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

REPLY BRIEF FOR RESPONDENTS

Jeffrey L. Fisher
Brian H. Fletcher
Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Gregory Antollino
Counsel of Record
ANTOLLINO, PLLC
275 Seventh Avenue
Suite 705
New York, NY 10001
(212) 334-7397
Gregory10011@icloud.com

Ria Tabacco Mar
James D. Esseks
AMERICAN CIVIL
LIBERTIES UNION
FOUNDATION
125 Broad Street
New York, NY 10004

Stephen Bergstein
BERGSTEIN & ULLRICH, LLP
5 Paradies Lane
New Paltz, NY 12561

[additional counsel listed on inside cover]

Additional Counsel

David D. Cole
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW
Washington, DC 20005

Erin Beth Harrist
Robert Hodgson
Christopher Dunn
NEW YORK CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR RESPONDENTS 1

I. An across-the-board policy of "sexual-orientation discrimination" discriminates "because of sex" with respect to each worker against whom it is applied 2

A. Immunity for "double discriminators" cannot be squared with *Dothard v. Rawlinson* 3

B. Immunity for "double discriminators" cannot be squared with *Price Waterhouse v. Hopkins* 6

C. Immunity for "double discriminators" cannot be squared with the prohibition on associational discrimination 10

II. Even under the narrowest definition of "sex" in 1964, discrimination against an individual for being lesbian, gay, or bisexual is "discrimination because of sex" 12

III. Arguments about post-1964 developments cannot override the plain language of Title VII 15

IV. Concerns about the legality of sex-specific workplace policies or the religious beliefs of a subset of employers should not influence this Court's decision 19

CONCLUSION 24

TABLE OF AUTHORITIES

Cases

Bauer v. Lynch,
812 F.3d 340 (4th Cir. 2016) 21

Baumgartner v. Harrisburg Hous. Auth.,
21 F.3d 541 (3d Cir. 1994) 16

Blum v. Gulf Oil Corp.,
597 F.2d 936 (5th Cir. 1979) (per curiam) 17

Bob Jones Univ. v. United States,
461 U.S. 574 (1983) 10

Buckhannon Bd. & Care Home, Inc. v. W.V. Dep't of Health & Human Res.,
532 U.S. 598 (2001) 16

Burlington N. & Santa Fe Ry. Co. v. White,
548 U.S. 53 (2006) 20

Connecticut v. Teal,
457 U.S. 440 (1982) 4

DeSantis v. Pac. Tel. & Tel. Co.,
608 F.2d 327 (9th Cir. 1979) 17

Dothard v. Rawlinson,
433 U.S. 321 (1977) 1, 3, 4, 5

Eginton v. Fla. State Univ.,
111 F. Supp. 3d 1263 (M.D. Fla. 2015) 9

Espinoza v. Farah Mfg. Co.,
414 U.S. 86 (1973) 5

Food Mktg. Inst. v. Argus Leader Media,
139 S. Ct. 2356 (2019) 16

Hively v. Ivy Tech Cmty. Coll.,
853 F.3d 339 (7th Cir. 2017) (en banc) 18

Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC,
565 U.S. 171 (2012) 23

Int'l Bhd. of Teamsters v. United States,
431 U.S. 324 (1977) 18

Johnson v. Transp. Agency,
480 U.S. 616 (1987) 21

Lamie v. U.S. Trustee,
540 U.S. 526 (2004) 18

L.A. Dep't of Water & Power v. Manhart,
435 U.S. 702 (1978) 12-13

Loving v. Virginia,
388 U.S. 1 (1967) 10

Meritor Sav. Bank, FSB v. Vinson,
477 U.S. 57 (1986) 14

Oncale v. Sundowner Offshore Servs., Inc.,
523 U.S. 75 (1998) 14, 20

Phillips v. Martin Marietta Corp.,
400 U.S. 542 (1971) (per curiam) 4, 13

Price Waterhouse v. Hopkins,
490 U.S. 228 (1989) ..... *passim*

Prowel v. Wise Bus. Forms, Inc.,
579 F.3d 285 (3d Cir. 2009) 8-9

Ruth v. Children's Med. Ctr.,
940 F.2d 662 (6th Cir. 1991) (unpublished table decision) 15

Smith v. Liberty Mut. Ins. Co.,
569 F.2d 325 (5th Cir. 1978) 17

Tex. Dep't of Housing & Cmty. Affairs v. Inclusive Communities Project, Inc.,
135 S. Ct. 2507 (2015) 15-16

Wedow v. City of Kansas City,
442 F.3d 661 (8th Cir. 2006) 20

Williamson v. A.G. Edwards & Sons, Inc.,
876 F.2d 69 (8th Cir. 1989) (per curiam) 15, 17

Wis. Dep't of Revenue v. William Wrigley, Jr., Co.,
505 U.S. 214 (1992) 20

Wrightson v. Pizza Hut of Am., Inc.,
99 F.3d 138 (4th Cir.1996). 17

Statutes

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* ..... *passim*

42 U.S.C. § 2000e-1(a) 23

42 U.S.C. § 2000e-2(a) 21

42 U.S.C. § 2000e-2(a)(1) ..... *passim*

42 U.S.C. § 2000e-2(a)(2) 20

Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 280003(a), 108 Stat. 2096 18

Other Authorities

Blashill, Aaron J. & Kimberly K. Powlishta, *Gay Stereotypes: The Use of Sexual Orientation as a Cue for Gender-Related Attributes*, 61 Sex Roles 783 (2009) 8

Br. of Major Religious Organizations as Amici Curiae Supporting Petitioner, *Gloucester Cty. Sch. Bd. v. G.G.*, 139 S. Ct. 1239 (2017) (per curiam) 9

Br. of Professors Samuel R. Bagenstos et al. as Amici Curiae in Support of Respondent Stephens, *R.G. & G.R. Harris Funeral Homes Inc. v. EEOC*, No. 18-107 20

Bureau of Labor Statistics, *May 2018 National Occupational Employment and Wage Estimates by Ownership: Federal, State, and Local Government* (2018)..... 22

Human Rights Campaign, *LGBTQ Equality at the Fortune 500*, https://tinyurl.com/yygzssxa (last visited Sept. 6, 2019) 22

Scalia, Antonin & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts (2012)..... 14

U.S. Census Bureau, *2016 SUSB Annual Data Tables by Establishment Industry* (2018).....22-23

REPLY BRIEF FOR RESPONDENTS

Donald Zarda claimed he was fired for being a man who was attracted to men, thereby "not conform[ing]" to the "straight male macho stereotype," J.A. 26, that men should not "associate sexually with other men," *id.* at 50.

The Government acknowledges that an employer that fires a man for being attracted to men and would not fire other employees for their sexual orientation violates Title VII. *See* U.S. Br. 19. But it and petitioners (hereinafter "Altitude") then conjure an employer that fires all men attracted to men *and* all women attracted to women. This employer, they argue, complies with Title VII because its "sexual-orientation discrimination" policy treats men and women equally. Altitude Br. 35; U.S. Br. 10.

That theory flouts Title VII's plain text, which asks whether the employer has discriminated against an "individual" because of "such individual's sex." 42 U.S.C. § 2000e-2(a)(1).[1] And it cannot be squared with this Court's decisions in *Dothard v. Rawlinson*, 433 U.S. 321 (1977), and *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Like an employer that bars both women from guarding male prisoners *and* men from guarding female prisoners, an employer that fires both men for being attracted to men *and* women for being attracted to women imposes upon men and women two different sex-specific rules, thereby discriminating against individuals of each sex because of their sex. And employers that require women to fit sex-specific

[1] As in our opening brief, we use the statutory phrase without ellipses to avoid distraction.

expectations about female behavior cannot escape liability by also requiring men to conform to sex-specific expectations about male behavior. Nor can immunity for "double discriminators" be squared with the prohibition on associational discrimination.

Their other arguments fare no better. Even under the narrowest view of what "sex" meant in 1964, the decision to fire Zarda for being attracted to men when a female employee attracted to men would have kept her job qualifies as discrimination "because of [his] sex." Nor do post-1964 decisions, by either the lower courts or Congress, justify a narrower reading of the phrase. Finally, predictions about the consequences of affirmance for other sex-specific policies and religious freedom are exaggerated and should be directed to Congress, not this Court.

I. An across-the-board policy of "sexual-orientation discrimination" discriminates "because of sex" with respect to each worker against whom it is applied.

Altitude and the Government argue that when an employer engages in wholesale "sexual-orientation discrimination," the "[u]nfavorable treatment of a gay or lesbian employee" is "not the consequence of that individual's sex, but instead of an employer's policy concerning a different trait—sexual orientation—that Title VII does not protect." U.S. Br. 17; Altitude Br. 17-18. That is incorrect. The ability to craft an abstract label to describe two sex-specific policies does not determine their lawfulness. Instead, the question is whether, *when the employer's criterion is applied*, an individual's sex determines whether he or she suffers an adverse employment consequence. The theory that an employer can fire a gay man as long as it also fires

a lesbian finds no support in either the text of Title VII or this Court's decisions construing that text.[2]

A. Immunity for "double discriminators" cannot be squared with *Dothard v. Rawlinson*.

1. The prison employment regulation in *Dothard v. Rawlinson*, 433 U.S. 321 (1977), expressly covered "selective certification for appointment of *either male or female* employees." *Id.* at 325 n.6 (quoting the regulation) (emphasis added). It excluded all workers from certain jobs where "the position would require contact with the inmates of the opposite sex." *Id.*

Dothard held that the policy of not permitting women to guard men or men to guard women "explicitly discriminate[d] against women on the basis of their sex," 433 U.S. at 332, as applied to Rawlinson (a woman). The policy would similarly have "explicitly discriminate[d]" against men seeking a job in a women's prison.

The application of *Dothard*'s holding to cases involving sexual-orientation discrimination is straightforward: A policy, however phrased, that tells women they cannot keep their job if they are attracted to women and men they cannot keep their job if they are attracted to men discriminates "because of sex" as to each "individual" who comes within the terms of the policy, 42 U.S.C. § 2000e-2(a)(1).

---

[2] In any event, Altitude does not assert such a policy. *See* Altitude Br. 1. That is reason enough to affirm the Second Circuit's holding that "Zarda is entitled to bring a Title VII claim for discrimination based on sexual orientation." Pet. App. 61.

2. The Government's sole response is to misread the regulation in *Dothard*. It admits that the regulation discriminated on the basis of sex, but then claims that is because the regulation disfavored women "on its face." U.S. Br. 22. Not so. It applied on its face to both men and women, barring each from contact jobs with the "opposite sex." The sex of the worker came into play only when the policy was being *applied*.

Altitude tries to distinguish *Dothard* a different way. It suggests this Court found Alabama's policy discriminatory only because the policy excluded women from 75% of the available positions. Altitude Br. 55 n.10. On this theory, a man denied a job requiring contact with female prisoners could not have claimed discrimination "because of sex."

That is plainly wrong. The Court's first Title VII case, *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (per curiam), involved an employer that filled 75-80% of the relevant positions with women. *Id.* at 543. That did not foreclose Phillips from bringing a disparate treatment claim based on her sex. *Id.* at 544; *see also Connecticut v. Teal*, 457 U.S. 440, 455 (1982).[3]

The deeper flaw in Altitude's argument is the mistaken belief that if an employer's act can be labeled as "sexual-orientation discrimination," it cannot also be sex discrimination. Altitude admits that Zarda can be described as having either an "'attraction to men' or 'attraction to the same sex.'" Altitude Br. 35. It does

[3] Altitude is also wrong that forbidden discrimination must be "sexist" or the product of "favoritism" toward one sex or the other. Altitude Br. 16. Even an employer action undertaken for beneficent reasons can violate Title VII. Zarda Br. 34-35.

not really contest that *if* the attraction is framed the first way, firing Zarda but not a woman attracted to men *would* be sex discrimination. But it insists that the comparison "must" be framed the second way "[b]ecause only the latter identifies a similarly situated opposite-sex comparator." *Id.*

To the contrary. The purpose of a comparator is to decide whether the differential treatment is based on the plaintiff's sex. But when a rule explicitly looks to the "opposite sex" (as in *Dothard*) or the "same sex" (as here), sex discrimination is baked into the rule itself. For example, in *Dothard*, the rule was applied to disqualify Rawlinson because of the interaction of her sex (female) and the prisoners' sex (male). The prison could not have masked its discrimination against Rawlinson by labeling the rule "no opposite-sex contact" and then claiming the rule applied equally to men. Likewise, if Altitude had a "sexual-orientation discrimination" policy, firing Zarda would be based on the interaction of his sex (male) and the sex of the people to whom he was attracted (male). Altitude could not mask that discrimination by labeling the rule "no same-sex attraction" and claiming it also applied to women. *See also* Br. of Lambda Legal Defense and Education Fund, Inc. as Amicus Curiae in Support of the Employees 14-17.[4]

---

[4] Altitude therefore errs in relying on *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86 (1973). Altitude Br. 32. That case held that Title VII's prohibition on "national origin" discrimination does not forbid discrimination against a non-citizen. 414 U.S. at 95-96. But "national origin" refers to a person's "ancestry"—for Espinoza, Mexican. *Id.* at 89, 92-93. It is entirely possible to discriminate against a non-citizen without her

3. To see why labeling something an "orientation" policy cannot avoid liability for a pair of actions that each depend on an employee's sex, imagine a company that fired men for loving romance novels, but continued to employ women who loved the same books. A man could clearly state a claim under Title VII that he was fired "because of sex."

If the company also fired women (but not men) who love automotive repair manuals, this would double the employer's liability, because it would then have *two* sex-discriminatory rules, not one. The fact that the employer's acts could be described as "literary-orientation discrimination" would not defeat the conclusion that they are *also* "sex discrimination" under Title VII: men are discriminated against for loving one set of books and women for loving another set. Substituting "men" for "romance novels" and "women" for "automotive repair manuals" does not erase the unlawfulness of the practice.

B. Immunity for "double discriminators" cannot be squared with *Price Waterhouse v. Hopkins*.

1. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), also shows why Title VII's textual focus on the sex of the "individual" worker, 42 U.S.C. § 2000e-2(a)(1), forbids firing a man for being gay even if the employer would also fire lesbians. Ann Hopkins was "macho"; she did not walk in a "feminine[]" way. 490 U.S. at 235 (plurality opinion). She did not fit the stereotype of how women should act. This Court held that she could establish liability under Title VII by

---

actual "national origin" playing any role. Not so for sexual-orientation discrimination and "sex."

showing the company would not have denied promotion to a man who behaved the way she did. *Id.* at 250-51.

Here, the specific behavior at issue involved Zarda's attraction to men, which does not fit a sex-specific stereotype about appropriate male behavior. Thus, he can establish liability by showing that Altitude does not fire women for being attracted to men.

As we explained in our opening brief, had Price Waterhouse denied promotions both to Hopkins and to men who contravened masculine stereotypes, it would have doubled, not eliminated, its liability. Zarda Br. 38-39. The Government agrees:

> [This] employer violates Title VII because it would be treating a subset of women (macho women) worse than a similarly situated subset of men (macho men) *and*—in a separate act of discrimination—treating a subset of men (effeminate men) worse than a similarly situated subset of women (effeminate women). Each practice separately violates Title VII because each results in "disparate treatment of men and women."

U.S. Br. 25-26 (citation omitted).

Precisely the same logic applies here. Just put the noun in each parenthetical first and substitute the phrases "who love women" for "macho" and "who love men" for "effeminate," and you get:

> [This] employer violates Title VII because it would be treating a subset of women (women who love women) worse than a similarly situated subset of men (men who love women)

> *and*—in a separate act of discrimination—treating a subset of men (men who love men) worse than a similarly situated subset of women (women who love men). Each practice separately violates Title VII because each results in "disparate treatment of men and women."

2. Altitude and the Government are also incorrect to suggest that sexual-orientation discrimination reflects a "single" stereotype unconnected to sex roles, Altitude Br. 44.

Disapproval of individuals for being gay or lesbian stems from the idea that men and women are different and should behave differently: men should not take on women's roles and women should not take on men's. An employer therefore acts upon a *different* sex-based stereotype when it fires a gay man than when it fires a lesbian. Zarda Br. 39. For example, gay men are thought to be too feminine, while lesbians are thought to be too masculine; the distinct sex-based stereotypes about gay men and lesbians extend to beliefs about "their occupational aspirations, activity interests, and personality traits." Aaron J. Blashill & Kimberly K. Powlishta, *Gay Stereotypes: The Use of Sexual Orientation as a Cue for Gender-Related Attributes*, 61 Sex Roles 783, 793 (2009).[5]

---

[5] This also explains the flaw in Altitude's argument about discrimination against bisexual employees. Altitude Br. 35. Firing a man for being bisexual reflects the view that by being (even in part) attracted to men, he contravenes expectations for male behavior. Firing a bisexual woman reflects a different stereotype: that by being (even in part) attracted to women, she contravenes expectations for female behavior.

Hostile environment cases offer a striking illustration of this point. *Compare, e.g.*, *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 287 (3d Cir. 2009) (gay man called "Princess," "Rosebud," and "faggot," and "a pink, light-up, feather tiara" was left at his desk), *with Eginton v. Fla. State Univ.*, 111 F. Supp. 3d 1263, 1267 (M.D. Fla. 2015) (woman called "dyke" and "completely unfeminine").[6]

The Government does not deny that beliefs about appropriate sex roles spur discrimination against lesbian or gay individuals. It insists only that this is not "necessarily" the source of discrimination because it is possible that an (unidentified) employer "may be relying on reasons that have nothing to do with gender norms, such as moral or religious beliefs about sexual, marital, and familial relationships." U.S. Br. 25. But the Government fails to identify any such moral or religious beliefs—however sincerely held—that amount to something *other than* the conviction that women and men have fundamentally different roles to play within a family or in intimate relationships. *Cf.* Br. of Major Religious Organizations as Amici Curiae Supporting Petitioner 6, 8 & 15-16, *Gloucester Cty. Sch. Bd. v. G.G.*, 139 S. Ct. 1239 (2017) (per curiam) (canvassing the views of multiple religions that men and women have different "attributes and responsibilities"—for example, both the Catholic

[6] As we explained in our opening brief, this entanglement of stereotypes about sexual orientation with other stereotypes about appropriate sex roles makes it unworkable to draw a line between cases where sex-specific stereotypes can be used to prove sex discrimination and cases where they cannot. Zarda Br. 27-31; *see also* Br. of GLBTQ Legal Advocates & Defenders et al. as Amici Curiae in Support of the Employees 9-14.

Church and the Southern Baptist Convention believe in men and women playing "complementary" roles).

To be clear, one need not pass judgment on those beliefs to recognize that they are, inevitably, rooted in convictions about the different sex-based roles of men and women. Even a positive stereotype can prompt actions forbidden by Title VII. For example, consider the belief that women are more attuned to others' feelings than men. Empathy is no doubt a good quality. Nevertheless, as *Price Waterhouse* shows, an employer that denies a promotion to a female worker because she is perceived as sometimes insensitive (or "brusque[]," 490 U.S. at 234), but who promotes men with similar behavior, violates Title VII.

C. Immunity for "double discriminators" cannot be squared with the prohibition on associational discrimination.

The concept of prohibited associational discrimination reflected in *Loving v. Virginia*, 388 U.S. 1 (1967), and *Bob Jones University v. United States*, 461 U.S. 574 (1983), offers yet a third rebuttal to the assertion that Title VII permits sexual-orientation discrimination.

1. Altitude and the Government concede that an employer that fires workers for violating a rule forbidding all interracial relationships discriminates "because of race." Altitude Br. 47-48; U.S. Br. 28. Thus, if Richard Loving's employer had fired him for marrying Mildred Jeter but would not have fired a black employee for marrying Jeter, it would have discriminated against Loving "because of [his] race." For the same reason, an employer that fires employees in interfaith marriages discriminates "because of

religion" when it fires a Jewish worker for marrying a Buddhist, but does not fire Buddhist workers for marrying Buddhists. *Cf.* Zarda Br. 40. And neither employer would have a defense if it also fired black employees for marrying white partners, or Buddhists for marrying Jewish partners.

2. The double-discrimination-is-no-discrimination theory Altitude and the Government espouse cannot explain these results. After all, an anti-exogamy policy where the employer fires *all* workers in interracial marriages, black or white, "treats both [blacks] and [whites] attracted to the [different race] in the same manner"; in the case of religion, an anti-exogamy rule, applied to everyone who marries outside his or her faith treats members of all faiths "in the same manner." Altitude Br. 35; *see* U.S. Br. 11.

Altitude and the Government try to escape that unpalatable consequence by arguing that race is different. (Note this responds not at all to discrimination against workers in interfaith marriages.) To be sure, the history of racism in America demands unique safeguards, but this case involves a statute that, with carefully delineated exceptions, condemns differential treatment based on race, sex, or religion equally. *Price Waterhouse*, 490 U.S at 243 n.9.

On top of that, Altitude and the Government rely heavily on the proposition of constitutional law that "[u]nlike race-based distinctions, sex-based distinctions are not invariably invidious, as for instance when they reflect physiological differences between men and women." U.S. Br. 29. But invidiousness is not the touchstone of lawfulness under Title VII. Zarda Br. 34-35. And neither of them

even purports to identify any differences, "physiological" or otherwise, that explain why a man with a husband and a woman with a husband are not similarly situated with respect to doing their jobs.

II. Even under the narrowest definition of "sex" in 1964, discrimination against an individual for being lesbian, gay, or bisexual is "discrimination because of sex."

1. The preceding section shows that Zarda's claim falls within Title VII's prohibition on sex discrimination because he alleges that his status as a man explains why he was fired for being sexually attracted to men.

That claim fits firmly within the meaning of "sex" at the time Title VII was enacted, as even the definitions proffered by Altitude and the Government show. Those definitions turn on the "status" or "character" of being "male or female." Altitude Br. 13; U.S. Br. 13.[7]

So the job of a court in a Title VII case has always been to ask whether the employer acted against a male plaintiff for conduct or traits that would not have prompted it to act against a female worker (and vice versa for a female plaintiff). When an employer acts on "impressions about the characteristics of males or

[7] For discussions of contemporaneous dictionary definitions confirming that "sex" referred to the spectrum of distinctions between male and female individuals, see, e.g., Br. of William N. Eskridge Jr. & Andrew M. Koppelman as Amici Curiae in Support of Employees 20-21; Br. of American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae in Support of the Employees 5-6; Br. of Kenneth B. Mehlman et al. as Amici Curiae in Support of the Employees 7-8.

females," *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 & n.13 (1978), its decision is "because of sex" within the meaning of Title VII.

Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (per curiam), shows that. The company denied Phillips a job on the theory that mothers with pre-school-age children would have their work impaired by "conflicting family obligations" while fathers would not. *Id.* at 544. "Sex" does not mean "motherhood," *cf.* U.S. Br. 12, yet this Court rightly held that Phillips stated a claim under Title VII. The employer made a behavioral (not a physiological) assumption that women are distracted from their work by having small children at home but men aren't. Nonetheless, acting on that difference involved acting "because of sex." And the case surely would have come out the same if the employer had instead relied on a normative belief that mothers with pre-school-age children *should* exit the paid workforce to care for them while fathers need not.

So from the outset, it was understood that acting against a worker in reliance on beliefs that the sexes do, or should, behave differently is discrimination "because of sex." And as we have already explained, *supra* pages 6-10, firing a worker for being a man attracted to men is such a belief. If anything, at the time Title VII was enacted, the belief that being gay or lesbian marked a "lack of conformity to traditional norms of masculinity and femininity" was even *more* explicit than it is today. Br. of Historians as Amici Curiae in Support of Employees 17.

2. The core of Altitude's and the Government's argument is not really what the word "sex" meant in the 1960s. Zarda has alleged that he was discriminated against "because of sex" even if "sex"

means only the status of being male or female, because a female employee attracted to men would not have been fired. Altitude and the Government thus resort to contending that Congress did not mean for Title VII to protect lesbian, gay, and bisexual people from discrimination based on their failure to conform to traditional sex roles.

This Court has already rejected that approach in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998); *see* Zarda Br. 42. Few Members of the enacting Congress would have anticipated that Title VII prohibits denying a promotion to a woman who acts "macho" and doesn't walk in a "feminine" way. Few Members in those days of "Mad Men" would have anticipated that Title VII prohibits sexual harassment—a prevalent practice but a term "not defined in *any* dictionary in the 1960s." Br. of Walter Dellinger et al. as Amici Curiae in Support of the Employees 7. Even fewer would have anticipated that Title VII prohibits male employees from harassing other men.

Those considerations did not deter this Court from following where the text led in *Price Waterhouse*, *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), and *Oncale*. So the fact that few Members would have anticipated that the words they used in Section 703(a)(1) also protect Donald Zarda should not deter the Court here. This Court should give the words "because of sex" their "full and fair scope," rather than "infer exceptions for situations that the drafters never contemplated and did not intend their general language to resolve," Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 101 (2012).

III. Arguments about post-1964 developments cannot override the plain language of Title VII.

1. The Government claims that when Congress "overhaul[ed]" Title VII in 1991 but "left the operative language in 42 U.S.C. 2000e-2(a)(1) intact," U.S. Br. 3, it "ratified the settled understanding" in the courts that sexual-orientation discrimination was not a form of sex discrimination. *Id.* at 30 (capitalization altered). But there is no reason to think Congress ratified that thin, and thinly reasoned, caselaw.

The Government is flatly wrong to claim that "[b]y 1991, at least four courts of appeals had held that discrimination 'because of * * * sex' in Title VII does not encompass discrimination because of sexual orientation," U.S. Br. 3.

Two of the cases it cites contain only dicta. The plaintiff in *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69 (8th Cir. 1989) (per curiam), was gay, but he raised only a *race*-discrimination claim, alleging that he had been treated worse than "similarly situated white homosexual employees." *Id.* at 70. And the plaintiff in *Ruth v. Children's Medical Center*, 940 F.2d 662, 1991 WL 151158, *5 (6th Cir. 1991) (unpublished table decision), did not "challenge" on appeal "th[e] portion of the magistrate's holding" that dealt with sexual-orientation discrimination.

To be sure, that leaves two cases in the Government's quiver. But that hardly constitutes a consensus Congress should be presumed to have ratified. It is a far cry from the *nine* courts of appeals whose analysis informed the decision in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507

(2015). There, this Court pointed to extensive discussion, and express approval in the legislative record, of the lower-court decisions. *Id.* at 2519-20. And even more to the point, the relevant statutory amendments included exceptions that "assume[d] the existence of disparate-impact claims" and would have been "superfluous" otherwise. *Id.* at 2520. Here, by contrast, the Government points to not one word in the legislative history of the 1991 Act discussing the courts of appeals decisions—and not one word in the 1991 amendments that depends on sexual-orientation discrimination not being a form of sex discrimination.

That even a far deeper consensus should not override plain language is shown by *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001). As of 1991, all twelve regional courts of appeals had interpreted the "prevailing party" language in fee-shifting statutes to permit awards without a favorable judgment as long as the plaintiff's lawsuit served as a catalyst to change the defendant's conduct. *See Baumgartner v. Harrisburg Hous. Auth.*, 21 F.3d 541, 544-45 n.3 (3d Cir. 1994) (collecting pre-1991 cases). But despite that consensus and amendments to the 1991 Act involving other aspects of the attorney's fee regime, this Court declared that "it behooves us to reconcile the plain language of the statutes with our prior *holdings*," 532 U.S. at 605, and it followed where that text and those holdings led. It should do the same here.

This is particularly true when the two actual holdings on which the Government relies (Br. 3-4) are "relic[s] from a bygone era of statutory construction,"

Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2364 (2019) (internal quotation marks omitted).

Blum v. Gulf Oil Corp., 597 F.2d 936 (5th Cir. 1979) (per curiam), was a summary disposition in which the court decided the issue in one sentence without discussing the language of Section 703(a)(1) at all. *Id.* at 938. Its sole source of authority was an earlier decision—*Smith v. Liberty Mutual Insurance Co.*, 569 F.2d 325 (5th Cir. 1978)—upholding denial of a job to a man because "he was thought to have those attributes more generally characteristic of females and epitomized in the descriptive 'effeminate,'" *id.* at 327. Even the Government would have to concede that *Smith* was wrongly decided in light of *Price Waterhouse*. *See* U.S. Br. 26.

As for *DeSantis v. Pacific Telegraph & Telephone Co.*, 608 F.2d 327 (9th Cir. 1979), it antedated *Price Waterhouse* by a decade and repeatedly relied on *Smith*. *Id.* at 330, 331-32. Its analysis is marbled with references to "congressional intent," and assumptions about legislative "objectives," *id.* at 329, 330.[8]

2. The fact that Congress subsequently passed several other statutes in which it included both "sex"

---

[8] The post-1991 caselaw the Government cites, U.S. Br. 4, fares no better. Most of the cases resolve the issue in only a sentence or two based on the assumption Congress did not intend to cover sexual-orientation discrimination. The authority on which they rely consists largely of a trio of cases, directly or once removed. We have already described *Williamson* and *DeSantis*. The third case involved a claim of sexual harassment brought by a heterosexual plaintiff who did "not allege that he was discriminated against because he is heterosexual"—that is, did not claim sexual-orientation discrimination. *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996).

and "sexual orientation" cannot be read back into the preexisting language of Title VII. *See* Zarda Br. 46-47; Br. of William N. Eskridge Jr. & Andrew M. Koppelman as Amici Curiae in Support of Employees 28-31.

Consider one example offered by the Government—the Violent Crime Control and Law Enforcement Act of 1994. That statute defines a hate crime as one committed "because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person." U.S. Br. 14 (quoting Pub. L. No. 103-322, § 280003(a), 108 Stat. 2096). The Government fastens on the inclusion of both "gender" and "sexual orientation." But that statute also includes "race," "national origin," and "ethnicity." Surely that does not show that this Court erred in construing Title VII to cover discrimination against "ethnic groups" as a form of discrimination "because of race [or] national origin." *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 362 (1977) (describing a claim of "racial and ethnic" discrimination). Even in the context of a single statute, the canon against surplusage does not override the "plain meaning" of the text. *Lamie v. U.S. Trustee*, 540 U.S. 526, 536 (2004). Here, statutes passed many decades later provide even less reason to depart from the ordinary meaning of "because of sex."

Finally, as we have already explained, the fact that Congress has not chosen to separately enumerate "sexual orientation" as a protected trait should not affect this Court's analysis of the language already in Title VII. *See* Zarda Br. 46; Br. of Members of Congress as Amici Curiae in Support of the Employees 11-25. After all, since the en banc decisions in *Hively v. Ivy*

Tech Community College, 853 F.3d 339 (7th Cir. 2017), and this case, Congress also has not amended Title VII to overturn the conclusion that discrimination for being lesbian, gay, or bisexual *is* a form of discrimination "because of sex."

IV. Concerns about the legality of sex-specific workplace policies or the religious beliefs of a subset of employers should not influence this Court's decision.

1. Altitude resorts to a litany of "staggering, indefensible outcomes" it claims will flow from affirming the judgment in this case. Altitude Br. 54. The Government fixates particularly on sex-specific restrooms. U.S. Br. 8, 10, 11, 17, 18, 20, 21, 25, 29. This case, however, will not determine the legality of such policies one way or the other.

The assertion that resolving this case could affect those questions conflates two distinct inquiries necessary to determine Title VII liability: (1) whether a challenged practice is "because of [an employee's] sex" and (2) whether that challenged practice constitutes forbidden "discrimination."

With respect to each of the policies Altitude or the Government identifies, the answer to the first question is inescapably "Yes." And the answer will remain "Yes" regardless how the Court rules in this case.

The lawfulness of sex-specific policies thus turns on the answer to the second question. Here, too, the legality of these practices will not change based on how the Court rules in this case. It will depend, as it does today, on the actual policy being challenged and not on *a priori* reasoning about the nature of restrooms, appearance codes, and the like.

"No one doubts that the term 'discriminate against' refers to distinctions or differences in treatment that *injure* protected *individuals*." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 59-60 (2006) (emphasis added) (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)). So the issue in each case involving sex-specific policies will be whether the employer's sex-differentiated treatment has *injured* the plaintiff.

To illustrate the point: Single-sex restrooms "segregate" workers, albeit temporarily, on the basis of sex. Title VII explains that segregation is forbidden when it "deprive[s] or tend[s] to deprive any individual of employment opportunities," 42 U.S.C. § 2000e-2(a)(2). So the question as to any particular employer's restroom policy will be how *this* policy affects the employment opportunities of *this* plaintiff. If, for example, the employer provides inferior or less convenient facilities to employees of one sex that impair their doing their job, the policy may constitute discrimination under Title VII. *See Wedow v. City of Kansas City*, 442 F.3d 661, 667-68 (8th Cir. 2006).

That being said, "the venerable maxim de minimis non curat lex ('the law cares not for trifles') is part of the established background of legal principles against which all enactments are adopted." *Wis. Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 231 (1992). So if a court concludes that the employer's provision of separate restrooms is "innocuous" as to the individuals who have sued, it will find no violation of Title VII, *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998). *See also* Br. of Professors Samuel R. Bagenstos et al. as Amici Curiae in Support of Respondent Stephens 24-25, *R.G. & G.R. Harris*

Funeral Homes Inc. v. EEOC, No. 18-107 (suggesting one possible standard for deciding these cases).

A similar logic applies to sex-specific dress or appearance codes. Even the dissenters in the court below agreed, for example, that it would violate Title VII to require "female employees to wear 'Hooters'-style outfits but male employees doing the same work to wear suit and tie." Pet. App. 101. Differences in other employer policies might, however, be sufficiently de minimis not to injure the plaintiff challenging them.

As for sex-based affirmative action and physical fitness standards: Title VII permits them only under narrow circumstances. The first is lawful only when the plan is necessary to remedy underrepresentation of women in traditionally segregated job categories and is carefully tailored. *Johnson v. Transp. Agency*, 480 U.S. 616, 640-42 (1987). The second are justifiable only when necessary to account for "physiological differences" that affect men's and women's ability to "demonstrate the same levels of physical fitness." *Bauer v. Lynch*, 812 F.3d 340, 351 (4th Cir.), *cert. denied*, 137 S. Ct. 372 (2016).

In short, for every one of the practices Altitude or the Government identifies, its legality will turn on context, regardless of how the Court answers the question presented in this case—which, again, is simply whether Altitude acted "because of" Zarda's sex when it allegedly fired him because he is a man (not a woman) attracted to men. Because the answer to that question is "Yes," it follows that "discharg[ing]" Zarda for being gay is an "unlawful employment practice," 42 U.S.C. § 2000e-2(a).

2. The religious concerns of a subset of employers should not override Title VII's plain text.

First, millions of workers protected by Title VII work for employers that either cannot, or do not, engage in sexual-orientation discrimination motivated by religious belief.

Title VII covers the federal government and nearly all state and local government employers. Among them, they employ roughly twenty-one million workers (15% of the labor force). Bureau of Labor Statistics, *May 2018 National Occupational Employment and Wage Estimates by Ownership: Federal, State, and Local Government* (2018), https://tinyurl.com/y5a6lsvx. The Constitution bars public officials from discriminating based on their religious beliefs.

Moreover, many covered employers, both public and private, have policies requiring equal treatment of lesbian, gay, bisexual, and heterosexual workers. *See, e.g.*, Human Rights Campaign, LGBTQ Equality at the Fortune 500, https://tinyurl.com/yygzssxa (last visited Sept. 6, 2019); Br. of 206 Businesses as Amici Curiae in Support of the Employees 21-25.

Second, while the majority of American *employees* are covered by Title VII, the majority of American *employers* are not. Eighty-five percent of U.S. employers have fewer than fifteen employees and thus are not covered at all. However this Court answers the question presented, these employers remain free, at least as a matter of federal law, to base their

employment decisions on their religious beliefs about sexual orientation.[9]

On top of this, religious employers are already exempted from Title VII with respect to employees who fall within the "ministerial exception." *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012).

Finally, as for the remaining subset of employers, this Court should not disturb Congress' careful balancing of antidiscrimination mandates and religiously motivated employment actions.

While Congress has exempted certain religious employers from the statutory ban on religious discrimination with respect to their entire workforce, *see* 42 U.S.C. § 2000e-1(a), it has not exempted them from the prohibitions on discrimination because of race, sex, or national origin. This Court should not artificially narrow the term "because of sex" to write into Title VII an exemption Congress chose not to include.

---

[9] We derived this figure from the table entitled "U.S. and states, NAICS sectors, small employment sizes less than 500" in U.S. Census Bureau, *2016 SUSB Annual Data Tables by Establishment Industry* (2018), https://tinyurl.com/y457tbuf.

CONCLUSION

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

Respectfully submitted,

Jeffrey L. Fisher
Brian H. Fletcher
Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Ria Tabacco Mar
James D. Esseks
AMERICAN CIVIL
LIBERTIES UNION
FOUNDATION
125 Broad Street
New York, NY 10004

David D. Cole
AMERICAN CIVIL
LIBERTIES UNION
FOUNDATION
915 15th Street, NW
Washington, DC 20005

Gregory Antollino
Counsel of Record
ANTOLLINO PLLC
275 Seventh Avenue
Suite 705
New York, NY 10001
(212) 334-7397
Gregory10011@icloud.com

Stephen Bergstein
BERGSTEIN & ULLRICH, LLP
5 Paradies Lane
New Paltz, NY 12561

Erin Beth Harrist
Robert Hodgson
Christopher Dunn
NEW YORK CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street
New York, NY 10004

September 10, 2019