Nos. 17-1618, 17-1623, 18-107

IN THE

Supreme Court of the United States

GERALD LYNN BOSTOCK,

Petitioner,

v.

CLAYTON COUNTY, GEORGIA,

Respondent.

ALTITUDE EXPRESS, INC., AND RAY MAYNARD,

Petitioners,

v.

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

Respondents.

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

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND AIMEE STEPHENS,

Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Eleventh, Second, and Sixth Circuits

BRIEF OF KENNETH B. MEHLMAN ET AL. AS *AMICI CURIAE* IN SUPPORT OF THE EMPLOYEES

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The *amici curiae* listed in the Appendix respectfully submit this brief in support of the petitioner in *Bostock v. Clayton County*, No. 17-1618, the respondents in *Altitude Express, Inc. v. Zarda*, No. 17-1623, and respondent Aimee Stephens in *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107.[1]

INTEREST OF THE *AMICI CURIAE*

Amici curiae are Republicans, former Republicans, and political conservatives from diverse backgrounds. *Amici* have served as officeholders in Republican presidential administrations, as Members of Congress, as members of state legislatures, as officials in political campaigns and political parties, as political candidates, and as advocates, advisors, and activists for various political and social causes. *Amici* support a textualist approach to statutory interpretation, in recognition that only the text, not legislative history or other unenacted indicia of "purpose" or "intent," is actual law, passed by Congress and presented to the President in accordance with Article I, Section 7 of the Constitution of the United States. Because *amici* believe that Title VII's plain language protects against discrimination based on sexual orientation and transgender status, *amici* submit that the decisions below in *Zarda* and *R.G. &*

[1] All parties have given consent to the filing of this brief. No counsel for a party wrote this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae* or their counsel made a monetary contribution intended to fund its preparation or submission.

G.R. should be upheld, and the decision below in *Bostock* should be reversed.

A full list of *amici* is provided as an Appendix to this brief.

SUMMARY OF ARGUMENT

Basic principles of textualism resolve this case. Title VII of the Civil Rights Act of 1964 tells employers that it is unlawful to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). These words are unambiguous, and this Court's cases have taken them as such. Both textualism and precedent accordingly command that Title VII's words be applied to mean what they say: It is unlawful for an employee's sex to contribute to an employer's decision to discharge or otherwise discriminate against the employee.

Yet that is exactly what happened in all three cases on review. Two men were discharged because they were gay, which necessarily means that they lost their jobs because they were *men* who were attracted to men. Had they been similarly situated *women*—that is, women who were attracted to men—their employers would not have discharged them for such attraction. The other plaintiff is a transgender woman whose employer discharged her for representing herself as the woman she understood herself to be. The employer so acted because the employee declined to accede to the demand that employees who had been assigned "male" at birth (or whom the employer other-

wise believed to be male in essence) refrain from representing themselves as women. Had the plaintiff been assigned *female* at birth (or had the employer otherwise believed her to be female in essence), she would not have been discharged for representing herself as a woman. Thus, in all three cases, an employee was fired for attractions or actions that his or her employer would have tolerated for members of another sex. Plainly, the employees were *discharged because of* their *sex*. These are straightforward violations of the plain words of Title VII.

The employer-litigants and the dissenters below have elided this common-sense textualist approach by relying on extra-statutory evidence of how they contend Members of Congress or the general public in 1964 would have believed that Title VII would be applied. They assert that, when Title VII was enacted, Congress and the American public would not have expected it to protect sexual orientation and transgender status because those aspects of identity were not the subjects of significant political debate at the time. Perhaps so, but it is not relevant. As this Court has repeatedly recognized, *in Title VII cases* as well as cases in other areas of the law, statutes often apply more broadly than their drafters anticipated, and extrinsic evidence of statutory "intent" is irrelevant when the statute's words are clear.

The employer-litigants and dissenters below additionally conflate discharge or discrimination "against any *individual*," as denoted in the statute, with discharge or discrimination against a protected *class* of people. As the plain text of Title VII indicates, and as the Court has expressly acknowledged, Title VII

bars discrimination against an individual because of that individual's protected traits. It does not matter that an employer might discriminate against men in some situations (*e.g.*, when they are attracted to men) and women in other situations (*e.g.*, when they are attracted to women), such that the aggregate of the employer's many discriminatory actions does not favor men *as a class* or women *as a class*. Each adverse employment action against an individual because of that individual's sex is an independent violation of Title VII, according to the words Congress wrote. In each instance, the individual is treated differently from a similarly situated employee of another sex. The statute does not allow employers to escape liability by committing further acts of discrimination against individuals of another sex.

Finally, to the extent that some decisions of courts of appeals have disagreed with the conclusions that flow naturally from statutory text, that is no reason for the Court to fail to apply sound textualist principles. To discharge or discriminate based on sexual orientation or transgender status is necessarily to discharge or discriminate because of sex, and no lower-court precedent can establish otherwise. Except when lower-court decisions have been ratified by later congressional enactment, this Court has always rejected arguments that it should defer to statutory interpretations reached in the lower courts and has independently applied the tools of statutory construction.

ARGUMENT

I. THE PLAIN TEXT OF TITLE VII PROHIBITS DISCRIMINATION BECAUSE OF AN INDIVIDUAL EMPLOYEE'S SEXUAL ORIENTATION OR TRANSGENDER STATUS.

Title VII provides that employers may not "fail or refuse to hire or . . . discharge any individual, or otherwise . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). The mandate is clear: An employer violates Title VII if it treats an individual applicant or employee worse than it would have if that person were of a different sex. As explained below, discrimination against an employee because of his or her sexual orientation flouts this prohibition; doing so, by definition, treats a man who has some traits or engages in some behaviors differently from a woman who has the same traits or engages in the same behaviors. So too does discrimination on the basis of transgender status; an individual employee who was assigned "male" at birth receives disparate treatment from one who was assigned "female" at birth despite engaging in the same behavior. In interpreting the plain meaning of the statute, it is irrelevant that Congress in 1964 might not have anticipated that sex discrimination would subsume discrimination based on sexual orientation or transgender status. Moreover, attempts by the employer-litigants to confine Title VII liability to employers who disfavor men *as a class* or women *as a class* are misplaced. The statute bars discrimination against "any *individual* . . . because of such *indi-*

vidual's . . . sex." *Id.* (emphasis added). Discriminating against a man because of his sex and discriminating against a woman because of her sex constitute separate and independent violations of Title VII.

A. Discrimination Because of Sexual Orientation or Transgender Status Necessarily Constitutes Discrimination Because of Sex.

By its plain text, Title VII applies whenever one of its enumerated traits motivates the discharge of an employee or any of the other specified employment practices. *See* 42 U.S.C. § 2000e-2(a)(1). The phrase "because of" ordinarily denotes "but-for" causation. In *Gross v. FBL Financial Services, Inc.*, this Court held, based on the ordinary meaning of "because of," that a plaintiff attempting to prove age discrimination under the Age Discrimination in Employment Act has the burden to establish that age was "the 'but-for' cause of the employer's adverse action." 557 U.S. 167, 176 (2009). And in *University of Texas Southwestern Medical Center v. Nassar*, this Court held, based on that ordinary meaning of "because of," that "Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action." 570 U.S. 338, 352 (2013). Under that formulation, the text forbids adverse action if a protected trait "was the 'reason' that the employer decided to act." *Gross*, 557 U.S. at 176.[2]

[2] A 1991 amendment to Title VII broadened that standard, stating that "an unlawful employment practice is established when the complaining party demonstrates that race, color,

"Sex" is not defined in Title VII. *See generally* 42 U.S.C. § 2000e (definitions). The term is therefore "interpreted as taking [its] ordinary, contemporary, common meaning." *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014) (internal quotation marks omitted). According to several dictionaries published close in time to the passage of Title VII, sex broadly refers to the fact of being male or female and the physical *and behavioral* characteristics commonly associated with those facts. For example, a 1961 dictionary defines sex as

> the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evolutionary change, that in its typical dichotomous occurrence is usu. genetically controlled and associated with special sex

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religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m). In *Nassar*, this Court recognized that the amendment created a "lessened causation standard." 570 U.S. at 348-349. *See also EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2032 (2015) (Title VII "relaxes" the "traditional standard of but-for causation" to "prohibit even making a protected characteristic a motivating factor in an employment decision" (internal quotation marks omitted)). Accordingly, by statutory text, it is unlawful for an employee's "sex" to cause an employer to discharge or discriminate against the employee, whether or not there are additional motives for the adverse employment decision. Because the complaints contain well-pleaded allegations that sexual orientation or transgender status was *the* motivating factor in each case before the Court, no question about mixed motives is presented by these cases.

> chromosomes, and that is typically manifested as maleness and femaleness.

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (unabridged ed.) (1961).

Similarly, a 1966 dictionary includes definitions such as "the fact or character of being either male or female," "either of the two groups of persons exhibiting this character," and "the sum of the structural and functional differences by which the male and female are distinguished, or the phenomena or behavior dependent on those differences." THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (unabridged ed.) (1966). These definitions are consistent with others published during the same general period. *E.g.*, CHAMBERS'S TWENTIETH CENTURY DICTIONARY (William Geddie ed., First American ed. 1965) ("the quality of being male or female: either of the divisions according to this, or its members collectively . . .: *the whole domain connected with this distinction*" (emphasis added)). Older dictionaries also emphasized the generality and breadth of "sex," such as the definition, "The distinction between male and female *in general*." THE OXFORD ENGLISH DICTIONARY (1933) (emphasis added). The definitions also comport with much more current usages.

Given these broad contemporary definitions of the term "sex," it is clear that discrimination on the basis of sexual orientation or transgender status necessarily constitutes action taken *because of* the individual employee's sex. It is impossible to cognize a person's sexual orientation without first noting whether the person is male or female (or possesses the physical or behavioral characteristics usually associated with

being male or female). For example, a gay man is gay only by virtue of being a *man* who is attracted to or has sex with men. This is tautological; a woman attracted to or having sex with men would not be gay. To treat a male employee who is attracted to men less favorably than a female employee who is attracted to men is, necessarily, to discriminate against the male employee because of his sex. It would penalize him for traits or actions that would be permissible for his female colleagues.

Likewise, to penalize a female employee for being attracted to or having sex with women, while not taking adverse employment action against male employees who are attracted to women, discriminates against the female employee because of her sex. The plain text of Title VII does not tolerate those inequities.

For similar reasons, discrimination against an employee for being transgender also occurs "because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). Such discrimination treats a person who was considered male at birth, but identifies as a woman, differently from a person who was classified as female at birth and also currently identifies as a woman. To permit a female-identifying employee who was assigned female at birth to represent herself as a woman while prohibiting a transgender woman from doing the same is to discriminate against the transgender woman because she was considered to have a particular sex at birth (and/or because the employer believes that the sex assigned to the employee at birth is the employee's current sex). Title VII flatly prohibits that practice.

B. Congressional "Intent" Does Not Override Unambiguous Text.

That the enacting legislature and/or the American public circa 1964 may not have expected the statute to apply to such discrimination does not change the result demanded by Title VII's plain text. It is well established that Congress's subjective intent or expectation about how a statute would apply, even if discernible, "is irrelevant" where statutory text is unambiguous. *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998).

Congress enacts and the President considers for signature only "the text" of a statute, "not the preferences expressed by certain legislators." *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 942 (2017). Consequently, it is not unusual to find situations in which "the text plainly applies or does not apply by its very words," even though "the legislators did not consider [that] particular circumstance." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 350 (2012); *see also id.* at 56 ("The difference between textualist interpretation and so-called purposive interpretation is not that the former never considers purpose. It almost always does. . . . [T]he purpose must be derived from the text, *not from extrinsic sources such as legislative history or an assumption about the legal drafter's desires*." (emphasis added)). Here, the relevant purpose is to ban discrimination because of sex. Even if some legislators in 1964 performed the mental gymnastics required to consider discrimination based on sexual orientation or transgender status to be somehow independent of sex, even if some legislators simply

had no opinion on the subject, and even if some legislators inserted the word "sex" in hopes of making the bill so broad that it would not pass, none of that justifies claiming to identify a statutory "purpose" different from the one so plainly stated in the text.

The Court has consistently recognized that seemingly unanticipated applications of a statute are "the product of the law Congress has written" and that "[i]t is not for [the Court] to rewrite the statute so that it covers only what we think is necessary to achieve what we think Congress really intended." *Lewis v. City of Chicago*, 560 U.S. 205, 215 (2010). In those circumstances, the Court has "repeatedly refused to adopt narrowing constructions." *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 660 (2008).

For example, in *Pennsylvania Department of Corrections v. Yeskey*, the Court considered whether the Americans with Disabilities Act applied to inmates in state prisons. 524 U.S. at 208. The statute broadly stated that "'no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a *public entity*, or be subjected to discrimination by *any such entity*.'" *Id.* at 209 (emphasis added) (quoting 42 U.S.C. § 12132). The petitioners argued that the quoted language did not apply to state prisons and prisoners, in part because the "statement of findings and purpose . . . [did] not mention prisons and prisoners." *Id.* at 211. In rejecting that argument, Justice Scalia wrote for a unanimous Court that "'the fact that a statute can be applied in situations not expressly anticipated by Congress does not demon-

strate ambiguity. It demonstrates breadth.'" *Id.* at 212 (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985)).

Yeskey is no outlier among the Court's precedents. In *Boyle v. United States*, for example, in rejecting a narrowing interpretation of RICO argued to be more consistent with legislators' purpose in passing the statute, the Court wrote: "Because the statutory language is clear, there is no need to reach petitioner's remaining arguments based on statutory purpose, legislative history, or the rule of lenity. In prior cases, we have rejected similar arguments in favor of the *clear but expansive text* of the statute." 556 U.S. 938, 950 (2009) (emphasis added).

"Because of" and "sex" are broad terms, not ambiguous ones. That they apply to contexts that many legislators may not have anticipated in 1964 in no way justifies dispensing with a plain reading of the text. The Court's decisions in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), and *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998), well illustrate the point. In *Meritor*, the Court recognized that sexual harassment and a resulting hostile work environment could constitute discrimination because of sex under Title VII. *Meritor*, 477 U.S. at 66. It is unlikely that Congress or the public in 1964 would have expected Title VII to forbid sexual harassment.[3] In fact, before *Meritor*, at least two courts had rejected

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[3] *See, e.g.,* Ellen Frankel Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL'Y REV. 333, 346 (1990) ("[T]he legislative history of Title VII does not indicate that Congress intended to address sexual abuses in the workplace.").

that application. One simply ruled that the statute did not "apply to verbal and physical sexual advances by another employee, even though he be in a supervisory capacity." *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163 (D. Ariz. 1975), *vacated*, 562 F.2d 55 (9th Cir. 1977). The other reasoned that "[t]he substance of plaintiff's complaint [wa]s that she was discriminated against, not because she was a woman, but because she refused to engage in a sexual affair with her supervisor." *Barnes v. Train*, No. 1828-73, 1974 WL 10628, at *1 (D.D.C. Aug. 9, 1974), *rev'd sub nom. Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977).

Contrary to the latter court's posited distinction between discrimination against women and discrimination against people who refuse to have affairs with their supervisors, *Meritor* recognized that Title VII applies where "a supervisor sexually harasses a subordinate *because of the subordinate's sex*." *Meritor*, 477 U.S. at 64 (emphasis added). The Court explained,

> Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.

Id. at 67 (internal quotation marks omitted). Consistent with the ordinary meanings of "because of" and "sex," this Court's holding confirmed that discrimination occurs because of sex if an employee's sex contrib-

utes to disadvantageous terms of employment. The Court's implicit reasoning was that a woman who is subject to a "hostile or offensive environment for members of one sex" (in this case, women) might not have been subject to that precise hostility or offense had she been a man. *Id.* (internal quotation marks omitted). Her entitlement to Title VII relief thus flows not from the subjective expectations of Title VII's authors, but from the textually compelled principle that it is unlawful for an employer to make her sex the cause (or one of multiple causes) of any disadvantage in the terms of her employment.

Oncale reaffirmed this point and made it more explicit. There, a male plaintiff alleged he had been sexually harassed by male coworkers. *Oncale*, 523 U.S. at 77. In holding that same-sex sexual harassment could give rise to a Title VII claim, the Court (speaking through Justice Scalia) recognized that there was "no justification in the statutory language or [the Court's] precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII." *Id.* at 79. The Court recognized that "male-on-male sexual harassment in the workplace was . . . not the principal evil Congress was concerned with when it enacted Title VII," *id.*, but the text commanded a result—namely, that harassment resulting from the plaintiff's sex be prohibited. Congress's subjective concerns and priorities in enacting Title VII were therefore of no importance: "[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Id.*

In the cases on review, the ultimate question is both simple and no different from the questions in *Meritor*, *Oncale*, or any other case applying the plain language of Title VII in the context of sex discrimination: Would the plaintiffs below have been treated differently by their employers were they of a different sex? The answer, in each case, is "yes."

Assuming their allegations to be true, Mr. Zarda and Mr. Bostock would not have been terminated for their attraction to men if they, themselves, had not been men. *See* 17-1623 Pet. App. 12; 17-1618 Pet. App. 2. Likewise, if Ms. Stephens's account is correct, she would not have been terminated for representing herself as a woman had her employer perceived her to be female, rather than male. 18-107 Pet. App. 8a-9a. The sex of each employee was a key motivating factor (and a but-for cause) for discharging all three plaintiffs. It does not matter that Congress or the public in 1964 may not have predicted these applications of plain text. *See, e.g.*, *Oncale*, 523 U.S. at 79; *see also Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 606-613 (2004) (Thomas, J., dissenting) (arguing that reliance on the legislative and/or "social history" of the term "age" is not an appropriate method of interpreting the ADEA, in contrast to applying the statute's "plain language").

C. Title VII Prohibits Discrimination Against *Individuals*, Rather than Against Protected Classes at Large.

The employer-litigants and dissenters below have argued that discrimination based on sexual orientation does not constitute sex discrimination where same-sex-attracted men are treated the same as

same-sex-attracted women. The argument posits that, if men and women are equally penalized for being attracted to persons of the same respective sex, then neither men nor women as a group are placed at a disadvantage. For example, the lead dissent in *Zarda* asserts,

> [I]n the area of sex discrimination, where the groups to be treated equally do have potentially relevant biological differences, not every distinction between men and women in the workplace constitutes discrimination against one gender or the other. The distinctions that were prohibited, however, in either case, are those that operate to the disadvantage of (principally) the disfavored race or sex. That is the social problem that the statute aimed to correct.

17-1623 Pet. App. 99-100.

That reasoning is erroneous. As explained above, the fact that Title VII may have "aimed to correct" a limited "social problem" does not alter the effect of the statute's broad and unambiguous text. *E.g.*, *Oncale*, 523 U.S. at 79; *Yeskey*, 524 U.S. at 212; *cf. Gen. Dynamics Land Sys.,* 540 U.S. at 606-613 (Thomas, J., dissenting). Moreover, the dissent's argument not only overlooks the plain meanings of "because of" and "sex," but also overlooks other key phrases in the statute: the phrases "any *individual*" and "because of such *individual's* race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (emphasis added). As explained below, the statute unambiguously prohibits discharge or other adverse action against an individual employee because of that individual em-

ployee's sex, whether or not any one sex faces a disadvantage as a class. This is true not only in the context of discrimination based on sexual orientation, but also discrimination based on transgender status.

The relevant text reads in its entirety: "It shall be an unlawful employment practice for an employer--(1) to fail or refuse to hire or to discharge *any individual*, or otherwise *to discriminate against any individual* with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's* race, color, religion, *sex*, or national origin." *Id.* (emphasis added). There is only one reasonable way to read that text: an employer may not take adverse action against an individual because of the individual's own traits. The statute does not define "individual," but dictionaries of the era unsurprisingly defined "individual" to mean an entity distinct from larger groups or classes, for example "a particular being or thing as distinguished from a class, species, or collection." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (unabridged ed.) (1961). Likewise, "individual" was understood to denote "a single human being, as distinguished from a group." THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (unabridged ed.) (1966). And so on. *E.g.*, CHAMBERS'S TWENTIETH CENTURY DICTIONARY (William Geddie ed., First American ed. 1965) ("subsisting as one: pertaining to one only or to each one separately of a group: single, separate"). As with the definition of "sex," the definition of "individual" was not new. *E.g.*, THE OXFORD ENGLISH DICTIONARY (1933) ("A single object or thing, or a group of things forming a single complex idea, and regarded as a unit; a single member

of a natural class, collective group, or number."); *id.* ("A single human being, as opposed to Society, the Family, etc.").

There is no room to read "discharge . . . or otherwise discriminate against any individual" to mean "discharge or otherwise discriminate against a class of people." The statute nowhere states that it applies only if an employer, through the sum of all its adverse employment actions, treats the average male employee worse than the average female employee, or vice versa. Each instance of discharging or discriminating against an individual because of that individual's sex is an independent violation of Title VII. The employer does not cure the violation by discriminating against other employees because of their respective sexes.

Those textualist principles easily resolve the issues on review. To treat individuals unfavorably because of their sexual orientation is to penalize them because of their sex (or because of generalizations about their sex), whether or not their sex, as a class, is treated unfavorably. Thus, in evaluating the claims of Mr. Zarda and Mr. Bostock, the question is not whether an employer who terminates all gay, lesbian, and bisexual employees—male or female—has, through the sum of all the firings, treated women as a class better than men as a class (or vice versa), any more than the question in hostile workplace cases is whether women as a whole were subjected to a different environment than men as a whole. The question is whether, in firing any individual gay employee, the employer has treated the individual differently from how it would have treated a similarly

situated employee of a different sex. Assuming their allegations to be true, the logic of Mr. Zarda's and Mr. Bostock's claims is inescapable: they would not have been fired for being attracted to men if they had not been men. They were thus individuals who were discharged because of their sex.

The same is true of transgender status and Ms. Stephens's claim: she would not have been fired for representing herself as a woman had she been assigned "female" at birth (or otherwise regarded as female in essence by her employer). She is thus an individual who was discharged because of her sex. It is no defense that her employer would also have fired individual transgender men because of their sex and, thus, treated men as a class the same as women as a class in the aggregate of its discriminatory actions. An employer who fires fifty transgender women and fifty transgender men because of their transgender status might not tip the balances between men and women on the whole, but it does discharge one hundred individuals because of their respective sexes.

It obviously would not comply with Title VII for an employer to say that it will fire employees who marry outside of their race or date adherents to religions other than their own. Such a prohibition, though it would apply equally to all races and religions and thus would be nondiscriminatory under the logic of the dissents below, would violate Title VII's plain language. The law plainly says that, whether or not a policy applies equally to every person and every group, employers are forbidden to tell individual employees that their continued employment depends on their conformity to the employer's preferred actions

and traits of a particular sex, race, religion, color, or national origin.

The Court has rejected the notion that "the existence or nonexistence of 'discrimination' is to be determined by comparison of class characteristics." *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 708 (1978). In *Manhart*, the Court held, in light of the phrases "any individual" and "such individual's . . . sex," that Title VII's "focus on the individual is unambiguous." *Id.* In that case, a city agency required its female employees to contribute more money from their paychecks to a pension fund than male employees. *Id.* at 704. The agency reasoned that, because women on average live longer than men, women would receive more payments than men. *Id.* at 705. The Court held that this practice unlawfully discriminated against individual female employees because Title VII "precludes treatment of individuals as simply components of a racial, religious, sexual, or national class." *Id.* at 708. To apply an unfavorable practice to individual women purely based on generalizations about women as a class (*i.e.*, that they tend to live longer than men) would be to treat them less favorably *because of their sex*. *Id.* And, because of the statute's unambiguous "focus on the individual," it would not matter if it could be shown that there was no discriminatory effect against "women as a class" (*i.e.*, because women would receive more payouts than men on average). *Id.* at 708, 716. That evidence would not "defeat the claim that the practice, on its face, discriminated against every *individual* woman." *Id.* at 716 (emphasis added).

Seven years before *Manhart*, the Court reached a similar conclusion resting on substantially the same principles. In *Phillips v. Martin Marietta Corp.*, a female Title VII plaintiff challenged her employer's practice of declining job applications from women with pre-school-age children. 400 U.S. 542, 543 (1971) (per curiam). The district court granted summary judgment to her employer, in part because the percentage of the employer's hires who were women was slightly greater than the percentage of applicants who were women; thus, the district court reasoned, "no question of bias against women as such was presented." *Id.* The court of appeals affirmed. *Id.* This Court unanimously vacated the judgment, rejecting the notion that the plaintiff's Title VII claim could be defeated by a showing that women as a broader class were not at a disadvantage relative to men. *Id.* at 544. It was enough for the plaintiff to have shown that her employer "permit[ed] one hiring policy for women and another for men—each having pre-school-age children." *Id.* In other words, it was enough to show that the individual woman who had pre-school-age children was subject to a hiring policy to which she would not have been subject had she been a similarly situated man—a man who had pre-school-age children.

Just as a woman with pre-school-age children may not be treated worse than a man with pre-school-age children simply because she is a woman, Title VII forbids treating a man who is attracted to men worse than a woman who is attracted to men simply because he is a man. And it forbids treating transgender persons worse than their similarly situated peers whose presented sex aligns with the one they were

assigned at birth. A person who was assigned "male" at birth, currently identifies as a woman, and wishes to represent herself as a woman may not be treated worse than someone who was assigned "female" at birth, currently identifies as a woman, and wishes to represent herself as a woman. These commands flow from the plain text of the statute and this Court's precedents.

II. PAST PRACTICE DOES NOT REQUIRE A CONTRARY RESULT.

As described above, the plain text of Title VII's prohibition on discrimination because of sex compels the conclusion that Title VII protects employees from the discrimination at issue in *Zarda, Bostock*, and *R.G. &. G.R*. This conclusion comports with a long line of the Court's precedents and established principles of statutory interpretation. This Court has never addressed the questions presented in these cases, but adherence to this Court's own reasoning on every relevant subsidiary point supports the position of the plaintiffs. *Stare decisis*, as applied to this Court's decisions, calls for recognizing that the statute prohibits discrimination based on sexual orientation or transgender status.

There is no serious argument to be made that this Court should apply principles of *stare decisis* to the decisions of lower courts. As an initial point, case law in the courts of appeals is not consistent. In *Zarda,* in *R.G. &. G.R.*, and in *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339 (7th Cir. 2017) (en banc), courts of appeals held that discrimination "because of . . . sex" encompasses discrimination on the basis of sexual orientation and/or transgender status. Inasmuch as

earlier cases and *Bostock* suggest a different outcome, those cases indicate a lack of consensus among the lower courts.

More fundamentally, this Court has repeatedly and consistently rejected arguments that the Court should be hesitant to depart from prevailing views in the courts of appeals. As the Court explained in *Milner v. Dep't of Navy*, the Court "ha[s] no warrant to ignore clear statutory language on the ground that other courts have done so." 562 U.S. 562, 576 (2011). Once an "issue is squarely presented, it behooves [the Court] to reconcile the plain language of the statutes with [its] prior *holdings*," regardless of "long-prevailing *Circuit* precedent." *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001) (internal quotation marks omitted). The Court accordingly rejected, just recently, a reading of a statute that had evinced a "disregard of the rules of statutory interpretation," notwithstanding the adoption of that reading by at least ten courts of appeals over the course of forty-five years. *Food Mktg. Inst. v. Argus Leader Media*, 588 U.S. ____ (2019) (slip op. at 8); *see also id.* (Breyer, J., dissenting) (slip op. at 2) (dissenting Justices agreeing that the lower courts' interpretation had "no basis in the statute").

Although arguments for deference to lower-court precedent have repeatedly been advanced in dissent, the Court has not taken up these suggestions. *See, e.g., Keene Corp. v. United States*, 508 U.S. 200, 222 (1993) (Stevens J., dissenting) (contending, in lone dissent, that "the overruling of a consistent line of precedent raises equitable concerns that should not be

disregarded"); *McNally v. United States*, 483 U.S. 350, 376 (1987) (Stevens, J., dissenting) (refusing, in portion of dissent not joined by other Justices, to "join a rejection of such a longstanding, consistent interpretation of a federal statute"). Prior circuit precedent, to the extent it misconstrues the plain meaning of Title VII, should have no bearing on the Court's analysis.

CONCLUSION

The judgments of the United States Courts of Appeals for the Second Circuit and the Sixth Circuit should be affirmed. The judgment of the United States Court of Appeals for the Eleventh Circuit should be reversed.

Respectfully submitted.

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APPENDIX

LIST OF *AMICI CURIAE*

Kenneth B. Mehlman, Chairman, Republican National Committee, 2005-2007

John Bailey, Policy Director, Bush-Cheney 2004, and Special Assistant to the President for Domestic Policy, 2007-2009

Reginald J. Brown, Associate White House Counsel, 2003-2005

Tom Campbell, United States Representative, California, 12th District, 1989-1993; 15th District, 1995-2001

Kathryn Biber Chen, General Counsel, Romney for President, 2011-2013

Ryan Costello, United States Representative, Pennsylvania, 6th District, 2015-2019

Carlos Curbelo, United States Representative, Florida, 26th District, 2015-2019

Sarah Davis, Member of the Texas House of Representatives, 134th District, 2011-Present

James C. Dozier, Republican Political Strategist and Advisor

Michael DuHaime, Former Political Director, Republican National Committee; Senior Campaign Staffer for President George W. Bush, Senator John McCain, Governor Chris Christie and Mayor Rudy Giuliani

Patrick Guerriero, Mayor of Melrose, Massachusetts, and Member of Massachusetts House of Representatives, 1993-2001

Coddy Johnson, National Field Director, Bush-Cheney 2004, White House Office of Political Affairs, and Regional Director Bush-Cheney 2000

Fred Karger, United States Presidential Candidate, 2012

Mark McKinnon, Creator, Executive Producer, and Co-Host of Showtime's *The Circus: Inside the Greatest Political Show on Earth*

Wade Lairsen, Associate Director, White House Office of Intergovernmental Affairs, 2007-2008; Former Associate Director, Government Affairs, Republican National Committee

Greg McNeilly, Executive Director, Michigan Republican Party, 2003-2005

Bruce P. Mehlman, Assistant Secretary of Commerce, 2001-2003

Jennifer A. Nassour, Former CEO, ReflectUS; Former Chair, MassGOP; Candidate for Boston City Council

Mina Nguyen, Deputy Assistant Secretary, U.S. Department of Treasury, 2006-2007

Casey Pick, Former Programs Director of Log Cabin Republicans and Legislative Counsel to American Unity Fund

Deborah Pryce, United States Representative, Ohio, 15th District, 1993-2009

Kelley Robertson, Chief of Staff, Republican National Committee, 2005-2006

Ileana Ros-Lehtinen, United States Representative, Florida, 27th District, 1989-2019

Claudine Schneider, United States Representative, Rhode Island, 2nd District, 1981-1991

John J.H. Schwarz, M.D., United States Representative, Michigan, 7th District, 2005-2007

Christopher Shays, United States Representative, Connecticut, 4th District, 1987-2009

Alan Simpson, United States Senator, Wyoming, 1979-1997

Robert Steel, Undersecretary of the Treasury for Domestic Finance, 2006-2008

Richard Tisei, Massachusetts State Senator 1991-2011, and Senate Minority Leader 2007-2011

Gregory S. Walden, Associate Counsel to President George H.W. Bush, 1990-1993; Associate Deputy Attorney General, 1987-1988

Meg Whitman, Republican Nominee for Governor of California, 2010; President & CEO of eBay, former CEO of HP and Hewlett Packard Enterprise