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

BRIEF FOR PETITIONERS ALTITUDE EXPRESS, INC., AND RAY MAYNARD

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QUESTION PRESENTED

Whether the prohibition on sex discrimination in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a)(1), prohibits discrimination based on sexual orientation.

PARTIES TO THE PROCEEDING

Petitioners are Altitude Express, Inc., formerly doing business as Skydive Long Island, and Ray Maynard.

Respondents are Melissa Zarda and William Moore, Jr., co-independent executors of the estate of Donald Zarda.

CORPORATE DISCLOSURE STATEMENT

The Rule 29.6 Corporate Disclosure Statement included in the petition for writ of certiorari remains accurate.

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INTRODUCTION

Petitioners have not discriminated against any employee for any reason. In fact, the jury in this very case found, when resolving a pendent state-law claim, that petitioners did not discriminate based on sexual orientation. But the court of appeals extended these proceedings by rewriting Title VII of the Civil Rights Act of 1964, and it created this interpretive clash over the meaning of that statute.

Through its enactment of Title VII in 1964, Congress prohibited sex discrimination in employment. That law forbids employers from treating employees of one sex better—or worse—than the other sex and doing so because of their sex. It does not reach—and certainly no one in 1964 would have thought it reached—employment actions based on sexual orientation, because those actions do not disadvantage employees of a particular sex.

Zarda twists Title VII's original public meaning to forbid not just conduct that favors one sex over the other, but any considerations of sex in employment practices. That view, if accepted, will have untold consequences in the workplace as sex-specific policies, from restroom access to fitness tests, are declared unenforceable. And it will jeopardize the crucial interests, such as privacy rights, that those policies protect.

Those and other concerns demonstrate why many have reservations about Zarda's arguments. Judicial

pronouncements—particularly those that redefine important concepts like the meaning of sex discrimination—are blunt instruments, unable to balance competing interests or mitigate collateral damage. Only Congress is equipped to do that. It has considered this issue more than 50 times during the last 44 years, but has decided not to add sexual orientation to Title VII. This Court should respect that legislative choice, leave this important policy question with Congress, and decline Zarda's invitation to cut short the legislative process.

STATEMENT OF THE CASE

1. Altitude Express always strived to serve clients with excellence. Donald Zarda did not live up to that standard. For that reason alone, he was discharged. Altitude did not care about Zarda's sexual orientation.

In 2010, Altitude provided Rosanna Orellana and her boyfriend, David Kengle, with tandem skydives—what some consider a thrilling fall during which they each were strapped to an instructor. Pet. App. 11, 144–45. After the jump, Orellana told Kengle that her instructor, Zarda, had "inappropriately touched her" in a flirtatious manner and then, to allay her discomfort, said that he was gay, emphasizing that he had "an ex-husband to prove it." *Id.* at 11–12. Kengle, in turn, complained to Altitude, and Zarda, who had a history of complaints against him, was discharged. *Id.* at 12, 145.

2. Zarda filed a charge with the EEOC, claiming that Altitude discharged him because he "referred to [his] sexual orientation and did not conform to the

straight male macho stereotype." Pet. App. at 180. But see *id.* at 164 (noting that Zarda testified that "he was masculine in appearance"). Zarda then filed suit in district court, asserting (1) sex discrimination under Title VII based on stereotyping allegations and (2) sexual-orientation discrimination under state law. J.A. 28–29.

Altitude moved for summary judgment, which the court granted on the Title VII claim. Pet. App. 165. Zarda based his Title VII arguments on (1) the purported "stereotyp[e] that a male must be guilty of sexual harassment if it is alleged" and (2) supposed stereotypes about the way he dressed. *Id.* at 162–65. But the court held that "[t]here's simply no evidence" that Altitude harbored a stereotype about men and harassment allegations, *id.* at 162, or that Zarda's discharge had anything "to do with conforming to male stereotypes in terms of what you may wear or how you may behave," *id.* at 164–65. The court denied summary judgment on the state-law sexual-orientation claim. *Id.* at 165–68.

Before trial, the EEOC decided *Baldwin* v. *Foxx*, EEOC Doc. No. 0120133080, 2015 WL 4397641 (July 15, 2015). In that decision, the agency reversed its longstanding position on sexual orientation, declaring that "allegations of discrimination on the basis of . . . sexual orientation state a claim of discrimination on the basis of sex within the meaning of Title VII." *Id.* at *10. Zarda then moved for reconsideration of the Title VII claim, arguing that the court "*should* be the first . . . to [ ] hold that Title VII protects sexual orientation" because the law "has opened up ever so slightly to allow this." J.A. 46–47. The court denied

the motion because of binding Second Circuit authority in *Simonton* v. *Runyon*, 232 F.3d 33, 36 (2d Cir. 2000). Thereafter, a jury considered Zarda's state-law sexual-orientation claim and returned a verdict for Altitude. Pet. App. 154–55.

3. On appeal, "Zarda did not challenge" the district court's determination that he "failed to establish the requisite proximity between his termination and his failure to conform to gender stereotypes." Pet. App. 150. Instead, Zarda insisted that the court should overturn *Simonton* and hold that Title VII prohibits sexual-orientation discrimination—an "invitation" that the panel "decline[d]." *Id.* at 149.

After voting to rehear the case en banc, the Second Circuit—in a deeply divided decision—overturned *Simonton* and held that "sexual orientation discrimination is motivated, at least in part, by sex and is thus a subset of sex discrimination." Pet. App. 20.

The majority offered three theories for overturning its settled law. First, sexual orientation is "a function of sex"—and thus protected under Title VII—because "one cannot fully define a person's sexual orientation without identifying his or her sex." Pet. App. 21. The court said that this conclusion reflected "the most natural reading" of Title VII's "prohibition on discrimination 'because of . . . sex,'" *id.* at 20, and this Court's use of comparator analysis, *id.* at 27–34. Second, "sexual orientation discrimination is almost invariably rooted in stereotypes about men and women." *Id.* at 35. "[S]ame-sex orientation," the court said, "'represents the ultimate case of failure to conform' to gender stereotypes." *Id.* at 38 (quoting

Hively v. *Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 346 (2017)). Third, "employees should not be discriminated against because of their association," including "friendships," "with persons of a particular sex." Pet. App. 47. Those associations need not be real or manifest by "acts" or actual relationships; it is enough if a person "desire[s]" a relationship. *Id.* at 50–52 & n.30.

Judge Jacobs concurred in the majority's associational analysis but criticized the rest. Pet. App. 62–68. He rejected the far-reaching implications of the majority's "function of sex" rationale: "*Everything* that cannot be understood without reference to sex does not amount to sex itself as a term in Title VII." *Id.* at 66. He also criticized the majority's use of "the comparator test" as carrying "ramifications that are sweeping and unpredictable," and denounced the notion that "being gay, lesbian, or bisexual, standing alone, . . . constitute[s] nonconformity with a gender stereotype that can give rise to a cognizable gender stereotyping claim." *Id.* at 66–68.

4. Judge Lynch penned the lead dissent, joined in large part by Judges Livingston and Raggi. Detailing the "historical context" surrounding Congress's enactment of Title VII, Pet. App. 73–84, Judge Lynch showed "the fundamental *public* meaning of the [statutory] language," *id.* at 85—"what 'discriminate against any individual . . . because of such individual's . . . sex'" meant "to ordinary speakers of English" in 1964, *id.* at 88 n.7. That historically based analysis of the text revealed that the "problem sought to be remedied by adding 'sex'" 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." *Id.* at 85–86. These are the "principles Congress committed the country to by enacting the words it chose." *Id.* at 87.

Judge Lynch discussed other legislation—both federal and state—to confirm 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." Pet. App. 111. The 22 states that prohibit sexual-orientation discrimination (and the District of Columbia) have done so by adding "sexual orientation" through legislation rather than "judicial interpretation of a pre-existing prohibition on gender-based discrimination." *Id.* at 105 & n.21 (collecting all statutes except Utah Code 34A-5-106(1)(a)(i)). In addition, Congress not only has rejected over 50 proposals to add sexual orientation to Title VII, but also overhauled Title VII in 1991 without making that change, even though, by that time, the EEOC and every circuit to address the issue held that Title VII does not prohibit sexual-orientation discrimination. *Id.* at 105–11.

The majority's argument, Judge Lynch explained, assumes that Title VII bans "any distinction between the sexes that an employer might make for any reason." Pet. App. 97–98. But that "reads 'discriminate' to mean pretty much the same thing as 'distinguish.'" *Id.* at 98. As used in the statute, however, the phrase "discriminate against" "references *invidious* distinctions"—those that "treat a person or group in an unjust or prejudicial manner."

Ibid. "[I]t 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." *Id.* at 98–99. This is why Title VII "does not prohibit an employer from having separate men's and women's toilet facilities," hair-length requirement, dress codes, or fitness standards "for jobs involving physical strength." *Id.* at 100–02. "Taken to its logical conclusion, though, the majority's interpretation of Title VII" would outlaw those practices. *Id.* at 102.

In short, Title VII's prohibition on sex discrimination "is aimed at employment practices that differentially disadvantage men vis-à-vis women or women vis-à-vis men." Pet. App. 112. "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." *Ibid.*

Judge Lynch also dismissed the majority's sex-stereotyping theory. When a plaintiff raises a sex-discrimination claim involving stereotype evidence, the "key element" is that one sex is "disadvantaged in a particular workplace. In that circumstance, sexual stereotyping is sex discrimination." Pet. App. 117. But when an employer acts based on sexual orientation, it is not relying on "any sex-specific stereotype" or "differentially harm[ing] either men or women vis-à-vis the other sex." *Ibid.*

The associational theory, which some courts of appeals have applied to discrimination against interracial relationships, "is no more persuasive," Judge Lynch concluded. Pet. App. 118. While hostility toward "'race-mixing'" is "grounded in bigotry against a particular race," an employer that treats gay relationships differently than heterosexual relationships does not "discriminate[ ] against [men] because it ha[s] something against *men*," or women because it has something against women, *id.* at 121.

SUMMARY OF THE ARGUMENT

Title VII's original public meaning, which Zarda does not discuss, forbids employers from treating employees of one sex better—or worse—than members of the other sex with the intent to disadvantage certain employees because they are men or because they are women. That prohibition does not cover employment decisions based on sexual orientation, which neither favor employees of one sex nor intend to disadvantage certain employees because of their sex. This Court should decline to read sexual orientation into Title VII.

The public—both in 1964 and today—has always understood sex discrimination and sexual-orientation discrimination as distinct concepts. Myriad indicators testify to this. Title VII's plain text and purpose, related federal statutes, longstanding judicial and regulatory interpretations, executive orders, failed legislative amendments, and the states' uniform experience all confirm that Title VII's ban on sex discrimination does not encompass decisions based on sexual attraction.

Other canons of construction bolster this conclusion. For instance, Congress does not bring about seismic legal changes in cryptic fashion. But Zarda's theory would do just that—effectively forbidding employers from adopting or enforcing sex-specific policies, such as those governing access to locker rooms and restrooms. Also, when Congress amended Title VII in 1991 without changing the meaning of sex discrimination, it adopted the uniform judicial and regulatory consensus then prevailing—that Title VII does not include sexual orientation.

Zarda and the Second Circuit offer three theories to justify rewriting Title VII to include sexual orientation. The first, which professes a textual basis, claims that sexual orientation is protected because it is partially determined by, and a function of, sex. But this Court has already rejected this kind of functional approach to interpreting Title VII classifications, concluding that national origin does not include alienage even though alienage is a function of one's national origin. *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86, 88–91 (1973). Moreover, Zarda's statutory argument rests on a faulty comparator analysis. He is wrong to compare himself to a heterosexual woman. By changing both the sex and sexual orientation of the comparator, Zarda's analysis fails to prove anything. To isolate sex, Zarda (a man attracted to the same sex) must be compared to a lesbian woman (a woman attracted to the same sex). Because employers that base decisions on employees' sexual attraction would treat both Zarda and the lesbian comparator the same way, the comparator analysis reveals no sex discrimination. Neither sex is favored over the other.

Zarda's stereotyping arguments based on *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989), are also misplaced. This Court has never created an independent claim for sex stereotyping, and there is no basis for doing so now. The employer in *Price Waterhouse* relied on a sex-specific stereotype—the view that women should not be aggressive—to treat a female employee worse than similarly situated male employees because she was a woman. In contrast, the alleged stereotype in this case—the belief that people should be attracted to the opposite sex—is not a sex-specific stereotype and does not treat employees of one sex worse than the other sex. Under *Price Waterhouse*, plaintiffs may use evidence that employers relied on sex-specific stereotypes to show that they treated one sex better than the other. But sex-based stereotypes alone do not take the place of showing that one sex was disfavored.

The associational-discrimination argument also comes up short. It is premised on an inapt analogy to race. Treating interracial relationships adversely is a form of race discrimination, which is one of the protected classifications in Title VII. But distinctions between gay and heterosexual relationships do not constitute sex discrimination because they do not favor one sex over the other. In addition, Zarda's demand for associational claims based on assumed or desired (rather than actual) relationships stretches associational theory well beyond its breaking point.

Zarda's misreading of Title VII comes with widespread consequences. One reason for this is that his view mandates a sex-blind workplace. According to him, the statute reaches beyond banning favoritism

for one sex and actually forbids employers from distinguishing between the sexes or even considering sex at work. That view would topple sex-specific policies—such as restroom and locker-room access, fitness tests, and dress codes—and jeopardize the important interest that those policies advance. Zarda's theory also imperils religious freedom, threatening to strip tax exemptions from, and upend the hiring practices of, faith-based organizations because of their beliefs about same-sex relationships.

Congress alone is equipped to balance these competing interests. And it is in the midst of doing just that, as a bill that would add sexual orientation to Title VII recently passed the House of Representatives. Zarda and his amici ask this Court to usurp the legislative process, end that legislative debate, and declare a victor. But this Court should decline that invitation and leave complex policy issues and significant Title VII changes where they belong—with Congress.

ARGUMENT

I. The original public meaning of Title VII does not cover employment decisions based on sexual orientation.

The original public meaning of Title VII's statutory phrase "discriminate . . . because of . . . sex"[1] forbids employers from treating employees of one sex better or worse than similarly situated employees of

[1] Altitude often drops the ellipses in subsequent quotations of this language from 42 U.S.C. 2000e-2(a)(1).

the other sex with the motive of disfavoring some because of their sex. Employment actions based on sexual orientation do not fit within the meaning of that text. Numerous interpretive principles confirm this.

A. The original public meaning of Title VII forbids employers from treating members of one sex better than the other sex with the motive of disfavoring certain employees because of their sex.

1. "[T]he starting point for our analysis is the statutory text." *Desert Palace, Inc.* v. *Costa*, 539 U.S. 90, 98 (2003). "[O]ur job is to interpret the words consistent with their 'ordinary meaning . . . at the time Congress enacted the statute'" in 1964. *Wis. Cent. Ltd.* v. *United States*, 138 S. Ct. 2067, 2070 (2018) (quoting *Perrin* v. *United States*, 444 U.S. 37, 42 (1979)).

Title VII bars employers from "discriminat[ing] against any individual . . . because of such individual's . . . sex." 42 U.S.C. 2000e-2(a)(1). This text is introduced by the phrase "otherwise to discriminate against," which makes clear that the "discriminate" requirement applies equally to the previously stated statutory prohibition on "fail[ing] or refus[ing] to hire" or "discharg[ing]" individuals. *Ibid.* See, *e.g.*, *Paroline* v. *United States*, 572 U.S. 434, 446–47 (2014) (construing a limitation in a "final category" in a statutory list to apply to the previously identified items); *Fed. Mar. Comm'n* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 734 (1973) ("Since the summary provision is explicitly limited . . . , it is reasonable to conclude that

Congress intended this limitation to apply to the specifically enumerated categories as well.").

When used to define unlawful employment practices, "discriminate" means "to make a difference in treatment or favor on a class or categorical basis." *Discriminate*, Webster's Third New International Dictionary of the English Language Unabridged (1964).[2] "Because of" identifies a "reason" for something. *Gross* v. *FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009) (citing various dictionaries). And "sex" refers to a person's status as either male or female determined by reproductive biology. *Sex*, The American Heritage Dictionary of the English Language (1st ed. 1969) (the "quality by which organisms are classified according to their reproductive functions; [e]ither of two divisions, designated male and female").

2. This statutory language in context establishes two key requirements. First, to discriminate because of sex—that is, to make an unlawful distinction based on sex—employers must treat members of one sex better or worse than similarly situated members of the other sex were or would have been treated. (For shorthand, Altitude will often say that one sex must be treated better than the other.) Second, a motive or

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[2] Accord *Discriminate*, Random House Dictionary of the English Language (1966) ("mak[ing] a distinction . . . against a person or thing on the basis of the group, class, or category to which the person or thing belongs"); see also Max Radin, Law Dictionary 96 (Lawrence G. Greene ed., 2d ed. 1970) (defining "discrimination" as the "making of improper distinctions"); *Discrimination*, Ballentine's Law Dictionary (3d ed. 1969) ("unreasonable and arbitrary action").

reason prompting employers' actions must be to disfavor—or prefer—members of one sex because of their sex. (For shorthand, Altitude will often say that this motive is the intent to disfavor one sex.)

Case law confirms both the discriminatory-treatment and motive requirements. As to the first, "'[t]he critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.'" *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (quoting *Harris* v. *Forklift Systems, Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)). So Title VII's ban on sex discrimination requires plaintiffs to show "disparate treatment of men and women." *L.A. Dep't of Water and Power* v. *Manhart*, 435 U.S. 702, 707 n.13 (1978).

While Title VII forbids employers from treating one sex worse than the other, it does *not* prohibit all distinctions between the sexes. That is why Title VII allows sex-specific employment policies including restroom access, fitness standards, and dress codes. Yet accepting Zarda's arguments would outlaw all sex distinctions in the workplace. Had Congress wanted to do that, it could have prohibited employers from "differentiat[ing] upon the basis of sex," a phrase used elsewhere in Title VII, 42 U.S.C. 2000e-2(h). Congress chose a different route by banning *discrimination* because of sex instead.

As to the second requirement, "[p]roof of discriminatory motive is critical." *Int'l Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977); see also

EEOC v. *Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033 (2015) (Title VII "prohibits certain *motives*"). A "plaintiff must establish 'that the defendant had a discriminatory intent or motive' for taking a job-related action." *Ricci* v. *DeStefano*, 557 U.S. 557, 577 (2009) (quoting *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 986 (1988)); see also *U.S. Postal Serv. Bd. of Governors* v. *Aikens*, 460 U.S. 711, 716 (1983) (noting that Title VII "obliges finders of fact to inquire into a person's state of mind").

In the sex context, employers must intend to disfavor members of one sex because of their sex. This motive is readily inferred from policies that on their face treat one sex worse than the other. *E.g.*, *Automobile Workers* v. *Johnson Controls, Inc.*, 499 U.S. 187, 197 (1991) (excluding all fertile women from certain jobs); *Manhart*, 435 U.S. at 715 (forcing all female employees to pay a higher amount into a retirement system).

On the one hand, Zarda's arguments recognize that employer motives and "beliefs" are central to the analysis. Zarda Br. 31–32. But on the other, he invokes *Manhart* and *Johnson Controls* to argue that nefarious purposes are *not* required. *Id.* at 34–35. This argument misses the point: the employers in *Manhart* and *Johnson Controls*, each of whom had policies that on their face disadvantaged women because they were women, had the intent to disfavor women because of their sex. Zarda confuses two different things: (1) an employer's reason or motive for acting against the plaintiff and (2) the "ultimate aim" that an employer hopes to accomplish through

its discrimination. Cf. *Ricci*, 557 U.S. at 579–80 (drawing that distinction).

Regardless, Zarda is incorrect that the policies in *Manhart* and *Johnson Controls* rested on "benign intentions." Zarda Br. 35. It was unlawful favoritism toward men that caused the employer in *Manhart* to hide behind actuarial tables to justify paying women less money for the same work. And given the evidence in *Johnson Controls* "about the debilitating effect of lead exposure on the male reproductive system," 499 U.S. at 198, it was sexist for the employer to categorically exclude only women from high-lead positions, thus allowing men but not women to make health decisions for themselves.

Although Title VII prohibits discriminatory intent against women or men, it does not ban employers from merely noticing their employees' sex while making employment decisions or administering employment policies. An employee's sex will often "'play a role' in an employment decision in the benign sense" that it is a "human characteristic[ ] of which decisionmakers are aware" and may consider "in a perfectly neutral" sense. *Price Waterhouse*, 490 U.S. at 277 (O'Connor, J., concurring). Title VII demands "neither asexuality nor androgyny in the workplace." *Oncale*, 523 U.S. at 81.

B. Title VII does not cover employment decisions based on sexual orientation.

The original public meaning of Title VII did not cover employer conduct based on an employee's sexual attraction. Nor does its current meaning. This

conclusion is compelled by the statutory language, its text-based purpose, related federal statutes, longstanding judicial and regulatory interpretations, other congressional and executive-branch indicia, and analogous state laws.

1. *Text.* "[T]he ordinary meaning of the word 'sex' does not fairly include the concept of 'sexual orientation.'" Pet. App. 97 (quoting *Hively*, 853 F.3d at 363 (Sykes, J., dissenting)). "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." *Ibid.* (quoting *Hively*, 853 F.3d at 363 (Sykes, J., dissenting)).

Likewise, "discrimination 'because of sex' is not reasonably understood to include discrimination based on sexual orientation." *Ibid.* (quoting *Hively*, 853 F.3d at 363 (Sykes, J., dissenting)). Sex discrimination and sexual-orientation discrimination, as Judge Lynch observed, have consistently been understood "in the political world, and by the American population as a whole, as different practices presenting different social and political issues." Pet. App. 111.

Those two concepts entail different kinds of treatment and motives. Sex discrimination is treating one sex more favorably than the other, but decisions based on sexual orientation do not advantage one sex. And while sex discrimination's unlawful motive is disfavoring members of one sex compared to the other, actions based on sexual attraction intend to

disadvantage employees of a particular sexual orientation, no matter their sex.

2. *Text-based Purpose.* A statute's purpose "is expressed by the ordinary meaning of the words used." *Jam* v. *Int'l Fin. Corp.*, 139 S. Ct. 759, 769 (2019) (citation omitted); accord, *e.g.*, *Bd. of Governors of Fed. Reserve Sys.* v. *Dimension Fin. Corp.*, 474 U.S. 361, 373 (1986). The purpose of including "sex" in Title VII—as its language makes plain—is to ensure men and women are afforded "equality of employment opportunities." *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 800 (1973).

In contrast, the purpose of forbidding employment practices based on sexual orientation is to guarantee that gay and heterosexual employees—regardless of their sex—are treated the same. The text-based purpose of Title VII is thus inconsistent with reading sexual orientation into the statute.

3. *Related Federal Statutes.* This Court regularly consults related statutes when construing nondiscrimination laws like Title VII. *E.g.*, *Univ. of Tex. Sw. Med. Ctr.* v. *Nassar*, 570 U.S. 338, 357 (2013) (noting differences between the ADA and Title VII to confirm the Court's reading of Title VII); *Gross*, 557 U.S. at 177 n.3 (comparing Title VII's text to the ADEA's text, and "giv[ing] effect to Congress' choice" to use different language). It is therefore highly relevant that many federal statutes explicitly include either "sex" or "gender" alongside "sexual orientation." A number of these statutes treat sex- or gender-based motives as distinct from sexual-orientation-based ones. *E.g.*, 18 U.S.C. 249(a)(2); 20 U.S.C.

1092(f)(1)(F)(ii); 34 U.S.C. 30503(a)(1)(C). And at least one of these statutes is a nondiscrimination law. *E.g.*, 34 U.S.C. 12291(b)(13)(A).

These related statutes show that Congress and the general public understand that sex discrimination is distinct from sexual-orientation discrimination—one does not subsume the other. These laws also demonstrate that "[w]hen it desires to do so, Congress knows how to place [sexual-orientation discrimination] within the . . . reach of a statute." *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 258 (1991).

In light of these related statutes, reading sexual orientation into Title VII would violate two well-settled canons of construction. First, it would wrongly "assume that Congress silently attaches different meanings to the same term in . . . related statutes." *Azar* v. *Allina Health Servs.*, 139 S. Ct. 1804, 1812 (2019). Second, it would imbue these other federal statutes with "surplusage." *Advocate Health Care Network* v. *Stapleton*, 137 S. Ct. 1652, 1659 (2017); see also *Bilski* v. *Kappos*, 561 U.S. 593, 608 (2010) (the canon against surplusage applies when "interpreting any two provisions in the U.S. Code, even when Congress enacted the provisions at different times").

The Second Circuit rejected outright the "presumption[ ] that terms are used consistently" because that presumption has its "greatest force when the terms are used in the same act." Pet. App. 57 (quotation marks omitted). But this Court just reaffirmed twice this year that the presumption against "attach[ing] different meanings to the same term" applies when that term appears in "related

statutes." *Azar*, 139 S. Ct. at 1812; accord *United States* v. *Davis*, 139 S. Ct. 2319, 2329 (2019) ("[W]e normally presume that the same language in related statutes carries a consistent meaning."). Because Title VII bans discrimination and targets biased motives just like these other federal statutes do, they are related, and the presumption applies. See A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 252–53 (2012) (noting that there is a "good deal of leeway" when evaluating whether two statutes are related under the related-statute canon).

Zarda tries to rebut the presumption against surplusage in the related statutes, arguing that "Congress is free to take a 'belt-and-suspenders' approach." Zarda Br. 47. While Congress can do that, Zarda's argument here rests on two far-fetched assumptions about the other statutes: (1) that the public meaning of sex discrimination in those statutes probably included sexual-orientation discrimination even though most of them were enacted between 2009 and 2013, when eleven circuits had unanimously concluded that sex discrimination did *not* include sexual-orientation discrimination, Pet. App. 111 n.25 (collecting cases); and (2) that Congress added "sexual orientation" *as an entirely separate category* just in case courts might think it was not included *within sex*. Both assumptions are utterly implausible. And they are conclusively disproven by Congress's choice to add sexual orientation as a separate category rather than, as members of Congress have attempted elsewhere, defining sex discrimination to include sexual-orientation discrimination. *E.g.*, Equality Act, H.R. 5, 116th Cong. § 7 (2019) (proposing to change "sex" in

Title VII to "sex (including sexual orientation and gender identity)").

Nor does Zarda's analogy to Title VII's inclusion of "race" and "color" hold water. Zarda Br. 47. Although race and color are related, it is not true that every case of race discrimination is color discrimination or vice versa. For instance, an employer that will hire dark-skinned but not light-skinned African Americans discriminates based on color but not race. And an employer that will hire people of one race with dark skin but not people of a different race with the same dark skin color discriminates based on race but not color. Each statutory term—race and color—does independent work, even if overlapping in many cases.

In contrast, Zarda (like the Second Circuit) insists that *every* instance of sexual-orientation discrimination is sex discrimination. See Pet. App. 19–20 (calling sexual-orientation discrimination "a subset" of sex discrimination). Under that theory, the term "sexual orientation" performs no work in statutes that include both "sexual orientation" and "sex." It is complete and utter surplusage unlike race or color in Title VII.

4. *Prior Federal Court and EEOC Interpretations.* "[T]he settled judicial construction of a particular statute is of course relevant in ascertaining statutory meaning." *Nassar*, 570 U.S. at 361. Early courts of appeals' rulings are especially illuminative. See *Food Mktg. Inst.* v. *Argus Leader Media*, 139 S. Ct. 2356, 2363 (2019). Such decisions establish strong "reliance interests in the settled meaning of a statute." *New Prime Inc.* v. *Oliveira*, 139 S. Ct. 532, 539 (2019). And "settled expectations" about Title VII's meaning

"should not be lightly disrupted." *Landgraf* v. *USI Film Prod.*, 511 U.S. 244, 265 (1994); see also Amici Br. Members of Congress in Support of Employers (Part I.B.).

From Title VII's enactment until 2017, "eleven Circuit Courts . . . had considered the question" presented here, and all "concluded that, by its terms, Title VII does not prohibit sexual orientation discrimination." Pet. App. 111 n.25 (collecting cases). This judicial unanimity for the first 50 years after Title VII's passage is a strong indicator that the plain meaning of "discriminate because of sex" does not include employment decisions based on sexual attraction.

"It is also significant," *Espinoza*, 414 U.S. at 93–94, that the EEOC agreed with this consensus for at least 40 years until its *Baldwin* opinion in 2015. *E.g.*, *Dillon* v. *Frank*, EEOC Doc. No. 01900157, 1990 WL 1111074, at *3–4 (Feb. 14, 1990) (explaining that sexual-orientation discrimination is "outside the purview of Title VII"); EEOC Decision No. 76-75, 1975 WL 342769, at *3 (Dec. 4, 1975) (concluding that "homosexuality . . . is not covered by Title VII"); EEOC Decision No. 76-67, 1975 WL 4475, at *3 (Nov. 21, 1975) (similar). The EEOC's original position—which was announced "closer to the enactment" and supported "in the plain language of the statute"—further demonstrates that Title VII does not outlaw sexual-orientation discrimination. *Arabian Am. Oil*, 499 U.S. at 257; see also *Wis. Cent.*, 138 S. Ct. at 2072 (citing the enforcement agency's original position as confirmation for the Court's interpretation).

5. *Other Congressional and Executive Indicia.* Other congressional and executive-branch actions provide further confirmation. In 1998, President Clinton added "sexual orientation" as a separate category to the executive order that already prohibited the federal government from discriminating because of sex. Exec. Order No. 13087, 63 Fed. Reg. 30,097 (May 28, 1998). Years later, when President Obama added "gender identity" to that order, he too kept "sex" separate from "sexual orientation." Exec. Order No. 13672, 79 Fed. Reg. 42,971 (July 21, 2014).

Similarly, over the last 40-plus years, members of Congress have introduced more than 50 bills to add "sexual orientation" alongside "sex" in Title VII. Pet. App. 106–07 n.23 (citing bills). The sheer breadth and consistency of these efforts leave no doubt that Americans, including countless members of Congress, have always understood that sex discrimination does not encompass actions based on sexual orientation.

6. *Interpretation of Parallel State Laws.* Finally, this Court has also looked to "state statutes" and their "interpretations" to confirm its "general understanding" that a protected classification like sex "does not embrace" a different (though related) classification. *Espinoza*, 414 U.S. at 88 n.2. Here, no state high court has prohibited sexual-orientation discrimination through a broad "judicial interpretation of a pre-existing prohibition on gender-based discrimination." Pet. App. 105. This uniform testament from the laboratories of democracy reinforces that sex discrimination does not include actions based on sexual orientation.

C. Other tools of statutory construction confirm that Title VII does not cover employment decisions based on sexual orientation.

1. *Statutory Context.* Title VII's text must be read within—and "may not be divorced from"—its broader statutory "context." *Nassar*, 570 U.S. at 356. That context reveals a "precise," "detailed," "specific," and "exhaustive" statute. *Id.* at 355–56. Congress took "special care in drawing so precise a statutory scheme"—one that includes a finite list of five specific protected classifications. *Id.* at 356. It would "be improper to indulge [Zarda's] suggestion" that such an exacting and exhaustive statute "incorporate[s]" a distinct kind of discrimination that Congress did not include. *Ibid.*; cf. *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 612 (1993) (noting that the ADEA lists "age" but "does not specify *further* characteristics").

This Court should not "infer that Congress meant anything other than what the text . . . say[s]," *Nassar*, 570 U.S. at 356, or "conclude that what Congress omitted from the statute is nevertheless within its scope," *id.* at 353. What Zarda seeks "is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted . . . may be included." *Iselin* v. *United States*, 270 U.S. 245, 251 (1926) (Brandeis, J.). Indulging that request would "transcend[ ] the judicial function." *Ibid.*

2. *Presumption against Fundamental Changes through Obscure Means.* This Court should reject "the doubtful proposition that Congress sought to

accomplish in a 'surpassingly strange manner' what it could have accomplished in a much more straightforward way." *Azar*, 139 S. Ct. at 1813. Congress usually takes the "direct path to [its] destination." *Id.* at 1812. It does not use "surprisingly indirect route[s] to convey . . . important and easily expressed message[s]" about Title VII's scope. *Landgraf*, 511 U.S. at 262. So when Congress does not "adopt 'obvious alternative' language"—here, inserting the term "sexual orientation" into Title VII—"the natural implication" is that the law does not achieve what that obvious language would have. *Stapleton*, 137 S. Ct. at 1659.

Had Congress wanted Title VII to prohibit sexual-orientation discrimination, it could have "includ[ed] language to that effect." *Desert Palace, Inc.*, 539 U.S. at 99. "Its failure to do so is significant, for Congress has been unequivocal when [outlawing sexual-orientation discrimination] in other circumstances." *Ibid.*; accord *Landgraf*, 511 U.S. at 259–60 (noting that Congress "surely would have used [clearer] language" in Title VII, such as the language found in other bills, if it wanted to convey "critically important meaning").

The absence of clear statutory language prohibiting employment decisions based on sexual orientation is particularly consequential here, where Zarda's proposed interpretation would resolve an "earnest and profound debate" about an important policy question without input from the people. *Gonzales* v. *Oregon*, 546 U.S. 243, 267 (2006). Congress does not act in a "cryptic . . . fashion," *Food & Drug Admin.* v. *Brown & Williamson Tobacco*

Corp., 529 U.S. 120, 160 (2000), or use "vague terms," *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1627 (2018), when ushering in such fundamental changes. It "does not, one might say, hide elephants in mouseholes." *Wittmer* v. *Phillips 66 Co.*, 915 F.3d 328, 336 (5th Cir. 2019) (Ho, J., concurring) (quoting *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001)). It is unreasonable to insist that this is the way Congress settled a national debate on how federal law should address sexual orientation in the workplace.

3. *Prior-construction Canon.* When a statutory "word or phrase has been given a uniform interpretation by inferior courts, a later version of that act perpetuating the wording is presumed to carry forward that interpretation." *Tex. Dep't of Hous. & Cmty. Affairs* v. *Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2520 (2015) (ellipses omitted).

Congress amended Title VII in 1991. See Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. At that time, the unbroken consensus of the EEOC and all circuits that addressed the question was that Title VII does not cover employment decisions based on sexual orientation.[3] By amending Title VII without changing the "discriminate because of sex" language, Congress "is presumed to carry forward" that uniform interpretation. *Inclusive*

[3] See *Dillon*, 1990 WL 1111074, at *3–4; EEOC Decision No. 76-75, 1975 WL 342769, at *3; EEOC Decision No. 76-67, 1975 WL 4475, at *3; *Williamson* v. *A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989); *Ulane* v. *E. Airlines, Inc.*, 742 F.2d 1081, 1085–86 (7th Cir. 1984); *DeSantis* v. *Pac. Tel. & Tel. Co.*, 608 F.2d 327, 329–30 (9th Cir. 1979); *Blum* v. *Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979) (per curiam).

Communities Project, Inc., 135 S. Ct. at 2520. Bolstering this presumption, the same Congress rejected two bills that would have reversed the consensus interpretation by adding "sexual orientation" to Title VII. Civil Rights Amendments Act of 1991, S. 574, 102d Cong.; Civil Rights Amendments Act of 1991, H.R. 1430, 102d Cong.; cf. *Inclusive Communities Project, Inc.*, 135 S. Ct. at 2520 ("Congress rejected a proposed amendment that would have" partially reversed the prevailing precedent).

Zarda and the Second Circuit dismiss the prior-construction canon because they say no evidence shows that "Congress was aware of, much less relied upon, the handful of Title VII cases discussing sexual orientation." Pet. App. 55; Zarda Br. 48. But "Congress is presumed to be aware of [the] administrative or judicial interpretation." *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978). The justification for this canon rests not on a "presumption of legislative knowledge," but on "the reasonable expectations" of "members of the bar practicing in that field." Scalia & Garner, *Reading Law* at 324.

Regardless, it is likely that Congress was aware of the sexual-orientation issue and had no desire to change the status quo. The same House Committees that authored reports for the 1991 Act also had before them a bill proposing to add sexual orientation. See Civil Rights Amendments Act of 1991, H.R. 1430, 102d Cong. Yet that specific change did not find "its way into the omnibus bill that overruled other judicial interpretations" of Title VII. Pet. App. 109.

Zarda also resists the prior-construction canon because the five circuits that had spoken to this issue in 1991, while uniform in their views, were apparently not enough. Zarda Br. 48.[4] This argument ignores that the canon applies when there are (1) "uniform holdings of lower courts" or (2) "well-established agency interpretations." Scalia & Garner, *Reading Law* at 324 (citing cases); see also *Lorillard*, 434 U.S. at 580 (mentioning both options). The first alternative was satisfied in 1991. Zarda recognizes that the courts of appeals were united then. That the circuit unanimity was not as deep as in *Inclusive Communities Project* does not displace the canon. Uniformity does not require that the majority of circuits had addressed the issue. In addition, Zarda does not deny that the second option was satisfied in 1991. Nor could he. The EEOC's position was unambiguous and long established.

4. *Over 50 Rejected Bills.* Congress's amendment of Title VII in 1991 without adding sexual orientation falls in the midst of a more than 40-year period during which Congress rejected over 50 bills to add sexual orientation to the statute. Pet. App. 106–07 n.23 (collecting bills). While congressional "inaction may not always provide crystalline revelation," "it may be probative" in some cases. *Johnson* v. *Transp. Agency, Santa Clara Cty.*, 480 U.S. 616, 629 n.7 (1987). This

[4] Zarda's claim (at 48–49 & n.14) that there were only three circuits ignores that *Ulane* expressed a clear view on the sexual-orientation issue, 742 F.2d at 1085–86 (concluding that Title VII does not include "sexual orientation" or transsexual status), and that *Blum* was binding in both the Fifth and Eleventh Circuits, see *Beech Aircraft Corp.* v. *Rainey*, 488 U.S. 153, 160 n.4 (1988).

is one of them. Congress's consistent rejection of "numerous and persistent" bills proposing to amend Title VII to ban sexual-orientation discrimination "clearly evinced a desire" not to bring about that change. *Flood* v. *Kuhn*, 407 U.S. 258, 281–84 (1972).[5]

Relying on *Pension Benefit Guaranty Corp.* v. *LTV Corp.*, 496 U.S. 633, 650 (1990), Zarda and the Second Circuit deny any significance to Congress's persistent rejection of these bills. Zarda Br. 46; Pet. App. 56–57. But *LTV Corp.* is nothing like this case. In that case, Congress declined to enact *a single bill*. Here, Congress has refused over 50 separate proposals. Also, in *LTV Corp.*, when Congress declined to act, the government was already proceeding as if the law included the proposed change. But here, for the first 40 years that Congress considered these bills, it did so "in light of the EEOC and judicial consensus that sex discrimination did not encompass sexual orientation discrimination." Pet. App. 110.

Thus, unlike in *LTV Corp.*, it is unreasonable "to conclude that Congress rejected the proposed amendments" to Title VII because it "believed that Title VII 'already incorporated the offered change.'" *Ibid.* (quoting *LTV Corp.*, 496 U.S. at 650). Quite the opposite, the only plausible inference is that members

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[5] See also *Heckler* v. *Day*, 467 U.S. 104, 118 n.30 (1984) (Congress's rejection of "repeated demands" for a requested change "demonstrates far more than simple congressional inaction"); *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 600–01 (1983) (finding congressional inaction "significant" when "no fewer than 13 bills" were introduced but none advanced out of committee over a 12-year period during which Congress "enacted numerous other amendments" to the relevant statute).

of Congress have consistently viewed sex and sexual orientation as distinct and never acted to forbid employment decisions based on the latter.

II. Zarda's theories for reading sexual orientation into Title VII are unpersuasive.

Zarda offers three primary theories for rewriting Title VII. While touting textualism, Zarda's arguments exhibit few of the hallmarks of text-based interpretation. Rather, he tries to take this Court's case law and portions of the statutory text and stretch them beyond recognition.

A. Title VII's text prohibiting sex discrimination does not cover employment decisions based on sexual orientation.

Zarda and the Second Circuit began with what they consider to be a text-based argument. Zarda Br. 19–23; Pet. App. 21–34. But those arguments have three significant flaws. First, if accepted, they would sweep into Title VII every status defined by reference to sex. Second, they rely on a profound distortion of comparator analysis. Third, they fundamentally misunderstand the "motivating factor" language in Title VII's mixed-motive provision, 42 U.S.C. 2000e-2(m).

1. Title VII does not include as a protected classification everything that is a function of sex.

Zarda and the Second Circuit insist that decisions based on sexual orientation amount to sex discrimination because an individual's sexual

orientation is defined by the sex to which he is attracted. Zarda Br. 19; Pet. App. 21–22. The Second Circuit expressly acknowledges the implication of this: that any status determined by reference to sex—what it called "a function of sex"—is now effectively added to Title VII. Pet. App. 19 ("Title VII prohibits . . . discrimination based on traits that are a function of sex"). Such a drastic expansion of Title VII's reach conflicts with the statutory text, this Court's precedent, and sound logic.

a. For starters, this expansion of Title VII is atextual. Title VII forbids discrimination "because of sex." It does not ban discrimination based on "functions of sex" or "traits defined by reference to sex." Nor does the phrase "because of sex" reasonably include such items. See *Dillon* v. *Frank*, No. 90-2290, 1992 WL 5436, at *4 (6th Cir. Jan. 15, 1992) (refusing "to define 'because of sex' to mean 'because of anything relating to being male or female, sexual roles, or to sexual behavior'") (footnote omitted).

To illustrate, consider the only Title VII provision that actually defines the phrase "because of sex." 42 U.S.C. 2000e(k). Responding to this Court's decision in *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), Congress in 1978 protected *some* functions of sex—namely, "pregnancy" and "childbirth"—by amending the phrase "because of sex" to include "because of . . . pregnancy, childbirth, or related medical conditions." Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. 2000e(k)). But Congress did not include *other* sex-dependent traits within the phrase "because

of sex," even though the same Congress considered many bills to add "sexual orientation" to Title VII.[6]

b. This Court has already refused to read Title VII to include characteristics outside of the text even if they depend on—or are a function of—a listed category. *Espinoza*, 414 U.S. at 88–91 (refusing to "interpret the term 'national origin' to embrace citizenship" or alienage). Citizenship and alienage are undoubtedly functions of one's national origin—that is, one's nation of birth. See 8 U.S.C. 1401–1409 (determining citizenship based on birthplace); *Espinoza*, 414 U.S. at 96 (Douglas, J., dissenting) ("Alienage results from one condition only: being born outside the United States."). But in *Espinoza*, this Court rejected the argument that employment decisions based on alienage are discrimination based on national origin. 414 U.S. at 88–91. So too here this Court should conclude that employment decisions based on sexual orientation do not amount to sex discrimination.

c. Moreover, the ramifications of Zarda's position are untenable. He would effectively rewrite Title VII, as Judge Jacobs acknowledged below, to add as new protected statuses everything that "cannot be defined or understood without reference to sex." Pet. App. 66. That would judicially amend the statute, without congressional approval, to include matters like

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[6] See Civil Rights Amendments, H.R. 451, 95th Cong. (1977); Civil Rights Amendments, H.R. 2998, 95th Cong. (1977); Civil Rights Amendments, H.R. 5239, 95th Cong. (1977); Civil Rights Amendments Act, H.R. 7775, 95th Cong. (1977); Civil Rights Amendments Act, H.R. 8269, 95th Cong. (1977).

genderqueer status (declining to "identify fully as either a man or a woman," Am. Psychological Ass'n, *Guidelines for Psychological Practice With Transgender and Gender Nonconforming People*, 70 Am. Psychologist 832, 862 (Dec. 2015) (hereinafter "APA, *Guidelines*")), polyandrous status ("having more than one husband at the same time," *Polyandry*, Black's Law Dictionary (11th ed. 2019)), and much more. In addition, under Zarda's logic, Title VII would have to include all characteristics dependent on race, color, religion, and national origin, thus overruling *Espinoza*. The Court should decline to go down that path.

2. Sex-plus comparator analysis undermines Zarda's attempt to rewrite Title VII.

a. Zarda analogizes to *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971) (per curiam), and *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. 669 (1983), arguing that the sex-plus claims there—where a subset of one sex was treated worse than a similarly situated subset of the other sex—mirror his arguments to read sexual orientation into Title VII. Zarda Br. 19–23. But those cases are entirely unlike this one.

Both *Phillips* and *Newport News* involved the discriminatory treatment of one sex versus the other. In *Phillips*, the employer's policy of hiring men with preschool-aged children but not women with preschool-aged children harmed *only female applicants*. 400 U.S. at 544 ("one hiring policy for women and another for men—each having pre-school-

age children"). Similarly, in *Newport News*, the employer's policy of providing limited pregnancy benefits to spouses of male employees disadvantaged *only male employees*. 462 U.S. at 684 ("[S]ince the sex of the spouse is always the opposite of the sex of the employee, it follows inexorably that discrimination against female spouses in the provision of fringe benefits is also discrimination against male employees."). Here, however, an employer that acts based on sexual orientation disfavors *both men and women*. There is no disparate treatment favoring employees of one sex.

In both *Phillips* and *Newport News*, the "plus" factors—parental status in the former, and marital status in the latter—produced comparators like the complainant employees in all relevant respects except for one: sex. *Newport News*, 462 U.S. at 678 (asking whether the treatment of one sex was "less favorable than for similarly situated" employees of the opposite sex). Stated differently, the plaintiffs in those cases had the same class memberships as their opposite-sex comparators. That precision ensured that sex discrimination rather than another motive explained the employers' actions.

Here, the "plus" factor must be "attraction to the same sex." Only that ensures that Zarda is like his female comparator in every way (except for sex). *Tex. Dep't of Cmty. Affairs* v. *Burdine*, 450 U.S. 248, 258 (1981) ("[I]t is the plaintiff's task to demonstrate that similarly situated employees were not treated equally"); *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 558 (1977) (no allegation that the employer "differentiates between similarly situated males and

females on the basis of sex"). When an employer that makes decisions based on sexual orientation treats both men and women attracted to the same sex in the same manner, there is no sex discrimination.

Zarda is wrong to insist (at 21) that the "plus" factor is "attraction to men" (rather than "attraction to the same sex"). Characterizing it that way compares Zarda to a heterosexual woman (a woman attracted to men). That does not produce a similarly situated opposite-sex comparator because it changes "sex *and* sexual orientation." *Hively*, 853 F.3d at 366 (Sykes, J., dissenting). It therefore fails to establish sex discrimination.

Zarda's comparator analysis "load[s] the dice" in his favor. *Ibid.* By changing the comparator's sex and sexual orientation, the comparator test functions not as a method to identify sex discrimination but as a circular form of question-begging—a self-fulfilling prophesy in a quest to rewrite Title VII.

Nor is Zarda's position vindicated by Title VII's focus on individuals. Zarda Br. 17. Whether the "plus" factor is framed as "attraction to men" or "attraction to the same sex," both are individualized to him. Because only the latter identifies a similarly situated opposite-sex comparator, that framing must apply.

Cases involving bisexual employees confirm that sexual-orientation discrimination is not a subset of sex discrimination. Whether the "plus" factor is characterized as "attraction to both men and women" or "attraction to both sexes," no sex discrimination occurs. Both the male employee who is attracted to

men and women (a bisexual man) and the female employee who is (a bisexual woman) are treated the same. Any attempt to avoid this conclusion would require further manipulation of the comparator analysis, revealing it as nothing more than a shell game.

b. Zarda misunderstands the point of considering the employer's treatment of similarly situated opposite-sex comparators. Zarda Br. 22–23, 36–41. That inquiry assesses whether the discriminatory-treatment element is satisfied. Despite Zarda's suggestions, it does not mean that an employer can absolve itself of wrongdoing by engaging in a different kind of sex discrimination against the opposite sex.

Thus, Altitude agrees with Zarda that the result in *Phillips* would not "have been different had the company also refused to hire an unmarried man on the notion that single men are prone to irresponsibility." Zarda Br. 22. That separate refusal would have been its own form of sex discrimination, involving a distinct employment policy (no hiring unmarried men), distinct "plus" factor (unmarried status), and distinct motive (bias against unmarried men).

Nor is it correct that employers who make employment decisions based on employees' attraction to the same sex have one policy for men and "another, parallel policy" for women. Zarda Br. 37. The policy is the same, the motive is the same, and the treatment of men attracted to the same sex and women attracted to the same sex is the same.

3. Title VII's mixed-motive provision does not help Zarda.

Zarda and the Second Circuit both rely on the "motivating factor" language in Title VII's mixed-motive provision, which allows a plaintiff to prevail under Title VII by demonstrating that sex "was a motivating factor . . . , even though other factors also motivated" the employer. 42 U.S.C. 2000e-2(m). They believe that sex is a "motivating factor" in all sexual-orientation cases because employers that act on that basis must at least notice the employee's sex. Zarda Br. 16–17, 37; Pet. App. 18–20, 26–27. But their arguments misapprehend both the purpose and meaning of the mixed-motive provision.

a. The Second Circuit said that the mixed-motive provision "defined" Title VII's prohibition on "discrimination 'because of . . . sex'" to outlaw any employment practice that "mak[es] sex 'a motivating factor.'" Pet. App. 26. Yet that provision—which is not "a substantive bar on discrimination," *Nassar*, 570 U.S. at 355—does not define the phrase "discriminate because of sex." Hence, it neither addresses nor eliminates the requirement that one sex be treated better than the other.

Rather, the mixed-motive provision merely "establishe[d] the causation standard for proving a violation *defined elsewhere in Title VII*." *Ibid.* (emphasis added). The Second Circuit panel recognized this by relying on that provision to reduce Zarda's causation burden and keep his Title VII claim alive. Pet. App. 148–49 (concluding that Zarda's adverse verdict on his state sexual-orientation claim

did not moot his federal sexual-orientation claim because of "the less stringent 'motivating-factor' test for causation"). But the en banc opinion was wrong to claim that the mixed-motive provision redefined the meaning of sex discrimination.

b. In addition, the Second Circuit watered-down the phrase "motivating factor"—reading it to mean nothing more than a thing considered or taken "into account." Pet. App. 59–60. "Motivating" means "to provide with a motive," and "motive" refers to "something that causes a person to act." Random House Webster's Dictionary 431 (1993); accord *Staub* v. *Proctor Hosp.*, 562 U.S. 411, 424 (2011) (Alito, J., concurring) (similarly defining "motivating factor").

A "motivating factor" refers to something more than a simple "'causal factor.'" *Staub*, 562 U.S. at 418–19. Nor does it mean just a "contributing factor"—something that merely "plays a part in producing a result," *Contributing Cause*, Black's Law Dictionary (11th ed. 2019)—because Congress rejected a version of the bill using that phrase. See Civil Rights and Women's Equity in Employment Act of 1991, H.R. 1, 102d Cong. § 5(a). Even the word "factor," without the modifier "motivating," connotes something provoking action—not just "a thing to be considered." Bryan A. Garner, A Dictionary of Modern Legal Usage 346 (2d ed. 1995).[7]

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[7] In addition, proximate-causation principles—which are relevant when construing "motivating factor" language in employment nondiscrimination statutes, see *Staub*, 562 U.S. at 416–17, 419–20 (interpreting a statute protecting military personnel that is "very similar to Title VII")—do not subject an

But employers that make decisions based on sexual orientation are not motivated by the employee's sex. As an initial matter, those employers might not even know the plaintiff's sex because some people (such as applicants in cover letters) disclose their sexual orientation but not their sex. To the extent the employer knows the plaintiff's sex, it merely notices sex while discriminating on another ground. That benign noticing does not prompt the employer to action. Only orientation does. See *Abercrombie & Fitch Stores*, 135 S. Ct. at 2033 ("Motive and knowledge are separate concepts.").

A test for determining if sex "played a motivating part in an employment decision" focuses on what a truthful employer would disclose as its reasons for acting. *Price Waterhouse*, 490 U.S. at 250 (plurality op.). If "one of those reasons [is] that the applicant or employee was a woman" or a man, sex was a motivating factor. *Ibid.*; see also *Nassar*, 570 U.S. at 343 (noting that the mixed-motive provision requires that "one of the employer's motives" be "the motive to discriminate" based on a protected trait). But the employer that made a decision based on sexual orientation would say that it acted because the employee was gay or heterosexual—not because he was a man or she was a woman. This confirms that sex is not a "motivating factor" in cases where an employer acts based on sexual orientation.

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actor to liability for background facts or considerations that "constitute[ ] only a trivial contribution to a causal set." Restatement (Third) of Torts: Liab. for Phys. & Emot. Harm § 36 (2010).

B. *Price Waterhouse*'s discussion of sex stereotyping did not write sexual orientation into Title VII.

Price Waterhouse resolved a circuit split over—and the plurality's holding addressed only—the burden that each party bears in a mixed-motive case. 490 U.S. at 232, 258. In passing, the plurality also affirmed the trial court's finding that the plaintiff, Ann Hopkins, proved sex discrimination through evidence that her employer relied on the sex-specific stereotype that women should not be aggressive and treated her worse than male coworkers. *Id.* at 250–52, 255–58. Zarda claims that discussion effectively added sexual orientation to Title VII. It did no such thing.

1. *Price Waterhouse* did not, as the dissent noted, create an "independent cause of action for sex stereotyping." *Id.* at 294 (Kennedy, J., dissenting); accord *Hively*, 853 F.3d at 369 (Sykes, J., dissenting) (same); *Wittmer*, 915 F.3d at 339 (Ho, J., concurring) (similar); *Hamm* v. *Weyauwega Milk Prod., Inc.*, 332 F.3d 1058, 1067 (7th Cir. 2003) (Posner, J., concurring) (similar). Rather, both the plurality and the dissent recognized that a plaintiff may rely on sex stereotypes as evidence of actual sex discrimination. See 490 U.S. at 251 (plurality op.) (noting that "stereotyped remarks can certainly be *evidence*" that sex motivated the employment decision); *id.* at 294 (Kennedy, J., dissenting) ("Evidence of use by decisionmakers of sex stereotypes" may show "discriminatory intent").

Unlike the employee in *Price Waterhouse*, Zarda produces no evidence that Altitude relied on a sex stereotype in dismissing him. He invoked multiple supposed stereotypes below—(1) "that a male must be guilty of sexual harassment if it is alleged," and (2) that his clothing was not masculine. Pet. App. 162–65. But the district court found "simply no evidence" that Altitude harbored the first view, *id.* at 162, or that Zarda's discharge had anything to do with the second, *id.* at 164–65. On appeal, "Zarda did not challenge" these holdings. *Id.* at 150.

Rather, Zarda attempts to take an evidentiary tool for establishing sex discrimination in a specific case, without any evidence that a sex-specific stereotype motivated his dismissal, and use it to "*de facto* amend[ ] Title VII to encompass sexual orientation." *Vickers* v. *Fairfield Med. Ctr.*, 453 F.3d 757, 764 (6th Cir. 2006). To fill the evidentiary void, Zarda imputes to the mind of Altitude and every similar employer the alleged stereotype that people should be attracted only to the opposite sex. Zarda Br. 25, 36 n.10. But no evidence suggests that view is held by Altitude. Nor is it held by, for example, an employer who does not object to same-sex attraction but believes that marriage is only an opposite-sex union. Yet Zarda stereotypes employers' motives by supposing that they hold the same views. By using *Price Waterhouse* that way, Zarda turns that case on its head.

2. The *Price Waterhouse* plurality did not break new ground on the meaning of sex discrimination. Its analysis fits comfortably within the established framework for demonstrating sex discrimination. Notably, the opinion affirmed the discriminatory-

treatment requirement: Title VII forbids the "disparate treatment of men and women resulting from sex stereotypes." 490 U.S. at 251 (quoting *Manhart*, 435 U.S. at 707 n.13). Accordingly, sex stereotyping that does not favor one sex over the other does not violate Title VII.

The plurality focused not just on any sex-*related* stereotype, but on sex-*specific* stereotypes, asking whether the employer insisted that the plaintiff "match[ ] the stereotype associated with [her] group." 490 U.S. at 251. The stereotype at issue there was the employer's insistence that women not be aggressive. See *id.* at 250 (discussing the employer's "belief that a woman cannot be aggressive, or that she must not be"); *id.* at 251 (noting that the employer "object[ed] to aggressiveness in women"); *id.* at 256 (discerning "sex stereotyping in [the employer's] description of an aggressive female employee as requiring 'a course at charm school'").

By relying on that stereotype, the employer in *Price Waterhouse* favored members of one sex over the other and acted with an impermissible motive. First, it treated men more favorably than women. While the company promoted aggressive men because its "positions require[d] th[at] trait," it pushed down aggressive women by placing them "in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not." *Id.* at 251. That stereotype threatened to drive women from Price Waterhouse's partnership ranks completely. Second, by acting on the belief that women should not be aggressive, Price Waterhouse had the motive to

disadvantage women like Ann Hopkins because of their sex.

3. Unlike *Price Waterhouse*, the purported stereotype at issue here—the notion that people should be attracted to the opposite sex—"is not a *sex-specific* stereotype at all"; nor does it "spring from a sex-specific bias." *Hively*, 853 F.3d at 370 (Sykes, J., dissenting). Rather, it is "a belief about what *all* people," regardless of their sex, "ought to be or do—to be heterosexual." Pet. App. 117. Acting on such a view satisfies neither the discriminatory-treatment requirement (because it does not operate "to the disadvantage of either sex") nor the motive requirement (because it "does not stem from a desire to discriminate against either sex"). *Ibid.*[8]

Sex-specific stereotypes disfavor men because they are men and women because they are women. Thus, employer reliance on those stereotypes, unlike a belief about sexual attraction, cuts to the heart of Title VII's purpose in prohibiting sex discrimination: to ensure that women and men have the same workplace opportunities. For too long, notions that women cannot, or should not, perform certain work have "plagued women" by creating "irrational impediments to [their] job opportunities." *Manhart*, 435 U.S. at 707 n.13. Sex-specific stereotypes, like insisting that

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[8] Zarda and his amici argue that bias against gays and lesbians is inherently "premised upon . . . sexism." Zarda Br. 35–36. But psychoanalyzing the origins of anti-gay prejudices is far afield and well beyond this Court's role. Title VII targets employment actions motivated by a specific list of reasons. It does not fish out "the 'deep roots' of biased attitudes." Pet. App. 123.

women cannot be aggressive, perpetuate this harm to women. Beliefs about sexual attraction do not.

The view that all people should be attracted to the opposite sex does not become a sex-specific stereotype just by casting it in male-specific terms—that "men should be attracted only to women." Zarda Br. 25. Title VII "prohibits certain *motives*." *Abercrombie & Fitch Stores*, 135 S. Ct. at 2033. The motive of employers that act based on sexual orientation (at least according to Zarda) is the belief that all people—whether male or female—should be attracted to the opposite sex. But even Zarda recognizes that the "notion that men should be attracted only to women and women should be attracted only to men is" a single "stereotype." Zarda Br. 25. It is two sides of the same coin. That view is not unique to either sex, and acting on it does not single out either sex for disfavored treatment.

4. Even in the stereotype context, plaintiffs who invoke comparator analysis must comply with the requirements discussed above. *Supra* at 33–36. As explained, the appropriate comparator for Zarda is a lesbian woman (that is, a woman attracted to the same sex). By the same logic, the purported stereotype is the belief that all people should be heterosexual (that is, attracted to the opposite sex).

Price Waterhouse illustrates how the comparator analysis works in this context. It compares men with a sex-specific-stereotyped trait (such as aggressiveness) to women with that same trait. Zarda effectively admits this. See Zarda Br. 38. Altitude does not suggest that the analysis should compare a woman

who departs from "traditional notions of femininity" with a man who departs from a different stereotyped trait—one involving a "traditional masculine sex stereotype[ ]." *Ibid.*

5. Zarda and his amici suggest that this case is about excluding gays and lesbians from Title VII. Zarda Br. 27–31. It is not. This case is not about *who* is protected but about "*what kinds* of discrimination [Title VII] makes illegal." *Espinoza*, 414 U.S. at 95 (emphasis added). Gays and lesbians, no less than heterosexuals, may prevail on sex-discrimination claims—for example, if Ann Hopkins were a lesbian, she still would have won. "[B]ut nothing in [Title VII] makes it illegal to discriminate on the basis of [sexual orientation]." *Ibid.*

Zarda does not want to fit within *Price Waterhouse* but to expand it beyond recognition. Under his view, plaintiffs raising sexual-orientation claims may simply impute sex stereotypes into their employers' minds and need not show that one sex is treated more favorably than the other. Far from conforming to *Price Waterhouse*, that defies it.

The ultimate irony is that Zarda and his amici rely on stereotypes to read sexual orientation into Title VII. As one judge has noted, their arguments assume that "all gay individuals" have the same desires and "engage in the same behavior." *Evans* v. *Ga. Reg'l Hosp.*, 850 F.3d 1248, 1258 (11th Cir. 2017) (Pryor, J., concurring). But that runs counter to Zarda's own emphasis on the need to treat people as individuals, Zarda Br. 17, and this Court's rejection of legal reasoning that "assum[es]" members of a minority

"group . . . think [or act] alike." *Schuette* v. *BAMN*, 572 U.S. 291, 308 (2014) (plurality op.); accord *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 627–28 (1984) (rejecting "legal decisionmaking" that relies on "generalizations about the relative interests and perspectives" of certain groups).

6. Zarda says that courts cannot distinguish stereotype-based sex-discrimination claims from sexual-orientation discrimination. Zarda Br. 27–28. But surely they can. If courts focus on sex-specific stereotypes and require plaintiffs to show that the stereotype caused the employer to treat one sex better than the other, they are well equipped to separate cognizable sex-discrimination claims from sexual-orientation claims. To the extent courts have struggled, it "stems from an unfortunate tendency to read [*Price Waterhouse*] for more than it's worth." *Hively*, 853 F.3d at 371 (Sykes, J., dissenting).

More important, distinguishing the two claims is not optional. Courts must "give effect to Congress' choice" to address sex discrimination but not sexual-orientation discrimination. *Nassar*, 570 U.S. at 354 (quoting *Gross*, 557 U.S. at 177 n.3). Declaring "every case of sexual orientation discrimination" a "case of gender stereotyping discrimination," as Zarda does, "would contradict Congress's decision not to make sexual orientation discrimination cognizable under Title VII." *Prowel* v. *Wise Bus. Forms, Inc.*, 579 F.3d 285, 292 (3d Cir. 2009). Courts must respect that legislative choice.

C. The associational-discrimination theory provides no support for reading sexual orientation into Title VII.

This Court has never recognized an associational-discrimination claim under Title VII—a statute that, unlike other federal nondiscrimination laws, does not include text protecting an employee's associations. Compare with 42 U.S.C. 12112(b)(4) (ADA discrimination includes adverse employment actions against "a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association").[9] Yet Zarda asks this Court to read such a claim into Title VII's silence. For this reason and the others that follow, Zarda's associational arguments miss the mark.

1. The lynchpin of Zarda's associational arguments is a comparison between distinctions involving interracial relationships and those involving gay relationships. Zarda Br. 31–36. But Zarda ignores Title VII's core textual requirement that plaintiffs must establish "discriminat[ion]" based on a protected classification. His analogy fails for this simple reason: while adverse actions against interracial relationships constitute racial discrimination, treating gay

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[9] *Newport News* did not address an associational-discrimination claim. Cf. Br. in Opposition 22. The claim there involved fringe benefits afforded to employees' dependents—benefits that are part of employee "compensation" and squarely within Title VII. 42 U.S.C. 2000e-2(a)(1); see also 42 U.S.C. 2000e(k) (covering pregnancy-related "fringe benefit[s]"). The claim did not rest merely on employees' association with others.

and heterosexual relationships differently does not amount to sex discrimination.

This Court's constitutional cases—which "provide helpful guidance in [the] statutory context" of Title VII, *Ricci*, 557 U.S. at 582—confirm this. *Loving* v. *Virginia*, 388 U.S. 1 (1967), declared that classifications disfavoring interracial marriage are "invidious racial discriminations." *Id.* at 8. But *Obergefell* v. *Hodges*, 135 S. Ct. 2584 (2015), did *not* say that distinguishing between heterosexual and gay relationships is sex discrimination, even though that argument was raised, see *Obergefell* Pet. Br. 48–49, and the majority's opinion discussed prior cases "invok[ing] equal protection principles to invalidate laws imposing sex-based inequality on marriage," 135 S. Ct. at 2602–04. Nor did this Court dismiss opposition to gay marriage as sex-based bigotry. It recognized instead that such views are often "based on decent and honorable religious or philosophical premises." *Id.* at 2602.

Notably, "none of [this] Court's landmark constitutional decisions upholding the rights of gay Americans" rests on a sex-discrimination premise. Pet. App. 127–28. *E.g.*, *Romer* v. *Evans*, 517 U.S. 620, 627, 631–32 (1996) (applying "conventional" rational-basis review, used to analyze laws that do not "target[ ] a suspect" or quasi-suspect class, in an equal-protection challenge to a law discriminating against "homosexuals, but no others"). On the contrary, this Court's equal-protection jurisprudence has preserved "the well-understood distinction between sex discrimination and sexual-orientation discrimination." *Wittmer*, 915 F.3d at 340 (Ho, J.,

concurring) (quoting *Hively*, 853 F.3d at 372 (Sykes, J., dissenting)). See generally Amicus Br. Marriage Law Foundation (discussing LGBT-related decisions from this Court and the nationwide litigation on gay marriage).

2. This Court's treatment of *Loving* as involving race discrimination but *Obergefell* as involving something other than sex discrimination makes perfect sense. When analyzing discrimination claims under the Constitution, this Court has declined to "equat[e] gender classifications" with "classifications based on race." *United States* v. *Virginia*, 518 U.S. 515, 532 (1996). All race-based classifications are presump-tively a form of racial discrimination, regardless of whether they prefer one race over another. See *Brown* v. *Bd. of Educ.*, 347 U.S. 483, 495 (1954) (racially based "separate but equal" treatment is race discrimi-nation). But sex-based classifications constitute sex discrimination *only* if they favor one sex over the other. *E.g.*, *Virginia*, 518 U.S. at 519 (excluding women from military college); *Reed* v. *Reed*, 404 U.S. 71, 71-74 (1971) (preferring men over women when administering estates). By prohibiting "discrimina-t[ion]," Title VII's text incorporates these principles, which explain why racially segregated restrooms violate Title VII, but sex-specific restrooms do not.

People who disfavor interracial relationships act based on "racial classifications" that are themselves a form of race discrimination—a particularly odious form that perpetuates the scourge of "White Supremacy" and the abhorrent notion that the races should "preserve" their "integrity." *Loving*, 388 U.S. at 7, 11

& n.11. In contrast, distinguishing gay and heterosexual relationships is not sex discrimination because it does not prefer one sex over the other.

3. Zarda's only attempt at a textual association-based argument is a repackaging of the comparator analysis. Zarda Br. 32–33. Again, Zarda's analogy to interracial hypotheticals breaks down. In the interracial scenario, the comparison is between a white employee married to a black spouse and a black employee married to a black spouse. Because the white employee is treated differently than the comparator black employee, the employer discriminates based on race.

But the sexual-orientation scenario is different. As explained above, the proper comparator for a gay male plaintiff like Zarda (a man attracted to the same sex) is a lesbian woman (a woman attracted to the same sex). *Supra* at 33–36. Because employers that make decisions based on sexual orientation treat the male and female comparators exactly the same, they do not discriminate based on sex.

4. Associational discrimination is an especially inapt theory for establishing categorical protection against sexual-orientation discrimination. Many gays and lesbians, including Zarda at the time of his discharge, are not in romantic relationships. Pet. App. 145 (noting that Zarda recounted his breakup). The associational argument thus depends not on actual associations, but on assumed or desired ones. In addition, the Second Circuit admitted that employer "opposition to romantic association between particular sexes" does *not* exist in all cases "where an

employer discriminates based on sexual orientation." *Id.* at 43–44. By its own terms, the associational theory falls short of providing the categorical protection Zarda claims.

Adopting Zarda's rationale will vastly expand Title VII's scope. The Second Circuit said that a plaintiff need not show an actual association—a "desire to date" suffices. Pet. App. 52 n.30. Alternatively, Title VII's associational protections apply to mere "friendships." *Id.* at 47. Reaching further still, the court below said that this theory applies equally to "all of Title VII's protected classes." *Id.* at 45. Taken together, then, an employee may base a Title VII claim on her desire for a friendship with a person of Russian descent. But construing the statute to permit "the filing of [such] frivolous claims," which will "raise the costs, both financial and reputational," on employers, is "inconsistent with" Title VII case law. *Nassar*, 570 U.S. at 358–59.

5. Zarda offers another passing point, claiming that this Court's sexual-harassment cases support the argument to add sexual orientation to Title VII. Zarda Br. 42–44. They do not. Unlike sexual-orientation discrimination, actionable sexual harassment—whether perpetrated by a same-sex or opposite-sex harasser—satisfies the sex-discrimination requirements. See *Oncale*, 523 U.S. at 80 (confirming that Title VII covers only "sexual harassment . . . that meets the statutory requirements").

Oncale itself affirms that sexual harassment must satisfy the discriminatory-treatment requirement: that "members of one sex are exposed to

disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Ibid.* Thus, sexual harassers violate Title VII by treating an employee worse than a similarly situated opposite-sex person was or would have been treated. This is true regardless of whether the plaintiff relies on "proposals of sexual activity," "hostility to the presence of [one sex] in the workplace," or "direct comparative evidence." *Id.* at 80–81. In all those cases, one sex is treated worse than the other. And the motive requirement is satisfied, too, since the employer's reason for acting is to disfavor the employee because of his or her sex.

III. Zarda's interpretation of Title VII produces significant ambiguities, indefensible outcomes, and troubling results.

Many people—including some who care deeply about LGBTQ Americans and firmly believe they should be treated with respect—have significant reservations about reading Title VII as Zarda and his amici urge. That revisionist view of Title VII produces significant ambiguities, indefensible outcomes, and troubling results. Those problems confirm that Zarda's proposed interpretation lacks persuasive force, see *Brown & Williamson Tobacco Corp.*, 529 U.S. at 133–43, and they demonstrate that Congress is the proper venue for this dispute.

1. Consider some of the ambiguities. What does sexual orientation mean? Zarda is not consistent, sometimes treating it as based on "attract[ion]," Zarda Br. 19, and other times based on "relationship," *id.* at 34. Scholarship agrees that sexual orientation

is inconsistently defined based on attraction, relationships, sexual conduct, or identity. *Obergefell* Amicus Br. Dr. Paul McHugh 8–9. This matters because some people's sexual orientation varies along these measures, *id.* at 9–12; and class membership often serves as a gateway to a Title VII claim, see *McDonnell Douglas*, 411 U.S. at 802 (requiring membership in a protected group). Another question is whether sexual orientation is limited to hetero-sexual, homosexual, and bisexual, or whether it includes, as some professional organizations say, pansexual and asexual (among other orientations). See APA, *Guidelines*, 70 Am. Psychologist at 862. Only Congress, if it chooses to add sexual orientation to Title VII, can resolve these ambiguities. Meanwhile, employers will be without guidance.

What about disparate-impact claims? Zarda argues that sexual-orientation discriminators violate Title VII's disparate-treatment provision because they consider their employees' sex or act based on sex stereotypes. That logic does not carry over to Title VII's disparate-impact provisions, 42 U.S.C. 2000e-2(a)(2) & (k), which care nothing about an employer's "discriminatory intent." *Lewis* v. *City of Chicago,* 560 U.S. 205, 215 (2010). Accepting Zarda's theory risks creating an anomaly: sexual orientation is effectively added to Title VII's disparate-treatment provision but not its disparate-impact sections. That, of course, will not stop some employees from contending otherwise, and in the meantime, employers will be forced to guess.

This uncertainty will immediately affect employers because Title VII's disparate-impact

provisions impose affirmative demands. Cautious employers will assume new disparate-impact obligations that necessitate substantial adjustments. For example, employers might decide that they need to add surrogacy—a very costly procedure—to their fringe benefits for childbirth, lest their childbirth policies impose disparate impacts on gay and bisexual men. And the definitional ambiguity of sexual orientation creates more problems. How is the employer to distinguish gay and bisexual men who seek this new surrogacy procedure from heterosexual men who opportunistically claim bisexual attraction?

Forcing employers to navigate these uncertainties is unfair. "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Landgraf*, 511 U.S. at 265. Accepting Zarda's position raises more questions than it answers. "Congress alone has the institutional competence" to sort through all these issues. *Wis. Cent.*, 138 S. Ct. at 2074.

2. Worse, adopting the analytical underpinnings of Zarda's argument will revolutionize the meaning of sex discrimination in the workplace and produce staggering, indefensible outcomes. Two staples of Zarda's arguments illustrate the problem. First, he says that merely distinguishing between the sexes, as opposed to disadvantaging one sex, violates Title VII: "a single employment policy that applies to both men and women . . . discriminate[s] because of sex if the operation of the policy depends on the sex of the

individual employee." Zarda Br. 39.[10] Second, Zarda argues that merely noticing an employee's sex, as opposed to making the employee's sex a motive, violates Title VII: "[a]n employer acts because of sex anytime it takes sex into account." Zarda Br. 18. Under this view of Title VII, employers must be "entirely blind to a person's sex." *Wittmer*, 915 F.3d at 334 (Ho, J., concurring).

That view overthrows important, long-standing employment policies and practices. These include sex-specific policies for determining access to living facilities, sleeping quarters, restrooms, showers, and locker rooms; fitness tests for police, fire, and similar positions; and organizational dress and grooming standards. Because such policies and practices differentiate between the sexes and require employers to "notice" their employees' sex, they cannot stand if Zarda's theory is correct. See *ibid.*; Pet. App. 99–103.

Those policies and practices are not trivial; they protect vital interests of employers, coworkers, and the public. Sex-specific facilities like sleeping quarters, restrooms, and showers "afford members of each sex privacy from the other sex." *Virginia*, 518 U.S. at 550 n.19; see also *Etsitty* v. *Utah Transit Auth.*, 502 F.3d 1215, 1225 (10th Cir. 2007) (assigning restrooms based on "biological sex" does not violate

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[10] Zarda claims that *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977), stands for this proposition. But the policy there did not just differentiate based on sex; it actually disfavored one sex (women) by excluding them "from consideration for approximately 75% of the available correctional counselor jobs." *Id.* at 332 n.16.

Title VII). But allowing men to access women's facilities (and vice versa) exposes countless individuals to deep invasions of their privacy.

Fitness tests are also significant. They ensure that police and fire personnel have the requisite physical fitness to protect the public. Because of physiological differences between men and women, the average fit man tests at a higher level for certain physical fitness measurements than the average fit woman. *Virginia*, 518 U.S. at 550 n.19 (allowing adjustments to "physical training programs" to account for "physiological differences between male and female individuals"); *Bauer* v. *Lynch*, 812 F.3d 340, 350–51 (4th Cir. 2016) (affirming sex-specific fitness-test requirements). But if Zarda is right, men need only satisfy the lower standards, thereby placing unqualified men in the field and sacrificing public safety. Either that or women will be held to the men's standard, which will risk excluding women from police and fire forces.

In addition, dress and grooming standards advance a core interest of many organizations—how the entity presents itself to the world. Courts and the EEOC allow those policies to differentiate between men and women if they do not burden members of one sex more than the other. *E.g.*, *Jespersen* v. *Harrah's Operating Co., Inc.*, 444 F.3d 1104, 1110–11 (9th Cir. 2006) (en banc); EEOC Compliance Manual § 619.4(d). Zarda's interpretation would hijack organizations' reasonable choices on how to shape their public images.

The implications of Zarda's stereotyping arguments are particularly unsettling. He claims

Title VII protection whenever employees refuse to "conform" to what they consider to be "a normative sex-based stereotype." Zarda Br. 24–25. If accepted, that would empower employees who reject sex-based norms—even well-established, non-invidious ones—to antagonize employers. Male attorneys may insist on "wear[ing] nail polish and dresses" to court hearings; female swim instructors may put on fake beards or "strip to the waist" at work; and their employers would be helpless to stop them. *Hamm*, 332 F.3d at 1066–67 (Posner, J., concurring).

The Second Circuit disclaimed any threat to these sex-specific policies, but its argument rings hollow. The court admitted that these policies "discriminate[ ] 'because of . . . sex'" within the meaning of Title VII, but speculated that they might not constitute adverse action. Pet. App. 32–33. Yet as soon as employers enforce these policies against employees who refuse to comply, the adverse action occurs. *Wittmer*, 915 F.3d at 337 (Ho, J., concurring). So rather than assuaging concerns, the Second Circuit actually confirmed that these policies would be unenforceable.

3. The potential impacts of Zarda's legal theories on religious liberty are also troubling. Federal law, both statutory and judicial, plays a crucial role in "teach[ing] the Nation." *Obergefell*, 135 S. Ct. at 2606. Zarda treats invidious hostility toward interracial relationships akin to the "decent and honorable" religious belief that marriage does not include gay unions—a belief held by "reasonable and sincere people." *Id.* at 2594, 2602. And a nondiscrimination statute that places sexual orientation alongside race

would do the same. But equating those two beliefs brands as bigots countless religious adherents—from faith traditions as diverse as Islam, Judaism, and Christianity. The ramifications of that are chilling and wide-ranging.

For example, this Court has allowed the government to revoke tax exemptions from faith-based schools that oppose interracial marriage because of our nation's "fundamental public policy" against racial discrimination, reflected in this Court's decision and federal statutes like "the Civil Rights Act of 1964." *Bob Jones Univ.*, 461 U.S. at 592–96, 602–05. This means that accepting Zarda's arguments would—with no legislative input—imperil longstanding tax exemptions afforded to religious institutions that recognize marriage as only between one man and one woman, decline to hire teachers who oppose the organization's beliefs about marriage, or provide "married student housing only to opposite-sex married couples." *Obergefell*, 135 S. Ct. at 2625–26 (Roberts, C.J., dissenting).

Tax exemptions aside, faith-based organizations like mosques, synagogues, churches, and schools will be pressured to hire employees whose sexual practices violate their teachings, all because Title VII's protections for those entities are limited. See 42 U.S.C. 2000e-1(a); 42 U.S.C. 2000e-2(e)(2). And hostile-work-environment principles will expose employees in *every* workplace to punishment for discussing their religious reservations about gay marriage. See *Obergefell*, 135 S. Ct. at 2642–43 (Alito, J., dissenting) (people who speak "those views in public . . . will risk being labeled as bigots and treated

as such"); see generally Amici Br. United States Conference of Catholic Bishops (discussing many of the relevant religious-liberty concerns).

4. Another adverse effect of accepting Zarda's position is that voluntary affirmative-action policies benefiting women must end because they distinguish employees and applicants based on sex and require employers to consider that trait. So the many high costs of adopting Zarda's theory include bolting down the glass ceiling.

5. All these harms—undermining clarity in the law, privacy rights, public safety, organizational autonomy, religious liberty, and women's workplace advancement—illustrate that "[f]ederal courts are blunt instruments when it comes to creating rights." *Obergefell*, 135 S. Ct. at 2625 (Roberts, C.J., dissenting). Most Americans—including people of faith, business owners, and anyone who uses sex-specific restrooms or locker-room facilities—will be affected by this ruling. Just as this Court should not shield voters "from the consequences of their political choices," *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 538 (2012), neither should it force them to pay for decisions they never made.

Congress, on the other hand, is "able to calibrate [Title VII's] provisions in a way that [this Court] cannot." *Arabian Am. Oil*, 499 U.S. at 259. Leaving with Congress the question of whether and how federal law should address sexual-orientation discrimination enables the legislature "to weigh the costs and benefits of different approaches and make the necessary policy judgment." *Azar*, 139 S. Ct. at

1816. Unlike a blanket decree from this Court, legislative consideration best protects the interests of all affected by this case.

Zarda and his amici are not without recourse; they have an assortment of options. *Am. Legion* v. *Am. Humanist Ass'n*, 139 S. Ct. 2067, 2094 (2019) (Kavanaugh, J., concurring). They can go to state legislatures (where they have succeeded 22 times, Pet. App. 105 n.21); state judiciaries; local governments (where they have succeeded over 250 times, Local Nondiscrimination Ordinances, Movement Advancement Project, https://tinyurl.com/y36g6nap); and private employers (which have widely adopted sexual-orientation policies, Amici Br. Business Organizations Supporting Employees 15 ("91% of Fortune 500 companies")). "This Court is not the *only* guardian of individual rights in America." *Am. Legion*, 139 S. Ct. at 2094 (Kavanaugh, J., concurring).

6. The people and their elected representatives "are in the midst of a serious and thoughtful public debate" on the important policy questions discussed above. *Obergefell*, 135 S. Ct. at 2624 (Roberts, C.J., dissenting). The House of Representatives recently passed a bill to add sexual orientation to Title VII, and that bill is now before the Senate. See Equality Act, H.R. 5, 116th Cong. (2019).

But Zarda and his amici want to end that debate, declare victory through this Court, and "[s]teal[ ] this issue from the people," *Obergefell*, 135 S. Ct. at 2612 (Roberts, C.J., dissenting)—a move almost certain to be decisive because Congress has never removed a

classification from Title VII. Doing that will unsettle our national order by "making a dramatic social change that much more difficult to accept." *Ibid.* And such direct judicial intrusion into a vibrant, ongoing legislative debate risks undermining the "legitimacy of this Court." *Id.* at 2624.

CONCLUSION

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

Respectfully submitted,

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