VII's prohibition on discrimination "because of sex." He also alleged that it violated New

[2] Although Altitude Express informed Zarda orally that it was firing him for touching the woman inappropriately during the jump, Pet. App. 12, the company did not continue that allegation in its correspondence with the New York Department of Labor. Zarda denied any misconduct.

York's prohibition on firing an employee because of the employee's "sexual orientation." N.Y. Exec. L. § 296.1(a). *See* J.A. 28-29.

Altitude Express moved for summary judgment on both claims. The district court denied the motion with respect to Zarda's state-law claim. It found the evidence before it "certainly sufficient to create an issue of fact" as to whether Zarda had been fired "because of [his] sexual orientation, or the disclosure of his sexual orientation." Pet. App. 167. In particular, the district court pointed to the "timing of the disclosure of sexual orientation" shortly before Zarda's termination, the "interactions" between Zarda and the owner of Altitude Express regarding Zarda's sexual orientation, and evidence that another employee "disclosed in some manner being heterosexual during a jump and there was no adverse action taken with respect to that." *Id.* at 166.

Nevertheless, the district court granted summary judgment to Altitude Express on Zarda's Title VII sex discrimination claim, concluding that the Second Circuit's decision in *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000), precluded Title VII sex stereotyping claims "predicated on sexual orientation." Pet. App. 12-13.[3]

While Zarda was preparing for trial on his state-law claim, the EEOC decided *Baldwin v. Foxx*, 2015 WL 4397641 (July 15, 2015). In *Baldwin*, the Commission held that Title VII's prohibition on

[3] Zarda died in an accident prior to the trial of his state-law claim. The executors of his estate, respondents here, were substituted as plaintiffs. Pet. App. 8 n.1. We will continue to refer to respondents as "Zarda."

discrimination "because of sex" forbids taking adverse employment actions against a person for being lesbian, gay, or bisexual. Pet. App. 13. Nevertheless, the district court denied Zarda's request to reconsider its dismissal of his Title VII claim. *Id.* at 14.

Zarda proceeded to trial on his state-law claim. Based on its understanding of New York law, the district court instructed the jury in a way that required Zarda to meet "a higher standard of causation" regarding whether he had been fired for his sexual orientation "than [would be] required by Title VII." Pet. App. 61. Applying that standard, the jury returned a verdict for Altitude Express.

3. On appeal, a panel of the Second Circuit rejected Altitude Express's argument that the jury's verdict on the state-law claim foreclosed Zarda's Title VII claim. The panel deemed it "entirely possible that a jury thought that Zarda's sexual orientation was 'one of the employer's motives' (i.e. a 'motivating factor') in its termination decision." Pet. App. 149. Thus, "if Title VII protects against sexual-orientation discrimination, then Zarda would be entitled to a new trial." *Id.* But because the panel was bound by *Simonton*, which could "only be overturned by the entire Court sitting in banc," it felt compelled to affirm the judgment in Altitude Express's favor. *Id.*

4. On Zarda's petition, the Second Circuit granted rehearing en banc to reconsider whether Title VII "prohibit[s] discrimination on the basis of sexual orientation through its prohibition of discrimination 'because of . . . sex.'" Pet. App. 156-57. The court ruled 10-3 that it does.

Chief Judge Katzmann's opinion for the court held that "sexual orientation discrimination is properly

understood as 'a subset of actions taken on the basis of sex.'" Pet. App. 19-20 (quoting *Hively v. Ivy Tech Comm. Coll.*, 853 F.3d 339, 343 (7th Cir. 2017) (en banc)).

First, the en banc court explained that this holding flows from the very nature of sexual orientation, which consists of the relationship between a person's sex and the sex of the people to whom he is attracted. Because "a 'gay' employee is simply a man who is attracted to men," Pet. App. 22-23, "firing a man because he is attracted to men is a decision motivated, at least in part, by sex," *id.* at 23. The relevant question under Title VII is whether men who are attracted to men are being treated differently from women who are attracted to men. *See id.* at 29. If they are, the adverse treatment is sex-based.

Second, the en banc court declared that "sexual orientation discrimination is rooted in gender stereotypes and is thus a subset of sex discrimination" under this Court's sex stereotyping jurisprudence. Pet. App. 40. Quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989), the Second Circuit declared that when an employer "acts on the basis of a belief that [men] cannot be [attracted to men], or that [they] must not be," but does not discriminate against women who are attracted to men, the employer "has acted on the basis of gender." Pet. App. 37 (interpolations supplied by the Second Circuit).

Finally, the en banc court held that discrimination on the basis of sexual orientation is forbidden "associational discrimination"—that is, discrimination against an individual because of the relationship between the individual's sex and the characteristics of others with whom the individual associates. *See* Pet.

App. 45-46. Pointing to the consensus that Title VII forbids discrimination against workers who are in interracial relationships, the court explained that it would clearly also violate the statute for an employer to fire a female employee for having male friends. *Id.* at 47. But just as an employer could not fire a female employee because of her close relationships with men, so too an employer cannot fire a male employee for close relationships with men. And relying on this Court's decision in *Loving v. Virginia*, 388 U.S. 1 (1967), which had struck down a state prohibition on interracial marriage, the court stated that "*Loving*'s insight—that policies that distinguish according to protected characteristics cannot be saved by equal application—extends to association based on sex." Pet. App. 49.

The en banc court concluded that the text of Title VII trumped any potential contrary arguments from legislative intent. Thus, it was irrelevant that Congress may not have recognized in 1964 that Title VII's prohibition of sex discrimination reaches discrimination against workers for being lesbian, gay, or bisexual. *See* Pet. App. 23-27. Nor, the court explained, did any "subsequent legislative developments" undermine this conclusion. *Id.* at 53.

Judges Hall, Chin, Carney, and Droney joined Chief Judge Katzmann's opinion in full. Judge Pooler also joined the opinion, save for a subsection discussing how to determine "whether an employee's treatment would have been different 'but for that person's sex.'" Pet. App. 27; *see* Pet. App. 2.

Judge Lohier filed a concurring opinion. He saw "no reasonable way to disentangle sex from sexual orientation in interpreting the plain meaning of the

words 'because of . . . sex.'" Pet. App. 70-71. Given the particular facts of a case, any of the court's rationales might therefore provide "evidentiary technique[s]" for assessing whether sex motivated an employer's decision. *Id.* at 71 (quoting *id.* at 66 (Jacobs, J., concurring)).

Judge Sack joined the court's discussions of associational discrimination and subsequent legislative developments. Pet. App. 69. Because he saw associational discrimination as a "simpler" route to holding that discrimination against someone for being gay is prohibited sex discrimination under Title VII, he did not think it necessary to "consider[] other possible bases for [that] judgment." Pet. App. at 70.

Judge Jacobs also concurred in the result. Pet. App. 62. He agreed that Zarda had "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." *Id.* Thus, he too concluded that such a firing would constitute forbidden associational discrimination.

Judge Cabranes concurred in the judgment. He viewed this as "a straightforward case of statutory construction." Pet. App. 68. He saw Zarda's sexual orientation as "a function of his sex. Discrimination against Zarda because of his sexual orientation therefore *is* discrimination because of his sex." *Id.*

Judges Lynch, Livingston, and Raggi each dissented. Pet. App. 2.

5. This Court granted Altitude Express's petition for a writ of certiorari. After granting certiorari, the Court directed that Zarda comply with the briefing rules for petitioners, and that Altitude Express comply

with the briefing rules for respondents. *See* Order of May 13, 2019.

SUMMARY OF THE ARGUMENT

Title VII's commitment to providing workers with equal employment opportunities without regard to their sex requires protecting people against discrimination for being lesbian, gay, or bisexual. This conclusion follows from the text and structure of Title VII and from this Court's prior decisions.

The text of Section 703 expresses two key principles: First, a person's ability to compete for employment opportunities should not be limited by his sex, either standing alone, or in combination with some other fact about the person. This Court has already held that discrimination "because of sex" occurs when a worker is denied a job or employee benefits because the worker is a woman with children, or a man with a pregnant spouse. It should hold here that discrimination against a man with a male partner is similarly discrimination "because of sex."

Second, the text and structure of Section 703 establishes that in determining whether an employer has impermissibly discriminated because of sex, the focus must remain on whether sex played a role in the adverse treatment of the plaintiff himself. Thus, the fact that an employer treats other persons of the plaintiff's sex fairly cannot defeat a claim that the plaintiff was subject to disparate treatment. If an employer discriminates against a male worker because the employer disapproves of men being attracted to other men, it does not matter that the employer treats other men fairly. Nor does it matter whether the employer also discriminates against its female

employees who are attracted to women. Such a policy would exacerbate, rather than excuse, the violation of Title VII.

This Court's decisions also show that discriminating against someone for being lesbian, gay, or bisexual is a form of prohibited sex stereotyping. Title VII rejects using sex-based generalizations to make employment decisions, whether those generalizations rest on beliefs about the capacity of women (or of men) to do a job at all or on normative beliefs about how a person of a particular sex *should* behave.

Discrimination predicated on a person's sexual orientation involves the latter type of prohibited sex stereotyping. Such discrimination is inextricably tied to the belief, which is objectively false for millions of Americans, that men should be attracted only to women and that women should be attracted only to men. That stereotype has nothing to do with a worker's capacity to do the job. Just as Title VII forbids employers from acting on the basis of other sex stereotypes, it forbids them from acting on this one.

Creating a "sexual orientation" exception to Title VII's prohibition on sex stereotyping would undermine protection of all workers. Such an exception would force courts to engage in a futile and incoherent effort to distinguish between claims involving sexual orientation and claims involving appropriate sex presentation and sex roles. The consequence would be to unfairly deny lesbian, gay, and bisexual workers the protection against sex stereotyping all other workers possess.

And the pernicious consequences of creating such a defense would extend beyond lesbian, gay, and

bisexual people. By countenancing an opportunistic affirmative defense to sex-stereotyping claims, it would encourage employers to argue even in sex stereotyping cases involving heterosexual workers that the adverse employment action was based on a belief (even if ultimately mistaken) that the worker was gay.

The associational discrimination jurisprudence of this Court and the courts of appeals further reinforces the conclusion that discrimination against lesbian, gay, and bisexual workers constitutes discrimination because of sex. This Court has already established that discriminating against someone of a particular race for dating or marrying persons of a different race constitutes discrimination because of race. Not surprisingly, then, every court of appeals to have faced the question agrees that an employer violates Title VII if it takes action against an employee on that basis.

The text and structure of the 1964 Civil Rights Act support the conclusion that a parallel principle applies with respect to sex discrimination. Discriminating against someone of a particular sex for dating or marrying someone of the same sex constitutes discrimination because of sex.

Together and separately, Title VII's unambiguous focus on the rights of each individual worker, the sex stereotyping cases, and associational discrimination jurisprudence rebut the proposition that an employer is free to discriminate against a male worker who is attracted to men so long as it also discriminates against a female worker who is attracted to women. The employer who discriminates against each of these groups is engaged in disparate treatment twice over: it has applied a rule to men that it does not apply to

women ("do not be attracted to men") and a different rule to women that it does not apply to men ("do not be attracted to women"). Such policies are also the equivalent of a rule that "all workers must conform to the stereotypes applicable to their sex," and that is exactly what Title VII forbids. The relevant question is always whether the particular worker's sex explains why that worker was subjected to the adverse employment action at issue.

Finally, Title VII's protections extend to forms of sex discrimination (like firing someone for being lesbian, gay, or bisexual) beyond those specifically contemplated by Congress in 1964. This Court has repeatedly applied Title VII's prohibitions to forms of sex discrimination beyond Congress's original animating concern—for example, same-sex sexual harassment claims. The text of the statute, rather than some hypothesis about the private understandings of the legislators who enacted it, must control.

Given the clarity of the text, any resort to arguments about whether the Congress that enacted Title VII would have recognized that discrimination predicated on sexual orientation is discrimination "because of sex" is especially unwarranted. Nor can anything Congress did after 1964 remove discrimination for being lesbian, gay, or bisexual from the ambit of Title VII. Time and again, this Court has refused to interpret statutes based on subsequent congressional inaction. And neither the express enumeration of "sexual orientation" in subsequent statutes nor anything in the 1991 Civil Rights Act justifies excluding sex discrimination claims like

Donald Zarda's from Title VII's prohibition on discrimination "because of sex."

ARGUMENT

Title VII's commitment to providing qualified workers with equal employment opportunities regardless of their sex requires protecting people against discrimination for being lesbian, gay, or bisexual. This conclusion follows from the text and structure of Title VII, which forbid employers from denying employment opportunities on the basis of overbroad generalizations about the talents, capacities, or preferences of men or women. It also rests firmly within a series of this Court's prior decisions. To reverse the Second Circuit's decision in this case would not only deny protection from sex discrimination to an entire category of workers, but would undercut the coherent administration of federal employment discrimination law more generally.

I. Title VII expresses a commitment that sex should play no role in denying an employment opportunity to a qualified worker.

The text of Section 703 of the Civil Rights Act of 1964, as amended, establishes two key principles relevant to Donald Zarda's claim that he was fired for being gay—that is, for being a man who was attracted to men. First, a person's ability to compete for employment opportunities should not be limited by his sex, either standing alone, or in combination with some other fact about the person. Second, in determining whether an employer has impermissibly discriminated because of sex, the focus must remain on the individual plaintiff's employment outcomes and

not those of others who share the same protected characteristic.

1. The text of Section 703(a)(1) enumerates certain aspects of an individual's identity and prohibits an employer from discriminating against individuals because of them. One of those protected aspects is an individual's "sex." 42 U.S.C. § 2000e-2(a)(1).

This prohibition rests on the proposition that a person's ability to perform a job is rarely related to his sex. "The objective of Congress in the enactment of Title VII is plain from the language of the statute." *Griggs v. Duke Power Co.*, 401 U.S. 424, 429 (1971). Employer reliance on the personal characteristics listed in Title VII is "artificial, arbitrary, and unnecessary." *Id.* at 431. Employers' decisions should instead "focus on qualifications rather than on race, religion, sex, or national origin." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 243 (1989) (plurality opinion). "The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and . . . neutral employment and personnel decisions." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973). Decisions based on the forbidden classifications undermine that "societal" interest as well as the "personal interests" of individual workers. *Id.*

The language Congress used in crafting a narrow exception to the general prohibition on sex discrimination confirms this point. Title VII permits employers to take sex into account only "in those certain instances" where sex "is a bona fide occupational qualification reasonably necessary to the normal operation of [a] particular business or enterprise" (the "BFOQ defense"). 42 U.S.C. § 2000e-

2(e). The provision's inclusion of the word "occupational" drives home the point that Title VII continues to prohibit taking into account aspects of a person's sex "[n]ot relating to one's job." *Nonoccupational*, Black's Law Dictionary (2019). Beyond this "most telling term," this Court has pointed to the BFOQ defense's "several terms of restriction" to further explain why any reliance on sex in the workplace must be strictly limited. *Automobile Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 201 (1991). In particular, the use of the phrase "certain instances" and the words "necessary" and "normal operation" reinforce the conclusion that sex will rarely play a legitimate role in employment decisions. *Id.*[4]

The depth of Title VII's commitment to the principle that sex is almost never a legitimate job consideration is reinforced by its directive prohibiting sex from playing *any* unjustified role in an employment decision. In 1964, the Senate, by a roll call vote, specifically rejected the proposal that the word "solely" be inserted prior to the enumeration of each of the prescribed categories. 110 Cong. Rec. 13,837-38 (1964). In 1991, Congress amended Title VII to enable a plaintiff to establish unlawful discrimination when he can show that sex "was a motivating factor for any employment practice, even though other factors also

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[4] Both this Court and the EEOC have emphasized that the BFOQ exception for sex discrimination is highly limited in scope. *See Automobile Workers v. Johnson Controls*, 499 U.S. 187, 201 (1991); *see also Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977). A BFOQ cannot be based on "assumptions of the comparative employment characteristics" of a particular sex, "stereotyped characterizations of the sexes," or "the preferences of coworkers, the employer, clients, or customers." 29 C.F.R. § 1604.2(a)(1)(i)-(iii).

motivated the practice." 42 U.S.C. § 2000e-2(m); *see* Civil Rights Act of 1991, § 107(a), Pub. L. No. 102-166, 105 Stat. 1071.

Employers, like all other Americans, retain the right to their moral views about how individuals of a particular sex should lead their lives. But Title VII prevents an employer from using those views to limit individuals' employment opportunities.

2. The text of Section 703(a)(1) forbids sex discrimination "against any individual" because of "such individual's" sex. 42 U.S.C. § 2000e-2(a)(1). This repetition of the word "individual" creates an "unambiguous" focus on whether the particular plaintiff before the court suffered discrimination based on that plaintiff's sex. *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 708 (1978).

In a series of subsequent cases, this Court has reaffirmed that individual focus. In *Johnson Controls*, the fact that the company was willing to assign the job at issue to some women—namely, those not capable of bearing children, 499 U.S. at 192—did not undermine this Court's declaration that when an employer excludes fertile women from a particular job, it has "explicitly discriminate[d] on the basis of their sex." 499 U.S. at 197. Similarly, in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), the fact that many *other* men on the oil platform were not sexually harassed, *see id.* at 80, would not refute the allegation that Oncale himself was singled out because of *his* sex, *see id.* at 82—and perhaps beliefs about his sexual orientation as well, *see id.* at 77 (describing how, when Oncale complained about his treatment, a supervisor called him "a name suggesting homosexuality").

To be sure, how an employer treats other people of the same sex may be helpful circumstantial evidence in determining whether the employer actually took the adverse action at issue "because of sex" or for some other reason. But the fact that an employer treated *other* workers of the same sex fairly is not a defense to Title VII liability when the evidence shows that sex played a role in the employer's treatment of the plaintiff. To see why, consider a hypothetical drawn from the facts in *Davis v. Passman*, 442 U.S. 228 (1979). Suppose the president of a corporation did what Rep. Passman did—send a letter firing a female deputy administrative assistant who was "able, energetic and a very hard worker" and who "command[ed] the respect of those with whom [she] worked," because he decided that he wanted "the understudy to [his] Administrative Assistant [to] be a man." *Id.* at 230 n.3 The letter announcing that decision by itself would satisfy a Title VII plaintiff's burden of showing her employer had acted "because of sex" without requiring any additional evidence regarding the treatment of other female employees.[5]

In short, Title VII protects a qualified individual from employment discrimination based on his or her sex. An employer acts because of sex anytime it takes sex into account—either standing alone, or in combination with some other fact about the employee. And Title VII protects individual workers regardless of whether other workers of the plaintiff's sex have been

[5] We often use firing as the exemplar of an employment practice covered by Title VII because Zarda challenged Altitude Express's decision to fire him. Title VII's protections extend to adverse treatment regarding the full range of "terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1).

treated fairly or workers of a different sex have been treated unfairly too.

II. Discriminating against an individual for being lesbian, gay, or bisexual constitutes discrimination "because of sex."

The conclusion that discrimination based on an individual's sexual orientation is a form of discrimination "because of sex" necessarily follows from, and fits comfortably within, this Court's decisions interpreting Title VII. And that conclusion vindicates a central commitment of Title VII because when an employer discriminates against an individual for being lesbian, gay, or bisexual, it acts on sex-based generalizations that have no connection to an individual's ability to do the job.

A. Discriminating against individuals for being attracted to persons of their own sex, rather than a different sex, is discrimination "because of sex."

1. "Sexual orientation" is a shorthand way to describe the relationship between an individual's sex and the sex of the people to whom that individual is attracted. A person who is attracted only to people of a different sex is "heterosexual." A person who is attracted only to people of the same sex is "gay" or "lesbian." And a person who is attracted both to people of the same sex and to people of a different sex is "bisexual."

Donald Zarda's claim that Altitude Express fired him "because of sex" could actually be adjudicated without ever using the term "sexual orientation" or "gay." The claim could accurately be framed entirely in terms of sex and nothing else: Zarda was fired for

being a man attracted to men. That is sex discrimination pure and simple. Pet. App. 22-23.

2. Zarda's claim actually mirrors the claim this Court recognized as discrimination "because of sex" in its very first sex-discrimination decision, *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (per curiam). In that case, Ida Phillips sought a job at Martin Marietta but was turned down because the company refused to hire "women with pre-school-age children." *Id.* at 543. The company argued that it had not discriminated on the basis of sex because it had hired a more than proportionate number of women for the position at issue. The court of appeals agreed with the company. And the court of appeals then held that "[w]hen another criterion of employment is added to one of the characteristics listed in the act," the discrimination is no longer because of the protected characteristic. *Phillips v. Martin Marietta Corp.*, 411 F.2d 1, 3-4 (5th Cir. 1969).

This Court rejected both those premises. It explained that a company could not have "one hiring policy for women and another for men—each having pre-school-age children." *Phillips*, 400 U.S. at 544. Title VII establishes that "characterizations of the proper domestic roles of the sexes [are] not to serve as predicates for restricting employment opportunity." *Id.* at 545 (Marshall, J., concurring).

The fact that Martin Marietta had hired other women for the job Phillips had sought could not obscure the conclusion that *she* had been denied the job because she was a woman. Tacking a second, non-job-related factor—being a parent of small children—onto the statutorily prohibited factor of sex could not transform Martin Marietta's hiring policy into

something other than sex discrimination. In other words, *Phillips* establishes that "sex-plus" discrimination—discrimination against a subset of women because of some additional factor (there, being a parent of young children)—is still discrimination "because of sex" within the meaning of Section 703(a)(1).

Had Martin Marietta articulated its policy as a refusal to hire "mothers," rather than not hiring "women with young children," the result would have been the same. Phillips's sex (plus her parental status) is why she did not get the job. Conversely, persons who shared her parental status of having small children at home but not her sex (i.e., "fathers") were not denied job opportunities. *See Phillips*, 400 U.S. at 543.

The same logic applies to Zarda. Were he not a man, he would not have been fired for his attraction to men. Conversely, persons who shared his attraction to men but not his sex (i.e., "heterosexual women") were not denied job opportunities. Saying he was fired for being "gay" does not change the analysis. Thus, Zarda has properly alleged discrimination "because of [his] sex." *See also* Br. for Kenneth B. Mehlman *et al.* as *Amici Curiae* in Support of Employees (Part I).

3. This Court's decision in *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983), reinforces the conclusion that sexual orientation discrimination is a subset of sex discrimination.

The case addressed the legality of a healthcare plan that provided only limited pregnancy benefits to the spouses of the company's employees. As a statutory matter, discrimination on the basis of pregnancy is sex discrimination. 42 U.S.C. § 2000e(k). The principal

question in the case was whether the company had discriminated on the basis of an *employee*'s sex. In explaining why the company had, the Court emphasized that each employee who was disadvantaged by the plan's restrictions was a man—a man who was married to a woman who was pregnant. *See Newport News*, 462 U.S. at 684. But not all male employees were disadvantaged, since men who were not married (or whose spouses were not pregnant) were denied nothing. If discriminating against a man because he has a pregnant female spouse is sex discrimination regardless of whether other men are treated fairly—and *Newport News* says that it is—so too it must follow that discriminating against him because he has a male spouse is sex discrimination regardless of whether men with female spouses or partners are treated fairly.

4. Both *Phillips* and *Newport News* involved discrimination "because of sex" that touched only subsets of women and men—women with young children and men with pregnant wives, respectively. That did not undercut the conclusion that the adverse employment decisions were made "because of sex." The same is true here: an employer that discriminates against men when those men are attracted to other men has acted "because of sex."

Nor would the result in *Phillips* have been different had the company also refused to hire an unmarried man on the notion that single men are prone to irresponsibility. The employer would simply be acting "because of sex" with respect to both female and male applicants. Both the female and the male applicant would have Title VII sex-discrimination claims because each of them would have been

subjected to a sex-specific judgment applicable to some, but not all, persons of their sex. As we now explain, this insight underlies this Court's sex-stereotyping jurisprudence.

B. Discriminating against someone for being lesbian, gay, or bisexual is a form of sex stereotyping prohibited by Title VII.

Title VII rejects using sex-based generalizations to make employment decisions. Some of these forbidden generalizations rest on beliefs about the capacity of women (or of men) to do a job at all. *See, e.g.*, *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 236 (5th Cir. 1969) (holding that the idea that women are not fitted for "strenuous, dangerous, obnoxious, boring, or unromantic tasks" could not justify excluding all women from the job of "switchman"). Other forbidden generalizations rest on ideas about the capacity of a subset of men or a subset of women to do the job. *See, e.g.*, *Phillips*, 400 U.S. at 543-44. But a final category of prohibited generalizations rests on normative beliefs about how a person of a particular sex *should* behave. Here, Title VII prohibits discriminating against a woman who does not conform to conventional expectations about proper female behavior or a man who does not conform to conventional expectations about proper male behavior.

1. The pathmarking sex stereotyping case is *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Ann Hopkins' employer suggested that she would receive a promotion only if she became less "macho," and began to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* at 235 (quoting *Hopkins v. Price*

Waterhouse, 618 F. Supp. 1109, 1117 (D.D.C. 1985)). Hopkins did not conform to these "suggestions" and was denied the promotion. *Id.* at 233.

This Court agreed that Price Waterhouse had acted against Hopkins because of her sex. The plurality opinion declared that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group." *Price Waterhouse*, 490 U.S. at 251. Because many of the criticisms of Hopkins "were motivated by stereotypical notions about women's proper deportment," Title VII forbade Price Waterhouse from acting upon them. *Id.* at 256. Justice O'Connor's concurrence emphasized that "Title VII tolerates no . . . discrimination, subtle or otherwise." *Id.* at 272 (O'Connor, J., concurring) (alteration in original) (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973)). She concluded that Price Waterhouse had "permitt[ed] stereotypical attitudes towards women to play a significant" role in rejecting Hopkins' promotion to partner. *Id.* (quoting *Hopkins v. Price Waterhouse*, 825 F.2d 458, 461 (D.C. Cir. 1987)).[6]

In the thirty years since, federal courts have repeatedly applied the principles announced in *Price Waterhouse* to protect both male and female employees who do not conform to sex-based

[6] In the Civil Rights Act of 1991, Congress superseded the burden-shifting framework for sex-stereotyping claims that this Court adopted in *Price Waterhouse*, replacing it with the "motivating factor" standard in § 703(m). *See Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 348-49 (2013). But Congress left untouched the Court's treatment of sex stereotyping as a form of sex discrimination.

stereotypes. *See, e.g.*, *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874 (9th Cir. 2001) (applying *Price Waterhouse* to a man discriminated against at work for "acting too feminine"); *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004) (applying *Price Waterhouse* to the sex stereotyping claim of a transgender employee who did not "conform with his employers' and co-workers' sex stereotypes of how a man should look and behave"); *Lewis v. Heartland Inns of Am.*, 591 F.3d 1033, 1038-39 (8th Cir. 2010) (applying *Price Waterhouse* to an employee fired "because her appearance did not comport with [her employer's] preferred feminine stereotype"); *EEOC v. Boh Bros. Constr. Co., L.L.C.*, 731 F.3d 444, 456-57 (5th Cir. 2013) (applying sex-stereotyping evidence to uphold judgment in favor of male plaintiff subjected to same-sex harassment).

2. The notion that men should be attracted only to women and women should be attracted only to men is a normative sex-based stereotype. While many men and women fit this generalization, millions do not. Discrimination against men and women for being lesbian, gay, or bisexual necessarily penalizes them for not conforming to this sex-based stereotype.

Donald Zarda's allegation that he was terminated for being gay is inextricably tied to this normative sex stereotype. Just as discrimination against Ann Hopkins based on the stereotype that women should be feminine and deferential was discrimination "because of sex," discrimination against Zarda because of the stereotype that men should be attracted only to women is discrimination "because of sex."

The sex-based stereotype that men should be attracted only to women and vice versa is particularly

unjustifiable as the basis for an adverse employment action as it is so utterly unrelated to performance on the job. There is no reason why a male employee's attraction to other men prevents him from being a competent skydiving instructor. More generally, throughout this litigation, no one has asserted that individuals' sexual orientation matters to their job performance.[7]

3. In the court of appeals, the Government contended that discrimination against people who are attracted to members of the same sex is not rooted in views about sex at all. Instead, it argued that such discrimination is rooted in "moral beliefs about sexual, marital, and familial relationships." C.A. U.S. Br. 19. But "moral beliefs" and "sex-based stereotypes" are not mutually exclusive categories. Some people believe as a moral matter that a woman's place is in the home, but that belief remains a stereotype as long as it asserts how women as a group should act. Indeed, how a moral belief about women's roles could be discussed without reference to sex is a mystery. In any event, Title VII's prohibition on sex discrimination contains no exception for "moral beliefs." It would have been no defense in *Phillips* for the employer to say that it was morally opposed to women with young children working outside the home. Nor in *Price Waterhouse* would it have been a defense for the employer to rely on a moral belief that women should be demure and

[7] Perhaps this is why in *Hollingsworth v. Perry*, counsel for the petitioners responded to Justice Sotomayor's question about whether denying gay people a job would be rational by stating he did not have "anything to offer [the Court] in that regard." Tr. of Oral Arg. at 14, *Hollingsworth v. Perry*, 570 U.S. 693 (2013) (No. 12-144).

deferential. Title VII, of course, does not forbid such moral beliefs, but it does prohibit using them to deny equal employment opportunities to individual workers.

4. Creating a "sexual orientation" exception to Section 703(a)(1)'s prohibition on sex stereotyping would undermine Title VII's protection of all workers.

The inescapable consequence of holding that an employer can fire a male employee for not conforming to the sex-based expectation that men should be attracted only to women—that is, for being gay or bisexual—would be to create an opportunistic affirmative defense in sex stereotyping cases. The court-appointed amicus in the Second Circuit made precisely this point: "'I fired him because he is gay' is a complete defense to Title VII liability." C.A. Mortara Br. 20 n.12. In those jurisdictions where state law provides no protection against discrimination for being lesbian, gay, or bisexual (and in any case where a plaintiff has not invoked whatever rights he or she might have under state law), the exclusion of sex stereotypes involving sexual orientation from the scope of Title VII may create an incentive to raise such a defense.

This will place courts in an untenable position. Since this Court's decision in *Price Waterhouse*, courts of appeals have grappled with how to disentangle sex-stereotyping claims from sexual-orientation discrimination. With the benefit of that experience, the Second and Seventh Circuits en banc have rightly concluded that there is no way to draw that distinction, because the latter is a subset of the former. "Stereotypical notions about how men and women should behave will often necessarily blur into ideas

about heterosexuality and homosexuality." *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005) (quoting *Howell v. N. Cent. Coll.*, 320 F. Supp. 2d 717, 723 (N.D. Ill. 2004)); *see also* Pet. App. 38-40. More generally, objections that employees fail to fit sex-based stereotypes can often be reframed as objections that the employees are too "gay"—and courts have already recognized that attempting to draw distinctions between the two is futile, because they are inextricably interrelated. As the Seventh Circuit has explained, "[h]ostility to effeminate men and to homosexual men, or to masculine women and to lesbians, will often be indistinguishable as a practical matter." *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1067 (7th Cir. 2003).

This Court's decision in *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983), illustrates the artificiality of trying to separate discrimination predicated on sexual orientation from other forms of sex discrimination. In *Newport News*, the Court held that a healthcare plan discriminated against male employees by failing to fully cover the costs of their spouses' pregnancies. At the time, marriage was restricted to different sex couples. But it is impossible to believe that the Court would have upheld the coverage limitation if the company had only had the bright idea of claiming that its plan discriminated on the basis of sexual orientation—in that case, heterosexuality—rather than sex.

Federal courts have consistently and properly recognized that Title VII does not exempt any class of employees from its protection, and therefore gay employees have the same ability as heterosexual employees to bring sex stereotyping claims that

involve their nonconformity to masculine or feminine sex stereotypes. *See, e.g.*, *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 290-91 (3d Cir. 2009); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1068 (9th Cir. 2002). And gay employees are protected not just against sex stereotyping, but also against being subjected to same-sex sexual harassment and hostile work environments predicated on their sex. *Cf. Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) ("sexual harassment of any kind" is prohibited by Title VII); *see also Boh Bros.*, 731 F.3d at 455-56; *Rene*, 305 F.3d at 1067.

If this Court were to reverse the decision below, however, it would launch the lower courts on the futile exercise of trying to distinguish between sexual-orientation and sex-stereotyping claims involving appropriate sex presentation and sex roles. Such a decision would threaten to strip lesbian, gay, and bisexual workers of the protections they currently hold in all circuits. In *Rene*, an openly gay man asserted that over the course of two years, he was subjected to a hostile work environment on "almost a daily basis." 305 F.3d at 1064. The actions taken against Rene were similar in many ways to the kinds of actions taken against Joseph Oncale. The court of appeals rejected the proposition that Rene's "otherwise viable cause of action [could be] defeated" if "he was targeted because he [was] gay." *Id.* at 1066; *see also Evans v. Georgia Reg'l Hosp.*, 850 F.3d 1248, 1254-55 (11th Cir.) (stating that an employee should be given the opportunity to repackage her claim that she was fired for being a

lesbian as a "gender nonconformity claim"), *cert. denied*, 138 S. Ct. 557 (2017).[8]

But if this Court holds that discrimination for being gay lies outside the ambit of Title VII, that principle will no longer hold. Federal courts will instead be faced with telling lesbian, gay, and bisexual people that protections they would have if they were heterosexual are no longer theirs: Nothing in Title VII supports denying to lesbian, gay, and bisexual workers "the safeguards that others enjoy." *Romer v. Evans*, 517 U.S. 620, 631 (1996).

And the pernicious consequences of creating such a defense would extend beyond lesbian, gay, and bisexual people to anyone who acts in ways that do not conform to his or her gender (for example, people like Ann Hopkins). If this Court were to hold that an employer's targeting of an employee's sexual orientation provides a defense to an otherwise meritorious sex stereotyping or sexual harassment claim, employers could discriminate against heterosexual employees and then argue they did so because they thought (even if they were ultimately mistaken) that the employee was gay. In such a world, an employer like Price Waterhouse could defeat liability by claiming that it assumed Hopkins' "macho" and "masculine" behavior indicated she was a lesbian. Hopkins's entitlement to be judged on her merits rather than on extraneous sex-based considerations

[8] The potential availability of a sex-stereotyping claim derived solely from appearance-based sex stereotypes would be inadequate because it would provide no protection to a lesbian, gay, or bisexual worker who exhibits no other gender-nonconforming behavior.

should not depend on her employer's belief about her sexual orientation.

Accordingly, carving out lesbian, gay, and bisexual employees from the protections Title VII affords to all employees to be free from discrimination because of sex-based stereotypes would run counter both to the text of Title VII and to established doctrine, which hold that Title VII's protections extend to *all* workers.

C. The associational discrimination cases reinforce the conclusion that discrimination against lesbian, gay, or bisexual workers constitutes discrimination because of sex.

1. "Associational discrimination" refers to discrimination against an individual because of the type of person that individual dates, marries, or otherwise associates with. In the Title VII context, the phrase "associational discrimination" has a relational connotation: it refers to discrimination based on a worker's protected traits and the traits of those persons with whom the worker has a relationship. Just as firing a white employee for being married to an African American person constitutes discrimination because of race, so firing a male employee for being married to another man constitutes sex discrimination.

Such discrimination stems from beliefs about how an individual's traits should limit the people with whom he or she has close ties. Race-based associational discrimination involves the belief that persons of a particular race should be attracted to, date, and marry only people of their own race. *See* C.A. Mortara Br. 15 (arguing that associational

discrimination based on interracial marriage can be "analogized to a 'racial stereotyping' version of *Price Waterhouse*"). Similarly, sex-based associational discrimination reflects a belief that persons of a particular sex should be attracted to, date, and marry only people of a different sex.

2. Every court of appeals to have faced the question agrees that an employer violates Title VII "if it takes action against an employee because of the employee's association with a person of another race." Pet. App. 44 (quoting *Holcomb v. Iona Coll.*, 521 F.3d 130, 138 (2d Cir. 2008)).[9] The rationale behind these decisions flows from the text of Title VII. A person who is discriminated against by his employer for being part of an interracial relationship is discriminated against "because of" his race: Had his race been the same as his partner's, he would not have faced discrimination. As the Second Circuit recognized, "where an employee is subjected to adverse action because an employer disapproves of interracial association, the employee

[9] *See Deffenbaugh–Williams v. Wal–Mart Stores, Inc.*, 156 F.3d 581, 589 (5th Cir. 1998), *vacated in part on other grounds*, 182 F.3d 333 (5th Cir. 1999) (en banc); *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc.*, 173 F.3d 988, 994-95 (6th Cir. 1999); *Hively v. Ivy Tech Comm. Coll.*, 853 F.3d 339, 347-49 (7th Cir. 2017) (en banc) (adopting the analysis of the associational discrimination cases for all of Title VII's protected characteristics); *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986). The EEOC reached the same conclusion when complaining parties alleged race discrimination rooted in association. *See, e.g.*, Decision No. 76-23, 1983 EEOC Dec. (CCH) para. 6615 (Aug. 25, 1975); Decision No. 71-1902, 1973 EEOC Dec. (CCH) para. 6281 (April 28, 1971); Decision No. 71-909, 3 F.E.P. Cas. 269 (1970).

suffers discrimination because of the employee's *own* race." *Holcomb*, 521 F.3d at 139.

3. The text and structure of the 1964 Civil Rights Act support the conclusion that Section 703(a)(1) forbids associational discrimination motivated by the sex of an employee and the sex of the people with whom he has relationships.

The text of Section 703(a)(1) does not differentiate among protected characteristics. To the contrary, "the statute on its face treats each of the enumerated categories exactly the same." *Price Waterhouse*, 490 U.S. at 243 n.9 (plurality opinion). That is why this Court has repeatedly held that the standards for actionable conduct should be harmonized across the different categories enumerated in Title VII. *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 n.1 (1998); *see also Oncale*, 523 U.S. at 78. Thus, if firing an employee for his interracial associations is discrimination "because of race" under Section 703(a)(1)—and it is—then firing an employee for his same-sex associations is discrimination "because of sex."

The overall structure of the 1964 Act reinforces this conclusion. In other Titles, Congress banned discrimination because of "race" but did not address discrimination on the basis of "sex." *See* 42 U.S.C. § 2000a(a) (governing access to places of public accommodation); 42 U.S.C. § 2000d (governing discrimination in federally-funded programs). Title VII is decisively different. Here, Congress included both "race" and "sex." Only if sex is a bona fide occupational qualification do different rules apply to sex discrimination claims than to race discrimination ones. That will never be the case when the discrimination is based on intimate association. No

one has ever explained how the off-work relationships of an individual like Donald Zarda could possibly impair "the normal operation" of a business—the prerequisite for finding a BFOQ. *See* 42 U.S.C. § 2000e-2 (e)(1).

4. Donald Zarda claimed that Altitude Express fired him for being gay. By definition, a person's sexual orientation is an associational characteristic: "gay," "heterosexual," and "bisexual" are terms that describe the relationship of a person of one sex to individuals of the same or different sexes. A man discriminated against because of the belief that men should not romantically associate with other men—that is, for being gay or bisexual—has been discriminated against because of his sex.

In the Second Circuit, the United States and the court-appointed amicus conceded that discrimination against people in interracial relationships is actionable under Title VII. But they argued that discrimination against people in same-sex relationships is not similarly actionable because the former is rooted in "racism" while the latter is not rooted in "sexism." C.A. U.S. Br. 21; C.A. Mortara Br. 16-18. Not so.

Title VII prohibits discrimination because of an individual's "race" or "sex"—not "because of racism" or "because of sexism." While many forbidden employment practices that discriminate against someone because of that person's race or sex may be racist or sexist, not all are. In *City of Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702 (1978), the Court invalidated a pension scheme requiring female employees to contribute more than their male counterparts, even though the rationale for

the policy was not "sexism" but the actuarial truth that, on average, women live longer than men. *Id.* at 711. Indeed, this Court has held that discrimination "because of sex" is actionable under Title VII even when it is motivated by benign intentions. As the Court explained in *Automobile Workers v. Johnson Controls, Inc.*, 499 U.S. 187 (1991), "[t]he beneficence of an employer's purpose does not undermine the conclusion that an explicit gender-based policy is sex discrimination under § 703(a)." *Id.* at 200.

Certainly, a judicial commitment to eradicating white supremacy animated many associational discrimination cases. But while that commitment may be sufficient to condemn associational discrimination, it is not necessary. For example, when this Court condemned the associational discrimination at the heart of Virginia's ban on interracial marriage, it rejected the idea that the invalidity of such laws depended on whether their purpose was to prop up white supremacy: the statutes' "racial classifications" would be unlawful "even assuming an even-handed state purpose to protect the 'integrity' of all races." *Loving v. Virginia*, 388 U.S. 1, 11 n.11 (1967). This Court has also consistently construed Title VII to prohibit discrimination based on race even when the purpose of eradicating white supremacy was obviously not implicated. *See, e.g.*, *Ricci v. DeStefano*, 557 U.S. 557 (2009).

Moreover, it is too facile to suggest that sexism sheds no light on discrimination against people for being lesbian, gay, or bisexual. Beliefs about sexual orientation are themselves inextricably interrelated to, and indeed premised upon, views about appropriate sex roles and the sexism that often underlies those

views. *See* Br. of Anti-Discrimination Scholars as *Amici Curiae* in Support of the Employees (Part I).

The court-appointed amicus in the Second Circuit also argued that there is no associational discrimination when an employer discriminates against workers for being lesbian, gay, or bisexual because while interracial marriage and dating involve acts, sexual orientation is merely a status. *See* C.A. Mortara Br. 17. Wrong: A plaintiff who is fired for dating or marrying someone of the same sex has engaged in essentially the same "act"—having an intimate relationship—as a white employee fired for dating or marrying someone who is black. And because sexual orientation is a relational concept, this Court has squarely rejected the notion that acts can be disentangled from status in this context. *See Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 669, 689 (2010).[10]

D. An employer's decision to discriminate against men who are attracted to men is not excused by its decision also to discriminate against women who are attracted to women.

Even the Government concedes that "if an employer fired only gay men but not gay women (or vice versa), that would be prohibited by Title VII." C.A. U.S. Br. 17-18. But it claims that as long as the

[10] In addition to providing an independent basis for holding that discrimination against individuals for being lesbian, gay, or bisexual is discrimination "because of sex," the associational discrimination cases also reinforce the foundational point that sexual orientation discrimination is based on a sex stereotype—namely, that a person of a particular sex should have intimate associations only with persons of a different sex.

employer fires both sets of employees, Title VII has nothing to say because then the employer has not discriminated on the basis of "sex." *See id.* at 17. That argument defies both text and precedent.

1. In accordance with the text of Section 703(a), this Court has repeatedly stressed that "the principal focus of [Title VII] is the protection of the individual employee." *Connecticut v. Teal*, 457 U.S. 440, 453 (1982). Thus, the question in a disparate treatment case like Zarda's is whether "*such individual*'s" sex, 42 U.S.C. § 2000e-2(a) (emphasis added), "was a motivating factor," *id.* § 2000e-2(m), in the employer's decision. When an employer fires a worker who is a man on the grounds that the worker is attracted to other men, and it would not have fired that worker had he been attracted to women, it has fired that worker "because of [his] sex." Only *men* who are attracted to men are fired for that attraction; women attracted to men can keep their jobs. In other words, men have been "exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Oncale*, 523 U.S. at 80 (quoting *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)). That is discrimination.

The fact that the employer has another, parallel policy that it applies to women—namely, that it fires them if they are attracted to women—cannot insulate the employer from liability. That simply means that women as well are exposed to a disadvantageous term or condition of employment to which members of the other sex are not exposed: they can lose their job for being attracted to women, while men won't be. The second policy just increases the number of workers with meritorious Title VII disparate treatment claims.

That is because "Title VII does not ask whether a particular sex is discriminated against; it asks whether a particular 'individual' is discriminated against 'because of such individual's . . . sex.'" Pet. App. 42 n.22 (quoting 42 U.S.C. § 2000e-2 (a)(1)).

2. The Government's arguments fare no better as a matter of precedent. Its position rests on the idea that a court faced with a Title VII claim must compare a man like Donald Zarda who does not conform to male stereotypes (that is, a gay man) to a woman who does not conform to female stereotypes (that is, to a lesbian). But this Court's decision in *Price Waterhouse* refutes the proposition that this is the appropriate comparison. In asking whether the company's actions were taken "because of sex," the Court did not compare Hopkins (a woman who did not comply with traditional notions of femininity) to a man who did not comply with traditional masculine sex stereotypes. 490 U.S. at 258. Rather, it compared her employment outcome as a woman who "walked, talked, and dressed" in a "macho" or "masculine" manner to that of a hypothetical man who was similarly "macho." *See id.* at 235, 258 (brackets omitted). Plugging the present case into that framework, Zarda (a man who was attracted to men) should be compared to a woman who is also attracted to men. If she is not fired for her attraction, he cannot be fired for his.

In any event, a company that imposes female sex stereotypes on women and male sex stereotypes on men does not thereby insulate itself from liability under Title VII. Consider an employer who has a policy that "All employees shall conform to the stereotypes appropriate to their sex" and fires both a woman like Hopkins for being too "macho" and a man for not being

sufficiently "manly." At an artificially high level of abstraction, the conform-to-your-own-sex's-stereotype policy might be said to govern both men and women. Nonetheless, actions pursuant to the policy are both "because of sex"—indeed, explicitly so—and discriminatory. How that policy gets applied will differ depending on a worker's sex. The concrete disadvantageous condition to which women are exposed is different than the concrete disadvantageous condition to which men are exposed: women must not be too "macho"; men must not be "unmanly."

The answer is no different if the employer has a more targeted, ostensibly sex-neutral policy that "All employees shall conform to one sex-based stereotype: that a person should not be attracted to persons of the same sex." As we have already explained, *see supra* Part II.B., discriminating against a worker for being lesbian, gay, or bisexual involves precisely this prohibited stereotype.[11]

Dothard v. Rawlinson, 433 U.S. 321 (1977), shows that even a single employment policy that applies to both men and women can discriminate because of sex if the operation of the policy depends on the sex of the individual employee. The policy at issue in that case required certain correctional officers to be the same sex as the inmates they guarded. *See id.* at 325 n.6 (laying out the criteria). It thus applied to both women and men. Nonetheless, this Court had no problem finding that the policy "explicitly discriminate[d]" on

[11] As the Br. of Anti-Discrimination Scholars as *Amici Curiae* in Support of the Employees points out, gay and bisexual men are subjected to a different set of stereotypes—based on ideas about masculinity—than are applied to lesbian and bisexual women.

the basis of sex. *Id.* at 332 & n.16. Dianne Rawlinson was denied the job she sought "because of" her sex. If a male prison officer had been denied an assignment in a female prison, he too would have been discriminated against because of his sex.[12]

3. The associational discrimination cases confirm the point. An employer who believes that people should marry only people of their own race (or religion) might apply that belief equally to all races (or religions), but acting on that belief still obviously qualifies as *discrimination* "because of race" (or "because of religion") actionable under Title VII because, as to any individual, that individual's race plays a decisive role in whether he is subjected to an adverse employment action. Thus, if an employer fires a white employee for being married to a black person and a black employee for being married to a white person, *both* employees have valid claims under Section 703(a)(1).

This Court's decision in *Bob Jones University v. United States*, 461 U.S. 574 (1983), is clear: "[D]iscrimination on the basis of racial affiliation and association is a form of racial discrimination" even if a "ban on intermarriage or interracial dating applies to all races." *Id.* at 605; *see also Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 410 U.S. 431, 439-40 (1973) (applying this rationale to 42 U.S.C. §§ 1981 and 1982).

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[12] The Court ultimately concluded that sex was a bona fide occupational qualification for the prison jobs at issue. *See Dothard*, 433 U.S. at 336-37. But this does not undercut the analytically prior point that the restriction was "because of sex." And Altitude Express has never asserted a BFOQ defense in this case.

The same principle should apply to sex discrimination claims. As we explained in the previous section, discrimination based on the view that people should date or marry only persons of a different sex is discrimination "because of sex." As to any individual worker, that worker's sex plays a decisive role in whether he will be subjected to that discrimination. Thus, if an employer fires a male employee for being married to a man and a female employee for being married to a woman, *both* employees have valid claims of discriminatory treatment under Section 703(a)(1).

III. Title VII's protections extend to forms of sex discrimination (like firing someone for being gay) beyond those specifically contemplated by Congress in 1964.

A core premise of nearly all the arguments against applying Title VII to discrimination against people who are lesbian, gay, or bisexual is the belief that in 1964, Congress would not have recognized such discrimination as a form of sex discrimination. *See, e.g.*, Pet. 7, 15-16; Pet. App. 79-88. But this Court interprets and applies the language of Title VII, and not the reconstructed beliefs of its drafters. As it explained in *University of Texas Southwest Medical Center v. Nassar*, 570 U.S. 338 (2013), courts must be careful to apply the text itself and not any extratextual "suggestion [about what] Congress meant." *Id.* at 356. Nothing about what Congress contemplated in 1964 or what it has done since should change this Court's conclusion that discriminating against somebody for being a man attracted to men discriminates against that person because of his sex.

A. This Court has repeatedly applied Title VII's prohibitions to forms of sex discrimination beyond those originally targeted by Congress.

1. Writing for a unanimous Court in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), Justice Scalia explained that Title VII's prohibition of sex discrimination cannot be limited to applications of that prohibition that were specifically contemplated by the legislators in 1964. To the contrary: "[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Id.* at 79. This Court has further cautioned against construing Title VII "so that it covers only what we think is necessary to achieve what we think Congress really intended." *Lewis v. City of Chicago*, 560 U.S. 205, 215-16 (2010). And the mere fact "that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning." *Union Bank v. Wolas*, 502 U.S. 151, 158 (1991); *see also Penn. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) (finding "irrelevant" that "Congress did not envision that the ADA would be applied to state prisoners" (internal brackets and quotations omitted)). These principles underlie this Court's recognition last Term that "[w]hile every statute's *meaning* is fixed at the time of enactment, new *applications* may arise in light of changes in the world." *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018).

2. This Court has recognized several types of sex discrimination claims that Congress neither

mentioned nor contemplated when it included "sex" in the list of forbidden bases for taking adverse employment actions.

Consider sexual harassment. Prior to this Court's decision in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), lower courts were slow to acknowledge that sexual harassment constitutes discrimination "because of sex." *See, e.g.*, *Miller v. Bank of Am.*, 418 F. Supp. 233, 236 (N.D. Cal. 1976) (finding that sexual harassment could not be discrimination because of sex because "[t]he attraction of males to females and females to males is a natural sex phenomenon"). In fact, four of the first five decisions to consider whether sexual harassment was discrimination "because of sex" thought that it was not. *See Tomkins v. Pub. Serv. Elec. & Gas. Co.*, 422 F. Supp. 553, 556 (D.N.J. 1976) (describing the four other opinions). Nevertheless, this Court held that Title VII's prohibition on discrimination because of sex reaches sexual harassment. *Meritor*, 477 U.S. at 66.

Even if one could argue that in 1964 Congress added "sex" to the list of prohibited characteristics in order to protect women against sexual harassment by men, it stretches credulity to suggest that Congress was thinking at all about same-sex, male-on-male harassment. Even so, in *Oncale*, this Court unanimously held that Title VII's text reaches such harassment. 523 U.S. at 82. "[M]ale-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII." *Id.* at 79. Nonetheless, there was "no justification in the statutory language or [this Court's] precedents for a categorical rule excluding" these claims. *Id.* Indeed, this Court has never held that

a form of sex discrimination should be excluded from Title VII's literal reach because it would not have been understood as discrimination "because of sex" by members of Congress at the time of enactment.

The Court's treatment of sex stereotyping claims themselves further illustrate this point. It is quite plausible that in 1964, most members of Congress believed that women in the workplace should conform to typical notions of appropriate female behavior regarding makeup, attire, and deportment. If Title VII prohibits discrimination based on *those* sorts of sex stereotypes—and *Price Waterhouse* establishes that it does—this undermines any claim that this Court should tie itself to Congress's views in 1964 about which sex stereotypes are or are not acceptable.

3. Using legislative history to determine the scope of Section 703(a)'s prohibition of sex discrimination is especially unjustified given the distinctive circumstances under which "sex" was added to the list of protected traits. "The prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives." *Meritor*, 477 U.S. at 63-64. And it was debated only briefly in the House of Representatives under the "five-minute" rule on the final day of floor consideration of the bill, producing only a handful of pages in the Congressional Record. Francis Vaas, *Title VII: Legislative History*, 7 B.C. Indus. & Com. L. Rev. 436, 442 (1966); 110 Cong. Rec. H. 2577-84 (1964). In the Senate, "the sex provision went without challenge, and virtually without mention." Robert Stevens Miller, Jr., *Sex Discrimination and Title VII of the Civil Rights Act of*

1964, 51 Minn. L. Rev. 877, 883 (1967).[13] The contrary argument thus rests not on any actual statements in the legislative history—an already dubious source for determining statutory meaning, particularly where, as here, the record is murky to nonexistent. Instead, the argument relies on assumptions about what the 1964 Congress "must" have wanted to do. Such speculation has no place in statutory interpretation.

What we do know about the Civil Rights Act of 1964 suggests that it was intended "to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978) (internal quotation marks omitted). Holding that sex stereotypes involving sexual orientation are within the scope of Section 703(a)(1) is thus entirely consistent with what little legislative history we have.

B. Nothing Congress did after 1964 changes the conclusion that discrimination against lesbian, gay, or bisexual workers violates Title VII's prohibition of sex discrimination.

That Congress has not expressly added "sexual orientation" to the list of protected traits does not change the fact that firing someone for being lesbian, gay, or bisexual involves discrimination "because of"

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[13] The only meaningful attention to the sex provision in the Senate was the addition of a technical amendment to ensure that it would not conflict with the Equal Pay Act, which had been passed the previous year. *See County of Washington v. Gunther*, 452 U.S. 161, 172-75 (1981); 110 Cong. Rec. 13,647 (1964). Thus, unsurprisingly, there is no mention of sexual orientation in the legislative history of Title VII.

that individual's "sex." *See* Br. of Members of Congress as *Amici Curiae* in Support of the Employees (Part II.B).

1. Time and again, this Court has refused to interpret statutes based on subsequent congressional inaction. "Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation," *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011), because congressional inaction cannot amend the text of "a duly enacted statute," *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 186 (1994). Indeed, Congress's failure to adopt proposed legislation is "a particularly dangerous ground on which to rest an interpretation of a prior statute," because "'several equally tenable inferences' may be drawn from such inaction." *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (quoting *United States v. Wise*, 370 U.S. 405, 411 (1962)).

The Government's suggestion in the Second Circuit that Title VII should nevertheless be interpreted based on Congress's "decli[nation] to enact proposed legislation" is an example of this discredited form of argument. C.A. U.S. Br. 13. The types of discrimination that some members of Congress thought "because of sex" would reach at the time of Title VII's passage does not limit the statute's meaning. *Oncale*, 523 U.S. at 79. It matters even less what kinds of discrimination the Government supposes that subsequent Congresses thought the phrase might reach based on the language of unenacted amendments.

2. This Court should also reject the Government's suggestion that the enumeration of "sexual

orientation" in other statutes precludes discrimination on the basis of sexual orientation from constituting sex discrimination for purposes of Title VII. C.A. U.S. Br. 12. But the statutes on which the government is relying were not enacted until decades later, which means they cannot shed any light on what Title VII meant when it was enacted.

The Government's argument is unpersuasive for the additional reason that Congress is free to take a "belt-and-suspenders" approach in its legislation. Congress might, out of an abundance of caution, enumerate a criterion that could also be fairly encompassed within other enumerated criteria. Section 703(a)(1) itself does this—it forbids discrimination either because of an individual's "race" or because of his "color." 42 U.S.C. § 2000e-2 (a)(1). "Color" is often used as a synonym for "race." And even when two terms are not this synonymous—for example, Section 703(a)(1) forbids discrimination both because of "race" and because of "national origin"—the criteria "may substantially overlap or even be indistinguishable depending on the specific facts of a case." *Vill. of Freeport v. Barrella*, 814 F.3d 594, 606 (2d Cir. 2016) (quoting *Deravin v. Kerik*, 335 F.3d 195, 201 (2d Cir. 2003)). Yet it would be nonsensical to interpret a statute that prohibits only discrimination because of "race" to permit discrimination that could also be described as discrimination on the basis of "color." In the same way, it would be illogical for the Court to hold that the type of sex of discrimination Donald Zarda alleged is not covered by Title VII merely because that type of discrimination is identified separately in another statute.

3. This Court should reject the Government's claim that the 1991 Civil Rights Act somehow ratified excluding sex discrimination claims like Zarda's from Title VII's prohibition on discrimination "because of sex." *See* C.A. U.S. Br. 10-12.

The Government's claim rests on two pillars. First, the Government asserts that in 1991, there was a "settled understanding that Title VII does not bar sexual orientation discrimination." C.A. U.S. Br. 10. Second, the Government points to this Court's decision in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, which found congressional ratification based on evidence that Congress was aware of a consensus among the courts of appeals with respect to how a provision of the Fair Housing Act had been applied. 135 S. Ct. 2507, 2519 (2015), C.A. U.S. Br. 10-11. Neither of those pillars can support the Government's argument.

First, as of 1991, the vast majority of the courts of appeals had not yet addressed the question of how Section 703(a)(1)'s prohibition on sex discrimination might bear on discrimination involving sexual orientation. This stands in sharp contrast to the fact that nine of the twelve courts of appeals had decisively ruled on the Fair Housing Act provision at issue in *Inclusive Communities*. Here, there was no such consensus.

Second, there is absolutely no evidence that Congress was even aware of the cases in which courts of appeals had addressed the question at issue here: *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69 (8th Cir. 1989), *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979), or *Blum v. Gulf Oil Corp.*, 597

F.2d 936 (5th Cir. 1979).[14] Nor was there any other discussion in the 1991 Act's legislative history of discrimination against workers for being lesbian, gay, or bisexual. This absence of evidence stands in sharp contrast to the evidence in *Inclusive Communities* that "Congress was aware of th[e] unanimous precedent" regarding the provision at issue and made a "considered judgment" to retain disparate-impact liability. 135 S. Ct. at 2519-20. For example, there were clear statements in the legislative record showing that Congress considered the lower court precedent when it amended the Fair Housing Act in other ways. *Id.* More to the point, Congress' intent was discernible in the text of the amendments at issue in *Inclusive Communities* because those amendments "included three exemptions from liability that assume the existence of disparate-impact claims." *Id.* at 2520.

Finally, an argument that Congress silently ratified unmentioned court of appeals decisions is especially unwarranted in light of Congress's approach to drafting the 1991 amendments. Congress identified, by name and in the text of the statute, "the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S 424 (1971)." Civil Rights Act of 1991, § 3(2), Pub. L. No. 102-166, 105 Stat. 1071. When Congress wanted to codify caselaw in the 1991 Act, it knew how to do so, and it didn't do it *sub silentio*.

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[14] A fourth case had dicta suggesting that discrimination on the basis of sexual orientation might not constitute sex discrimination. *See Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984). But the actual issue in that case was discrimination on the basis of transgender status, not sexual orientation. *Id.* at 1084.

In short, nothing about the history of Section 703(a)(1) detracts from the conclusion that when an employer fires an employee for being lesbian, gay, or bisexual, that employer has acted "because of sex." This Court should apply Title VII as written.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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