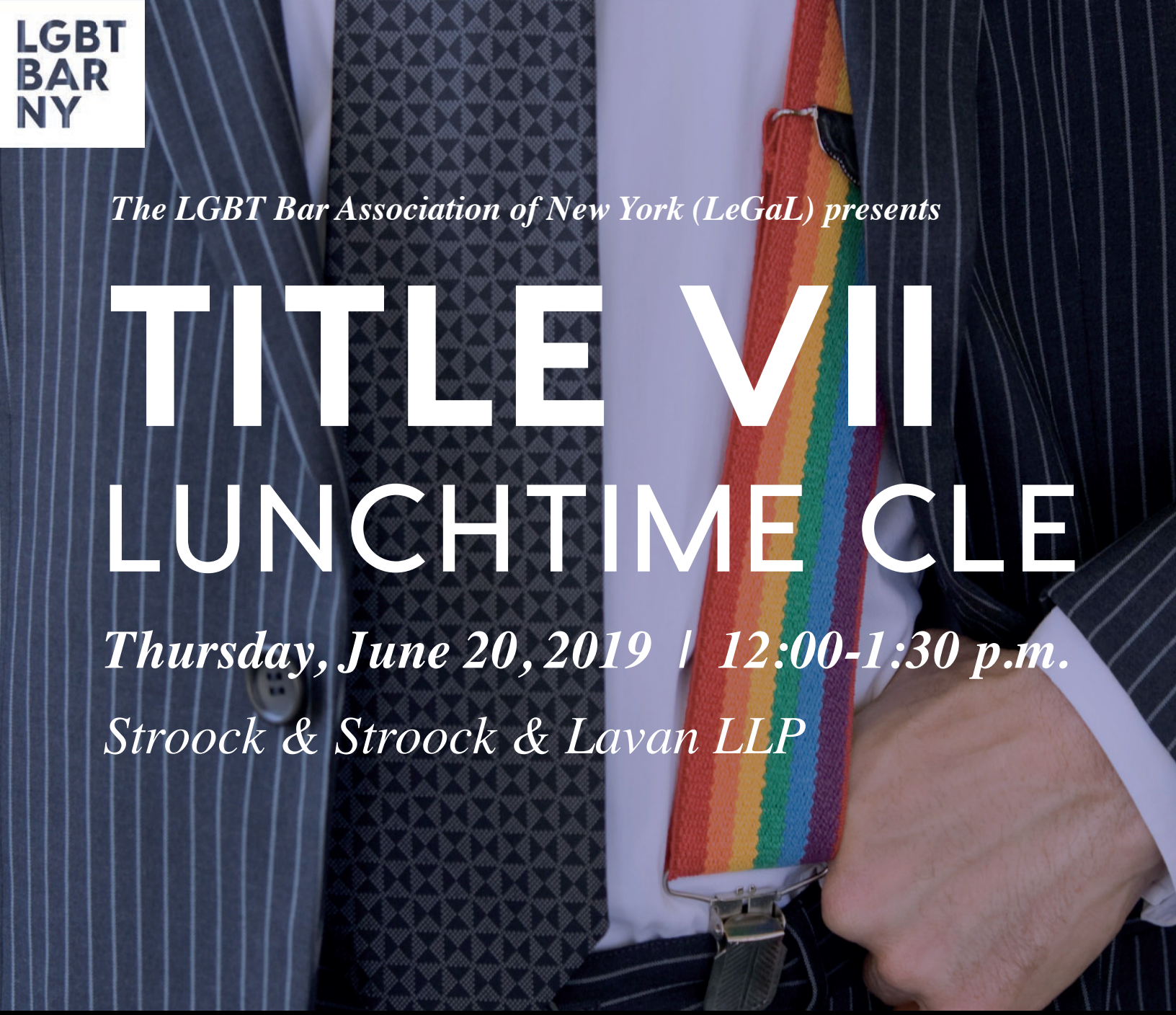

LGBT BAR NY

The LGBT Bar Association of New York (LeGaL) presents

TITLE VII LUNCHTIME CLE

Thursday, June 20, 2019 | 12:00-1:30 p.m.

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FEATURING

Arthur S. Leonard, *Robert F. Wagner Professor of Labor and Employment Law,* New York Law School

MODERATED BY

Eric Lesh, *Executive Director,* The LGBT Bar Association of New York (LeGaL)

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Title VII Lunchtime CLE

June 20, 2019, 12:00-1:30 p.m. | Stroock & Stroock & Lavan LLP

Presented by the LGBT Bar Association of New York (LeGaL)

AGENDA

A review of three recent Title VII cases impacting LGBT people in the workplace.

I. **Welcome** (5 minutes)

II. **Background – Development of sex discrimination interpretation under Title VII** (15 minutes)

III. **Key cases in the circuits accepting broader interpretations of "sex discrimination" flowing from Price Waterhouse** (20 minutes)

IV. **EEOC's embrace of a broad interpretation of "sex discrimination"** (20 minutes)

V. **The Supreme Court Cert Cases: *Bostock*, *Zarda*, and *Harris Funeral Homes*** (20 minutes)

VI. **Questions & Answers** (10 minutes)

SPEAKER BIOS

PROF. ARTHUR S. LEONARD @asleonard1

Arthur S. Leonard is the Robert F. Wagner Professor of Labor and Employment Law at New York Law School, where he has been a faculty member since 1982. He is a graduate of Cornell University's New York State School of Industrial and Labor Relations (1974) and Harvard Law School (1977). He became a member of the New York bar in 1978. He worked as an Associate Attorney at Kelley Drye & Warren and Seyfarth, Shaw, Fairweather and Geraldson before joining New York Law School. He started New York's LGBT Bar Association and served as its first president from 1984 to 1988. He edits and writes most of *LGBT Law Notes*, a monthly newsletter published by the LGBT Bar Association, which is archived on the NYLS Impact Center website. He is a contributing writer on law for *GayCityNews.com*, and his monthly podcast on significant legal developments can be found at http://legal.podbean.com or on itunes. He blogs on legal issues at *artleonardobservations.com*.

ERIC LESH, ESQ. *(moderator)* @EDLesh

Eric Lesh is the Executive Director of The LGBT Bar Association and Foundation of Greater New York (LeGaL). Prior to joining LeGaL, Eric was the Fair Courts Project Director for Lambda Legal, the oldest and largest national legal organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and individuals living with HIV. In his role, Eric focused his efforts on eliminating bias in the legal system, increasing diversity of the judicial bench, and expanding access to justice for LGBT people and those with HIV. He has trained attorneys and judges across the country, briefed federal courts on issues ranging from juror discrimination to judicial misconduct, and assisted court users through Lambda Legal's help desk and educational resources. In 2017, he was recognized as one of the Best LGBT Lawyers Under 40 by the National LGBT Bar Association.

CLE MATERIALS

Summary

The Supreme Court's Certiorari Grant in Three Title VII Cases Concerning the Interpretation of "Because of . . . sex" as it relates to sexual orientation and gender identity discrimination

Materials Included

- **Sex Discrimination Time-Line of Selected Key Developments**, page 1
- **Decisions Below:**

  ***Zarda v. Altitude Express* (2nd Circuit),** page 6

  ***Bostock v. Clayton County* (11th Circuit)**, page 52

  ***EEOC v. R.G. & G.R. Harris Funeral Homes* (6th Circuit)**, page 55

Sex Discrimination Time-Line of Selected Key Developments (Title VII and some decisions under other federal sex discrimination statutes)

1964 – Title VII is amended on the floor of the House of Representatives to add "sex" to the list of forbidden grounds for discrimination in employment. No definition of "sex" is included in the statute, which goes into effect on July 2, 1965.

1971 – Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (concurring opinion by Justice Marshall quotes EEOC's interpretation of Title VII: "By adding the prohibition against job discrimination based on sex to the 1964 Civil Rights Act Congress intended to prevent employers from refusing 'to hire an individual based on stereotyped characterizations of the sexes.' Equal Employment Opportunity Commission, Guidelines on Discrimination Because of Sex, 29 CFR § 1604.1 (a) (1) (ii)." Plaintiff challenged employer policy of not accepting applications from women with pre-school age children as sex discrimination, challenging the stereotype of women as primary caretaker of young children).

1971 - Sprogis v. United Air Lines, Inc., 444 F. 2d 1194, 1198 (7th Cir. 1971) (Airline's refusal to employ married women as stewardesses was illegal sex discrimination; "In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.")

1977 – Holloway v. Arthur Andersen & Co., 566 F.2d 659 (9th Cir. 1977) (gender identity discrimination claims held not actionable under Title VII – early leading case: "Giving the statute its plain meaning, this court concludes that Congress had only the traditional notions of 'sex' in mind")

1978 – Pregnancy Discrimination Act overrules Supreme Court's holding that discrimination against pregnant employees is not sex discrimination by adding a definitional provision to Title VII stating that sex discrimination includes discrimination because of pregnancy or childbirth

1978 – Los Angeles Department of Water and Power v. Manhart, 435 U.S. 702 (1978) (holding that requiring women to make larger contributions than men to municipal pension fund because women live on average several years longer than men is actionable under Title VII as sex discrimination because it relies on a stereotype that women live longer than men; "It is now well recognized that employment decisions cannot be predicated on mere "stereotyped" impressions about the characteristics of males or females.").

1978 - Smith v. Liberty Mutual Insurance Co., 569 F.2d 325 (5th Cir. 1978) (early precedent holding gender identity claims not covered by Title VII).

1979 - Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979) (per curiam) (stating in dicta that "homosexuals" are not protected against discrimination under Title VII)

1979 – DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327 (9th Cir. 1979) (leading case rejecting sexual orientation discrimination claims under Title VII; treats Holloway as persuasive precedent based on legislative intent).

1982 – Sommers v. Budget Marketing, Inc., 667 F. 2d 748 (8th Cir. 1982) (leading early ruling rejecting protection against discrimination for transsexuals under Title VII, particularly noting the "bathroom" problem:" Should Budget allow Sommers to use the female restroom, the male restroom, or one for Sommers's own use?").

1984 – Ulane v. Eastern Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984), cert. denied, 471 U.S. 1017 (1985) (Airline pilot who transitioned was not protected from discrimination under Title VII – frequently cited as leading case because of cert denial; "Even though Title VII is a remedial statute, and even though some may define 'sex' in such a way as to mean an individual's 'sexual identity,' our responsibility is to interpret this congressional legislation and determine what Congress intended when it decided to outlaw discrimination based on sex;" "The dearth of legislative history on section 2000e-2(a)(1) strongly reinforces the view that that section means nothing more than its plain language implies.").

1989 - Price Waterhouse v. Hopkins, 490 U.S. 228, 242 (1989) (plurality opinion) (Holds that evidence of treating an employee adversely because the employee fails to comport with the employer's stereotyped beliefs about appropriate workplace gender roles is evidence of discriminatory motivation because of sex under Title VII; "Congress' intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute;" "As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with

their group, for "`[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes,'" quoting Sprogis, see supra).

1991 – Civil Rights Act of 1991 amends Title VII to codify a version of the "mixed motive" analysis used by the Supreme Court in Price Waterhouse v. Hopkins, without mentioning either with approval or disapproval the Court's discussion of "gender stereotypes" or "sex stereotypes" as part of that decision.

1998 – Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998) (rejecting 5th Circuit holding that same-sex harassment cannot be actionable under Title VII because Congress was only concerned with discrimination against people because they are male or female; "As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory 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.; Title VII can be construed to apply not only to circumstances contemplated by enacting Congress but also to "comparable evils.").

2000 – Rosa v. Park West Bank & Trust Company, 214 F.3d 213 (1st Cir. 2000) (refusal of lending institution to provide services to a customer whose dress failed to conform to gender stereotypes violated sex discrimination prohibition in Equal Credit Opportunity Act)

2000 – Schwenk v. Hartford, 2014 F. 3d 1187 (9th Cir. 2000) (transgender woman inmate could bring an action under the Gender-Motivated Violence Act against a male corrections officer for attempted rape).

2000 - Simonton v. Runyon, 232 F.3d 33 (2d Cir. 2000) (2nd Circuit **rejects** argument that discrimination because of sexual orientation is an instance of sex stereotyping that is actionable under Title VII; "When interpreting a statute, the role of a court is limited to discerning and adhering to legislative meaning. The law is well-settled in this circuit and in all others to have reached the question that Simonton has no cause of action under Title VII because Title VII does not prohibit harassment or discrimination because of sexual orientation.").

2001 – Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864 (9th Cir. 2001) (abrogating DeSantis v. Pacific Tel. & Tel. Co., to the extent that it would bar a Title VII suit by a gay male employee who was subjected to sexual harassment because of his perceived gender non-conformity).

2004 – Smith v. City of Salem, Ohio, 378 F.3d 566 (6th Cir. 2004) (uses gender stereotyping theory to hold that Title VII applies to discrimination claim by a transgender employee who encountered adverse personnel action when employer learned that plaintiff was transitioning).

2005 –Dawson v. Bumble & Bumble, 398 F.3d 211, 217-23 (2d Cir. 2005) (2nd Circuit reaffirms Simonton v. Runyon).

2005 – Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir.), cert. denied, 546 U.S. 1003 (2005) (reaffirms holding of Smith v. City of Salem, Ohio, that a transgender plaintiff can use gender stereotyping theory to bring a sex discrimination claim under Title VII).

2011 – Glenn v. Brumby, 663 F. 3d 1312 (11th Cir. 2011) (holding that discrimination against a public employee because of her gender identity can be actionable under the 14th Amendment Equal Protection Clause as a form of sex discrimination requiring heightened scrutiny review).

2012 – Macy v. Holder, EEOC DOC 0120120821, 2012 WL 1435995 (2012) (Reversing its position of almost half a century, EEOC holds gender identity discrimination is a form of sex discrimination; discriminating against a person because of their gender identity is necessarily discrimination because of sex).

2015 - Baldwin v. Foxx, EEOC Decision No. 0120133080, 2015 WL 4397641, at *5 (July 15, 2015) (Reversing its position of 50 years, EEOC holds sexual orientation discrimination is a form of sex discrimination; discrimination against a person because of their sexual orientation is necessarily discrimination because of sex)

2016 – G.G. v. Gloucester County School Board, 822 F.3d 709 (4th Cir. 2016), vacated & remanded, 137 S. Ct. 1239 (207) (holding that *Auer* deference required district court to defer to Obama Administration's interpretation of Title IX, under which gender identity discrimination is a form of sex discrimination for purposes of statute forbidding sex discrimination by educational institutions that receive federal funding; cert. granted, opinion vacated in light of Trump Administration's "withdrawal" of Obama Administration's interpretation of Title IX; remanded for reconsideration, claim for injunctive relief held mooted by plaintiff's graduation from Gloucester County High School).

2017 - Evans v. Georgia Regional Hospital, 850 F.3d 1248, 1257 (11th Cir.), cert. denied, 138 S. Ct. 557, 199 L.Ed.2d 446 (2017) (holds that sexual orientation discrimination claims are not actionable under Title VII, relying on dicta in Blum, supra, old 5th Circuit decision; Supreme Court refused to review the case).

2017 - Christiansen v. Omnicom Grp., Inc., 852 F.3d 195, 202 (2d Cir. 2017) ("clarifies" 2nd Circuit sex stereotyping doctrine to make clear that a gender non-conforming male is not precluded from bringing a sex discrimination claim under Title VII just because the plaintiff is gay; concurring opinion urges 2nd Circuit to reconsider its doctrine on sexual orientation discrimination in an appropriate en banc case).

2017 – Hively v. Ivy Tech Community College, 853 F. 3d 339 (7th Cir. 2017) (holding that sexual orientation discrimination claims are actionable under Title VII as discrimination because of sex. "The Court [in Oncale] could not have been clearer: the fact that the enacting Congress may not have anticipated a particular application of the law cannot stand in the way of the provisions of the law that are on the books. It is therefore neither here nor there that the Congress that enacted the Civil Rights Act in 1964 and chose to include sex as a prohibited basis for employment discrimination (no matter why it did so) may not have realized or understood the full scope of the words it chose. Indeed, in the years since 1964, Title VII has been understood to

cover far more than the simple decision of an employer not to hire a woman for Job A, or a man for Job B. The Supreme Court has held that the prohibition against sex discrimination reaches sexual harassment in the workplace, including same-sex workplace harassment; it reaches discrimination based on actuarial assumptions about a person's longevity; and it reaches discrimination based on a person's failure to conform to a certain set of gender stereotypes. It is quite possible that these interpretations may also have surprised some who served in the 88th Congress. Nevertheless, experience with the law has led the Supreme Court to recognize that each of these examples is a covered form of sex discrimination;" "It would require considerable calisthenics to remove the 'sex' from 'sexual orientation.'").

2017 – Whitaker v. Kenosha Unified School District No. 1 Board of Education, 858 F. 3rd 1034 (7th Cir. 2017) (Holding school district violated Title IX ban on sex discrimination by forbidding transgender boy from using boys' restroom facilities at high school, as gender identity discrimination is covered under Title IX; "By definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth.").

2018 – Zarda v. Altitude Express, 883 F.3d 100 (2nd Cir. 2018) (en banc) (Holding that sexual orientation discrimination claims are actionable under Title VII, overruling Simonton v. Runyon and Dawson v. Bumble & Bumble) (cert. granted, 4/22/2019).

2018 – Bostock v. Clayton County Board of Commissioners, 723 Fed. Appx. 964 (Mem) (11th Cir. 2018), petition for rehearing en banc denied, 894 F.3d 1335 (11th Cir. 2018) (holding that Blum v. Gulf Oil remains binding in the 11th Circuit, in reliance on Evans v. Georgia Regional Hospital, rejects petition for en banc reconsideration in light of recent developments) (cert. granted, 4/22/2019).

2018 – Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018) (Holding that discrimination because of an individual's gender identity is actionable as discrimination because of sex under Title VII) (cert. granted, 4/22/2019).

2018 – Doe v. Boyertown Area School District, 897 F.3d 518 (3rd Cir. 2018) (School district did not violate 1st and 14th amendment rights of cisgender students by allowing transgender students to use restrooms consistent with their gender identity; court notes school district adopted policy in light of Title IX obligations to provide equal educational opportunity to transgender students) (cert. denied, May 28, 2019).

2019 – On April 22, the Supreme Court granted certiorari in Altitude Express v. Zarda (2nd Circuit), Bostock v. Clayton County, Georgia (11th Circuit), and R.G. & G.R. Harris Funeral Homes, Inc., v. Equal Employment Opportunity Commission (6th Circuit), to be argued during the Fall 2019 Term of the Supreme Court. Argument of Altitude Express and Bostock is consolidated into a one-hour argument.

THE DECISIONS BELOW

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

v.

ALTITUDE EXPRESS, INC., doing business as Skydive Long Island, and Ray Maynard, Defendants-Appellees.

United States Court of Appeals, Second Circuit, en banc.

883 F.3d 100 (2018)

Question Presented in Altitude Express's Certiorari Petition:

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

From Discussion Section of Opinions:

Robert Katzmann, Chief Judge:

Donald Zarda, a skydiving instructor, brought a sex discrimination claim under Title VII of the Civil Rights Act of 1964 ("Title VII") alleging that he was fired from his job at Altitude Express, Inc., because he failed to conform to male sex stereotypes by referring to his sexual orientation. Although it is well-settled that gender stereotyping violates Title VII's prohibition on discrimination "because of... sex," we have previously held that sexual orientation discrimination claims, including claims that being gay or lesbian constitutes nonconformity with a gender stereotype, are not cognizable under Title VII. [1] *See* Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000); *see also* Dawson v. Bumble & Bumble, 398 F.3d 211, 217-23 (2d Cir. 2005).

At the time *Simonton* and *Dawson* were decided, and for many years since, this view was consistent with the consensus among our sister circuits and the position of the Equal Employment Opportunity Commission ("EEOC" or "Commission"). *See, e.g.,* Kalich v. AT&T Mobility, LLC, 679 F.3d 464, 471 (6th Cir. 2012); Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285, 289 (3d Cir. 2009); Medina v. Income Support Div., 413 F.3d 1131, 1135 (10th Cir. 2005); Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc., 224 F.3d 701, 704 (7th Cir. 2000); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999);[3] Wrightson v. Pizza Hut of Am., Inc., 99 F.3d 138, 143 (4th Cir. 1996); Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989) (per curiam); Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979) (per curiam); *see also Johnson v. Frank,* EEOC Decision No. 01911827, 1991 WL 1189760, at *3 (Dec. 19, 1991). But legal doctrine evolves and in 2015 the EEOC held, for the first time, that "sexual orientation is inherently a `sex-based consideration;' accordingly an allegation of discrimination based on sexual orientation is necessarily an allegation of sex

discrimination under Title VII." *Baldwin v. Foxx,* EEOC Decision No. 0120133080, 2015 WL 4397641, at *5 (July 15, 2015) (quoting *Price Waterhouse v. Hopkins,* 490 U.S. 228, 242, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (plurality opinion)). Since then, two circuits have revisited the question of whether claims of sexual orientation discrimination are viable under Title VII. In March 2017, a divided panel of the Eleventh Circuit declined to recognize such a claim, concluding that it was bound by *Blum,* 597 F.2d at 938, which "ha[s] not been overruled by a clearly contrary opinion of the Supreme Court or of [the Eleventh Circuit] sitting *en banc.*" *Evans v. Ga. Reg'l Hosp.,* 850 F.3d 1248, 1257 (11th Cir.), *cert. denied,* ___ U.S. ___, 138 S.Ct. 557, 199 L.Ed.2d 446 (2017). One month later, the Seventh Circuit, sitting en banc, took "a fresh look at [its] position in light of developments at the Supreme Court extending over two decades" and held that "discrimination on the basis of sexual orientation is a form of sex discrimination." *Hively,* 853 F.3d at 340-41. In addition, a concurring opinion of this Court recently called "for the Court to revisit" this question, emphasizing the "changing legal landscape that has taken shape in the nearly two decades since *Simonton* issued," and identifying multiple arguments that support the conclusion that sexual orientation discrimination is barred by Title VII. *Christiansen v. Omnicom Grp., Inc.,* 852 F.3d 195, 202 (2d Cir. 2017) (Katzmann, *C.J.,* concurring) ("Christiansen and *amici* advance three arguments, none previously addressed by this Court...."); *see also id.* at 204 ("Neither *Simonton* nor *Dawson* addressed [the but-for] argument.").

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

DISCUSSION

II. Sexual Orientation Discrimination

A. The Scope of Title VII

"In passing Title VII, Congress made the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees." *Price Waterhouse,* 490 U.S. at 239, 109 S.Ct. 1775. The text of Title VII provides, in relevant part:

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

42 U.S.C. § 2000e-2(a)(1). This "broad rule of workplace equality," *Harris v. Forklift Sys., Inc.,* 510 U.S. 17, 22, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993), "strike[s] at the entire spectrum of disparate treatment" based on protected characteristics, *L.A. Dep't of Water & Power v. Manhart,* 435 U.S. 702, 707 n.13, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978) (quoting *Sprogis v. United Air Lines, Inc.,* 444 F.2d 1194, 1198 (7th Cir. 1971)), "regardless of whether the discrimination is

directed against majorities or minorities," *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63, 71-72, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977). As a result, we have stated that "Title VII should be interpreted broadly to achieve equal employment opportunity." *Huntington Branch, N.A.A.C.P. v. Town of Huntington,* 844 F.2d 926, 935 (2d Cir. 1988) (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-36, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971)).

In deciding whether Title VII prohibits sexual orientation discrimination, we are guided, as always, by the text and, in particular, by the phrase "because of ... sex." However, in interpreting this language, we do not write on a blank slate. Instead, we must construe the text in light of the entirety of the statute as well as relevant precedent. As defined by Title VII, an employer has engaged in "impermissible consideration of ... sex ... in employment practices" when "sex ... was a motivating factor for any employment practice," irrespective of whether the employer was also motivated by "other factors." 42 U.S.C. § 2000e-2(m). Accordingly, the critical inquiry for a court assessing whether an employment practice is "because of ... sex" is whether sex was "a motivating factor." *Rivera v. Rochester Genesee Reg'l Transp. Auth.,* 743 F.3d 11, 23 (2d Cir. 2014).

Recognizing that Congress intended to make sex "irrelevant" to employment decisions, *Griggs,* 401 U.S. at 436, 91 S.Ct. 849, the Supreme Court has held that Title VII prohibits not just discrimination based on sex itself, but also discrimination based on traits that are a function of sex, such as life expectancy, *Manhart,* 435 U.S. at 711, 98 S.Ct. 1370, and non-conformity with gender norms, *Price Waterhouse,* 490 U.S. at 250-51, 109 S.Ct. 1775. As this Court has recognized, "any meaningful regime of antidiscrimination law must encompass such claims" because, if an employer is "`[f]ree to add non-sex factors, the rankest sort of discrimination'" could be worked against employees by using traits that are associated with sex as a proxy for sex. *Back v. Hastings On Hudson Union Free Sch. Dist.,* 365 F.3d 107, 119 n.9 (2d Cir. 2004) (quoting *Phillips v. Martin Marietta Corp.,* 416 F.2d 1257, 1260 (5th Cir. 1969) (Brown, *C.J.*, dissenting from denial of rehearing en banc)). Applying Title VII to traits that are a function of sex is consistent with the Supreme Court's view that Title VII covers not just "the principal evil s] Congress was concerned with when it enacted" the statute in 1964, but also "reasonably comparable evils" that meet the statutory requirements. *Oncale v. Sundowner Offshore Servs., Inc.,* 523 U.S. 75, 79, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998).

With this understanding in mind, the question before us is whether an employee's sex is necessarily a motivating factor in discrimination based on sexual orientation. If it is, then sexual orientation discrimination is properly understood as "a subset of actions taken on the basis of sex." *Hively,* 853 F.3d at 343.

B. Sexual Orientation Discrimination as a Subset of Sex Discrimination

We now conclude that sexual orientation discrimination is motivated, at least in part, by sex and is thus a subset of sex discrimination. Looking first to the text of Title VII, the most natural reading of the statute's prohibition on discrimination "because of ... sex" is that it extends to sexual orientation discrimination because sex is necessarily a factor in sexual orientation. This statutory reading is reinforced by considering the question from the perspective of sex stereotyping because sexual orientation discrimination is predicated on assumptions about how

persons of a certain sex can or should be, which is an impermissible basis for adverse employment actions. In addition, looking at the question from the perspective of associational discrimination, sexual orientation discrimination — which is motivated by an employer's opposition to romantic association between particular sexes — is discrimination based on the employee's own sex.

1. Sexual Orientation as a Function of Sex

a. "Because of ... sex"

We begin by considering the nature of sexual orientation discrimination. The term "sexual orientation" refers to "[a] person's predisposition or inclination toward sexual activity or behavior with other males or females" and is commonly categorized as "heterosexuality, homosexuality, or bisexuality." *See Sexual Orientation,* Black's Law Dictionary (10th ed. 2014). To take one example, "homosexuality" is "characterized by sexual desire for a person of the same sex." *Homosexual, id.; see also Heterosexual, id.* ("Of, relating to, or characterized by sexual desire for a person of the opposite sex."); *Bisexual, id.* ("Of, relating to, or characterized by sexual desire for both males and females."). To operationalize this definition and identify the sexual orientation of a particular person, we need to know the sex of the person and that of the people to whom he or she is attracted. *Hively,* 853 F.3d at 358 (Flaum, *J.,* concurring) ("One cannot consider a person's homosexuality without also accounting for their sex: doing so would render `same' [sex] ... meaningless."). Because one cannot fully define a person's sexual orientation without identifying his or her sex, sexual orientation is a function of sex. Indeed sexual orientation is doubly delineated by sex because it is a function of both a person's sex and the sex of those to whom he or she is attracted. Logically, because sexual orientation is a function of sex and sex is a protected characteristic under Title VII, it follows that sexual orientation is also protected. *See id.* ("[D]iscriminating against [an] employee because they are homosexual constitutes discriminating against an employee because of (A) the employee's sex, *and* (B) their sexual attraction to individuals of the *same sex.*").

Choosing not to acknowledge the sex-dependent nature of sexual orientation, certain *amici* contend that employers discriminating on the basis of sexual orientation can do so without reference to sex. In support of this assertion, they point to *Price Waterhouse,* where the Supreme Court observed that one way to discern the motivation behind an employment decision is to consider whether, "if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be" the applicant or employee's sex. 490 U.S. at 250, 109 S.Ct. 1775. Relying on this language, these *amici* argue that a "truthful" response to an inquiry about why an employee was fired would be "I fired him because he is gay," not "I fired him because he is a man." But this semantic sleight of hand is not a defense; it is a distraction. The employer's failure to reference gender directly does not change the fact that a "gay" employee is simply a man who is attracted to men. For purposes of Title VII, firing a man because he is attracted to men is a decision motivated, at least in part, by sex. More broadly, were this Court to credit *amici*'s argument, employers would be able to rebut a discrimination claim by merely characterizing their action using alternative terminology. Title VII instructs courts to examine employers' motives, not merely their choice of words. *See* 42

U.S.C. § 2000e-2(m). As a result, firing an employee because he is "gay" is a form of sex discrimination.

The argument has also been made that it is not "even remotely plausible that in 1964, when Title VII was adopted, a reasonable person competent in the English language would have understood that a law banning employment discrimination `because of sex' also banned discrimination because of sexual orientation[.]" *Hively,* 853 F.3d at 362 (Sykes, *J.,* dissenting). Even if that were so, the same could also be said of multiple forms of discrimination that are indisputably prohibited by Title VII, as the Supreme Court and lower courts have determined. Consider, for example, sexual harassment and hostile work environment claims, both of which were initially believed to fall outside the scope of Title VII's prohibition.

In 1974, a district court dismissed a female employee's claim for sexual harassment reasoning that "[t]he substance of [her] complaint [was] that she was discriminated against, not because she was a woman, but because she refused to engage in a sexual affair with her supervisor." *Barnes v. Train,* No. 1828-73, 1974 WL 10628, at *1 (D.D.C. Aug. 9, 1974). The district court concluded that this conduct, although "inexcusable," was "not encompassed by [Title VII]." *Id.* The D.C. Circuit reversed. Unlike the district court, it recognized that the plaintiff "became the target of her supervisor's sexual desires *because she was a woman.*" *Barnes v. Costle,* 561 F.2d 983, 990 (D.C. Cir. 1977) (emphasis added). As a result, the D.C. Circuit held that "gender cannot be eliminated from [plaintiff's formulation of her claim] and that formulation advances a prima facie case of sex discrimination within the purview of Title VII" because "it is enough that gender is a factor contributing to the discrimination." *Id.* Today, the Supreme Court and lower courts "uniformly" recognize sexual harassment claims as a violation of Title VII, *see, e.g., Meritor Sav. Bank, FSB v. Vinson,* 477 U.S. 57, 66-67, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986), notwithstanding the fact that, as evidenced by the district court decision in *Barnes,* this was not necessarily obvious from the face of the statute.

The Supreme Court has also acknowledged that a "hostile work environment," although it "do[es] not appear in the statutory text," *Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742, 752, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998), violates Title VII by affecting the "psychological aspects of the workplace environment," *Meritor,* 477 U.S. at 64, 106 S.Ct. 2399 (internal quotation marks omitted). As Judge Goldberg, one of the early proponents of hostile work environment claims, explained in a case involving national origin discrimination,

> [Title VII's] language evinces a Congressional intention to define discrimination in the broadest possible terms. Congress chose neither to enumerate specific discriminatory practices, nor to elucidate in extenso the parameter of such nefarious activities. Rather, it pursued the path of wisdom by being unconstrictive, knowing that constant change is the order of our day and that the seemingly reasonable practices of the present can easily become the injustices of the morrow.

Rogers v. E.E.O.C., 454 F.2d 234, 238 (5th Cir. 1971). Stated differently, because Congress could not anticipate the full spectrum of employment discrimination that would be directed at the protected categories, it falls to courts to give effect to the broad language that Congress used. *See Pullman-Standard v. Swint,* 456 U.S. 273, 276, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982) ("Title VII

is a broad remedial measure, designed `to assure equality of employment opportunities.'" (quoting *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 800, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973))).

The Supreme Court gave voice to this principle of construction when it held that Title VII barred male-on-male sexual harassment, which "was assuredly not the principal evil Congress was concerned with when it enacted Title VII," *Oncale,* 523 U.S. at 79-80, 118 S.Ct. 998, and which few people in 1964 would likely have understood to be covered by the statutory text. But the Court was untroubled by these facts. "[S]tatutory prohibitions," it explained, "often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Id.* Applying this reasoning to the question at hand, the fact that Congress might not have contemplated that discrimination "because of ... sex" would encompass sexual orientation discrimination does not limit the reach of the statute.

The dissent disagrees with this conclusion. It does not dispute our definition of the word "sex," Lead Dissent at 145, nor does it argue that this word had a different meaning in 1964. Instead, it charges us with "misconceiv[ing] the fundamental public meaning of the language of" Title VII. *Id.* at 143 (emphasis omitted). According to the dissent, the drafters included "sex" in Title VII to "secure the rights of women to equal protection in employment," *id.* at 145, and had no intention of prohibiting sexual orientation discrimination, *id.* at 142-43. We take no position on the substance of the dissent's discussion of the legislative history or the zeitgeist of the 1960s, but we respectfully disagree with its approach to interpreting Title VII as well as its conclusion that sexual orientation discrimination is not a "reasonably comparable evil," *Oncale,* 523 U.S. at 79, 118 S.Ct. 998, to sexual harassment and male-on-male harassment. Although legislative history most certainly has its uses, in ascertaining statutory meaning in a Title VII case, *Oncale* specifically rejects reliance on "the principal concerns of our legislators," *id.* at 79-80, 118 S.Ct. 998 — the centerpiece of the dissent's statutory analysis. Rather, *Oncale* instructs that the text is the lodestar of statutory interpretation, emphasizing that we are governed "by the provisions of our laws." *Id.* The text before us uses broad language, prohibiting discrimination "because of ... sex," which Congress defined as making sex "a motivating factor." 42 U.S.C. §§ 2000e-2(a)(1), 2000e-2(m). We give these words their full scope and conclude that, because sexual orientation discrimination is a function of sex, and is comparable to sexual harassment, gender stereotyping, and other evils long recognized as violating Title VII, the statute must prohibit it.

b. "But for" an Employee's Sex

Our conclusion is reinforced by the Supreme Court's test for determining whether an employment practice constitutes sex discrimination. This approach, which we call the "comparative test," determines whether the trait that is the basis for discrimination is a function of sex by asking whether an employee's treatment would have been different "but for that person's sex." *Manhart,* 435 U.S. at 711, 98 S.Ct. 1370 (internal quotation marks omitted). To illustrate its application to sexual orientation, consider the facts of the recent Seventh Circuit case addressing a Title VII claim brought by Kimberly Hively, a lesbian professor who alleged that she was denied a promotion because of her sexual orientation. *Hively,* 853 F.3d at 341 (majority). Accepting that allegation as true at the motion-to-dismiss stage, the Seventh Circuit

compared Hively, a female professor attracted to women (who was denied a promotion), with a hypothetical scenario in which Hively was a male who was attracted to women (and received a promotion). *Id.* at 345. Under this scenario, the Seventh Circuit concluded that, as alleged, Hively would not have been denied a promotion but for her sex, and therefore sexual orientation is a function of sex. From this conclusion, it follows that sexual orientation discrimination is a subset of sex discrimination. *Id.*

The government,[1] drawing from the dissent in *Hively,* argues that this is an improper comparison. According to this argument, rather than "hold[ing] everything constant except the plaintiff's sex" the *Hively* majority's comparison changed "two variables — the plaintiff's sex and sexual orientation." 853 F.3d at 366 (Sykes, *J.,* dissenting). In other words, the Seventh Circuit compared a lesbian woman with a heterosexual man. As an initial matter, this observation helpfully illustrates that sexual orientation is a function of sex. In the comparison, changing Hively's sex changed her sexual orientation. Case in point.

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

To understand how the test works in practice, consider *Manhart.* There, the Supreme Court evaluated the Los Angeles Department of Water's requirement that female employees make larger pension contributions than their male colleagues. 435 U.S. at 704-05, 98 S.Ct. 1370. This requirement was based on mortality data indicating that female employees outlived male employees by several years and the employer insisted that "the different contributions exacted from men and women were based on the factor of longevity rather than sex." *Id.* at 712, 98 S.Ct. 1370. Applying "the simple test of whether the evidence shows treatment of a person in a manner which *but for* that person's sex would be different," the Court compared a woman and a man, both of whose pension contributions were based on life expectancy, and asked whether they were required to make different contributions. *Id.* at 711, 98 S.Ct. 1370 (internal quotation marks omitted). Importantly, because life expectancy is a sex-dependent trait, changing the sex of the employee (the independent variable) necessarily affected the employee's life expectancy and thereby changed how they were impacted by the pension policy (the dependent variable). After identifying this correlation, the Court concluded that life expectancy was simply a proxy for sex and therefore the pension policy constituted discrimination "because of ... sex." *Id.*

We can also look to the Supreme Court's decision in *Price Waterhouse.* Although that case did not quote *Manhart*'s "but for" language, it involved a similar inquiry: in determining whether discrimination based on particular traits was rooted in sex stereotypes, the Supreme Court asked

whether a female accountant would have been denied a promotion based on her aggressiveness and failure to wear jewelry and makeup "if she had been a man." 490 U.S. at 258, 109 S.Ct. 1775. Otherwise said, the Supreme Court compared a man and a woman who exhibited the plaintiff's traits and asked whether they would have experienced different employment outcomes. Notably, being aggressive and not wearing jewelry or makeup is consistent with gender stereotypes for men. Therefore, by changing the plaintiff's gender, the Supreme Court also changed the plaintiff's gender non-conformity.

The government's proposed approach to *Hively,* which would compare a woman attracted to people of the same sex with a man attracted to people of the same sex, adopts the wrong framing. To understand why this is incorrect, consider the mismatch between the facts in the government's comparison and the allegation at issue: Hively did not allege that her employer discriminated against women with same-sex attraction but not men with same-sex attraction. If she had, that would be classic sex discrimination against a subset of women. *See* Lead Dissent at 152 n.20. Instead, Hively claimed that her employer discriminated on the basis of sexual orientation. To address that allegation, the proper question is whether sex is a "motivating factor" in sexual orientation discrimination, *see* 42 U.S.C. § 2000e-2(m), or, said more simply, whether sexual orientation is a function of sex. But, contrary to the government's suggestion, this question cannot be answered by comparing two people with the same sexual orientation. That would be equivalent to comparing the gender non-conforming female plaintiff in *Price Waterhouse* to a gender non-conforming man; such a comparison would not illustrate whether a particular stereotype is sex dependent but only whether the employer discriminates against gender non-conformity in only one gender. Instead, just as *Price Waterhouse* compared a gender non-conforming woman to a gender conforming man, both of whom were aggressive and did not wear makeup or jewelry, the *Hively* court properly determined that sexual orientation is sex dependent by comparing a woman and a man with two different sexual orientations, both of whom were attracted to women.

The government further counters that the comparative test produces false positives in instances where it is permissible to impose different terms of employment on men and women because "the sexes are not similarly situated." Gov. Br. at 16-17 (quoting *Michael M. v. Superior Court of Sonoma Cty.,* 450 U.S. 464, 469, 101 S.Ct. 1200, 67 L.Ed.2d 437 (1981)). For example, the government posits that courts have rejected the comparative test when assessing employer policies regarding sex-segregated bathrooms and different grooming standards for men and women. Similarly, the lead dissent insists that our holding would preclude such policies if "[t]aken to its logical conclusion." Lead Dissent at 151. Both criticisms are misplaced.

A plaintiff alleging disparate treatment based on sex in violation of Title VII must show two things: (1) that he was "discriminate[d] against ... with respect to his compensation, terms, conditions, or privileges of employment," and (2) that the employer discriminated "because of ... sex." 42 U.S.C. § 2000e-2(a)(1). The comparative test addresses the second prong of that test; it reveals whether an employment practice is "because of ... sex" by asking whether the trait at issue (life expectancy, sexual orientation, etc.) is a function of sex. In contrast, courts that have addressed challenges to the sex-specific employment practices identified by the government have readily acknowledged that the policies are based on sex and instead focused their analysis on the first prong: whether the policies impose "disadvantageous terms or conditions of employment."

Harris, 510 U.S. at 25, 114 S.Ct. 367 (Ginsburg, *J.,* concurring); *see, e.g., Jespersen v. Harrah's Operating Co.,* 444 F.3d 1104, 1109-10 (9th Cir. 2006) (upholding grooming standards that do not "place[] a greater burden on one gender than the other"); *Knott v. Mo. Pac. R.R. Co.,* 527 F.2d 1249, 1252 (8th Cir. 1975) (concluding that "slight differences in the appearance requirements for males and females have only a negligible effect on employment opportunities"); *Willingham v. Macon Tel. Publ'g Co.,* 507 F.2d 1084, 1092 (5th Cir. 1975) (same); *Dodge v. Giant Food, Inc.,* 488 F.2d 1333, 1336-37 (D.C. Cir. 1973) (holding that hair-length regulations, like "the requirement that men and women use separate toilet facilities[,]... do not pose distinct employment disadvantages for one sex").[16] Whether sex-specific bathroom and grooming policies impose disadvantageous terms or conditions is a separate question from this Court's inquiry into whether sexual orientation discrimination is "because of ... sex," and has no bearing on the efficacy of the comparative test.

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

2. Gender Stereotyping

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

Since 1978, the Supreme Court has recognized that "employment decisions cannot be predicated on mere `stereotyped' impressions about the characteristics of males or females," because Title VII "strike[s] at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Manhart,* 435 U.S. at 707 & n.13, 98 S.Ct. 1370. This is true of stereotypes about both how the sexes are and how they should be. *Price Waterhouse,* 490 U.S. at 250, 109 S.Ct. 1775 ("[A]n employer who acts on the basis of a belief that a woman cannot ... or must not [possess certain traits] has acted on the basis of gender."); *see also* Zachary R. Herz, Note, Price's *Progress: Sex Stereotyping and Its Potential for Antidiscrimination Law,* 124 Yale L.J. 396, 405-06 (2014) (distinguishing between ascriptive stereotypes that "treat[] a large group of people alike" and prescriptive stereotypes that speak to how members of a group should be).

In *Price Waterhouse,* the Supreme Court concluded that adverse employment actions taken based on the belief that a female accountant should walk, talk, and dress femininely constituted impermissible sex discrimination. *See* 490 U.S. at 250-52, 109 S.Ct. 1775 (plurality); *see also id.* at 259, 109 S.Ct. 1775 (White, *J.,* concurring in the judgment); *id.* at 272-73, 109 S.Ct. 1775 (O'Connor, *J.,* concurring in the judgment).[18] Similarly, *Manhart* stands for the proposition that "employment decisions cannot be predicated on mere `stereotyped' impressions about the characteristics of males or females," and held that female employees could not, by virtue of their

status as women, be discriminated against based on the gender stereotype that women generally outlive men. 435 U.S. at 707-08, 711, 98 S.Ct. 1370. Under these principles, employees who experience adverse employment actions as a result of their employer's generalizations about members of their sex, *id.* at 708, 98 S.Ct. 1370, or "as a result of their employer's animus toward their exhibition of behavior considered to be stereotypically inappropriate for their gender may have a claim under Title VII," *Dawson,* 398 F.3d at 218.

Accepting that sex stereotyping violates Title VII, the "crucial question" is "[w]hat constitutes a gender-based stereotype." *Back,* 365 F.3d at 119-20. As demonstrated by *Price Waterhouse,* one way to answer this question is to ask whether the employer who evaluated the plaintiff in "sex-based terms would have criticized her as sharply (or criticized her at all) if she had been a man." 490 U.S. at 258, 109 S.Ct. 1775. Similarly, this Court has observed that the question of whether there has been improper reliance on sex stereotypes can sometimes be answered by considering whether the behavior or trait at issue would have been viewed more or less favorably if the employee were of a different sex. *See Back,* 365 F.3d at 120 n.10 (quoting *Doe ex rel. Doe v. City of Belleville,* 119 F.3d 563, 581-82 (7th Cir. 1997)).

Applying *Price Waterhouse*'s reasoning to sexual orientation, we conclude that when, for example, "an employer ... acts on the basis of a belief that [men] cannot be [attracted to men], or that [they] must not be," but takes no such action against women who are attracted to men, the employer "has acted on the basis of gender." *Cf.* 490 U.S. at 250, 109 S.Ct. 1775.[20] This conclusion is consistent with *Hively*'s holding that same-sex orientation "represents the ultimate case of failure to conform" to gender stereotypes, 853 F.3d at 346 (majority), and aligns with numerous district courts' observation that "stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women.... The gender stereotype at work here is that `real' men should date women, and not other men," *Centola v. Potter,* 183 F.Supp.2d 403, 410 (D. Mass. 2002); *see also, e.g., Boutillier v. Hartford Pub. Sch.,* 221 F.Supp.3d 255, 269 (D. Conn. 2016); *Videckis v. Pepperdine Univ.,* 150 F.Supp.3d 1151, 1160 (C.D. Cal. 2015); *Terveer v. Billington,* 34 F.Supp.3d 100, 116 (D.D.C. 2014); *Heller v. Columbia Edgewater Country Club,* 195 F.Supp.2d 1212, 1224 (D. Or. 2002).[21]

This conclusion is further reinforced by the unworkability of *Simonton* and Dawson's holding that sexual orientation discrimination is not a product of sex stereotypes. Lower courts operating under this standard have long labored to distinguish between gender stereotypes that support an inference of impermissible sex discrimination and those that are indicative of sexual orientation discrimination. *See generally Hively v. Ivy Tech Cmty. Coll., S. Bend,* 830 F.3d 698, 705-09 (7th Cir. 2016) (panel op.) (collecting cases), *vacated by Hively,* 853 F.3d 339 (en banc). Under this approach "a woman might have a Title VII claim if she was harassed or fired for being perceived as too `macho' but not if she was harassed or fired for being perceived as a lesbian." *Fabian v. Hosp. of Cent. Conn.,* 172 F.Supp.3d 509, 524 n.8 (D. Conn. 2016). In parsing the evidence, courts have resorted to lexical bean counting, comparing the relative frequency of epithets such as "ass wipe," "fag," "gay," "queer," "real man," and "fem" to determine whether discrimination is based on sex or sexual orientation. *See, e.g., Kay v. Indep. Blue Cross,* 142 Fed.Appx. 48, 51 (3d Cir. 2005). Claims of gender discrimination have been "especially difficult for gay plaintiffs to bring," *Maroney v. Waterbury Hosp.,* No. 3:10-CV-1415, 2011 WL 1085633, at *2 n.2 (D. Conn. Mar. 18, 2011), because references to a plaintiff's sexual orientation are generally

excluded from the evidence, *Boutillier,* 221 F.Supp.3d at 269, or permitted only when "the harassment consists of homophobic slurs directed at a *heterosexual,*" *Estate of D.B. by Briggs v. Thousand Islands Cent. Sch. Dist.,* 169 F.Supp.3d 320, 332-33 (N.D.N.Y. 2016) (emphasis added). *But see Franchina,* 881 F.3d at 53 (holding that jury may consider evidence referencing plaintiff's sexual orientation for purposes of a sex discrimination claim). Unsurprisingly, many courts have found these distinctions unworkable, admitting that the doctrine is "illogical," *Philpott v. New York,* 252 F.Supp.3d 313, 316 (S.D.N.Y. 2017), and produces "untenable results," *Boutillier,* 221 F.Supp.3d at 270. In the face of this pervasive confusion, we are persuaded that "the line between sex discrimination and sexual orientation discrimination is `difficult to draw' because that line does not exist save as a lingering and faulty judicial construct." *Videckis,* 150 F.Supp.3d at 1159 (quoting *Prowel,* 579 F.3d at 291). We now conclude that sexual orientation discrimination is rooted in gender stereotypes and is thus a subset of sex discrimination.

The government resists this conclusion, insisting that negative views of those attracted to members of the same sex may not be based on views about gender at all, but may be rooted in "moral beliefs about sexual, marital and familial relationships." Gov. Br. at 19. But this argument merely begs the question by assuming that moral beliefs about sexual orientation can be dissociated from beliefs about sex. Because sexual orientation is a function of sex, this is simply impossible. Beliefs about sexual orientation necessarily take sex into consideration and, by extension, moral beliefs about sexual orientation are necessarily predicated, in some degree, on sex. For this reason, it makes no difference that the employer may not believe that its actions are based in sex. In *Manhart,* for example, the employer claimed its policy was based on longevity, not sex, but the Supreme Court concluded that, irrespective of the employer's belief, the longevity metric was predicated on assumptions about sex. 435 U.S. at 712-13, 98 S. Ct. 1370. The same can be said of sexual orientation discrimination.

To be clear, our conclusion that moral beliefs regarding sexual orientation are based on sex does not presuppose that those beliefs are necessarily animated by an invidious or evil motive. For purposes of Title VII, any belief that depends, even in part, on sex, is an impermissible basis for employment decisions. This is true irrespective of whether the belief is grounded in fact, as in *Manhart, id.* at 704-05, 711, 98 S.Ct. 1370, or lacks "a malevolent motive," *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc.,* 499 U.S. 187, 199, 111 S.Ct. 1196, 113 L.Ed.2d 158 (1991). Indeed, in *Johnson Controls,* the Supreme Court concluded that an employer violated Title VII by excluding fertile women from jobs that involved exposure to high levels of lead, which can adversely affect the development of a fetus. 499 U.S. at 190, 200, 111 S.Ct. 1196. As the Court emphasized, "[t]he beneficence of an employer's purpose does not undermine the conclusion that an explicit gender-based policy is sex discrimination" under Title VII. *Id.* at 200, 111 S.Ct. 1196. Here, because sexual orientation is a function of sex, beliefs about sexual orientation, including moral ones, are, in some measure, "because of ... sex."

The government responds that, even if discrimination based on sexual orientation reflects a sex stereotype, it is not barred by *Price Waterhouse* because it treats women no worse than men. Gov. Br. at 19-20. We believe the government has it backwards. *Price Waterhouse,* read in conjunction with *Oncale,* stands for the proposition that employers may not discriminate against

women or men who fail to conform to conventional gender norms. *See* *Oncale,* 523 U.S. at 78, 118 S.Ct. 998 (holding that Title VII "protects men as well as women"); *Price Waterhouse,* 490 U.S. at 251, 109 S.Ct. 1775 ("We are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."). It follows that the employer in *Price Waterhouse* could not have defended itself by claiming that it fired a gender-non-conforming man as well as a gender-non-conforming woman any more than it could persuasively argue that two wrongs make a right. To the contrary, this claim would merely be an admission that the employer has doubly violated Title VII by using gender stereotypes to discriminate against both men and women. By the same token, an employer who discriminates against employees based on assumptions about the gender to which the employees can or should be attracted has engaged in sex-discrimination irrespective of whether the employer uses a double-edged sword that cuts both men and women.

3. Associational Discrimination

The conclusion that sexual orientation discrimination is a subset of sex discrimination is further reinforced by viewing this issue through the lens of associational discrimination. Consistent with the nature of sexual orientation, in most contexts where an employer discriminates based on sexual orientation, the employer's decision is predicated on opposition to romantic association between particular sexes. For example, when an employer fires a gay man based on the belief that men should not be attracted to other men, the employer discriminates based on the employee's own sex. *See Baldwin,* 2015 WL 4397641, at *6.

This Court recognized associational discrimination as a violation of Title VII in *Holcomb v. Iona College,* 521 F.3d 130, 139 (2d Cir. 2008), a case involving allegations of racial discrimination. Holcomb, a white man, alleged that he was fired from his job as the assistant coach of a college basketball team because his employer disapproved of his marriage to a black woman. This Court concluded that Holcomb had stated a viable claim, holding that "an employer may violate Title VII if it takes action against an employee because of the employee's association with a person of another race." *Id.* at 138. Although the Court considered the argument that the alleged discrimination was based on the race of Holcomb's wife rather than his own, it ultimately concluded that "where an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's *own* race." *Id.* at 139; *see also* *Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists,* 401 F.Supp. 1363, 1366 (S.D.N.Y. 1975) ("[I]f [plaintiff] was discharged because, as alleged, the defendant disapproved of a social relationship between a white woman and a black man, the plaintiff's race was as much a factor in the decision to fire her as that of her friend.").

Applying similar reasoning, the Fifth, Sixth, and Eleventh Circuits have reached the same conclusion in racial discrimination cases. *See* *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc.,* 173 F.3d 988, 994-95 (6th Cir. 1999) (holding that plaintiff had alleged discrimination where the employer was "charged with reacting adversely to [plaintiff] because of [his] race in relation to the race of his daughter"); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.,* 156 F.3d 581, 589 (5th Cir. 1998) ("[A] reasonable juror could find that [plaintiff] was discriminated against because of her race (white), if that discrimination was premised on the fact that she, a white person, had a relationship with a black person."), *vacated in part on other*

grounds by Williams v. Wal-Mart Stores, Inc., 182 F.3d 333 (5th Cir. 1999) (en banc); *Parr v. Woodmen of the World Life Ins. Co.,* 791 F.2d 888, 892 (11th Cir. 1986) ("Where a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of *his* race."). Other circuits have indicated that associational discrimination extends beyond race to all of Title VII's protected classes. *See Hively,* 853 F.3d at 349 (majority) (holding that Title VII prohibits associational discrimination on the basis of race as well as color, national origin, religion, and sex); *Barrett v. Whirlpool Corp.,* 556 F.3d 502, 512 (6th Cir. 2009) (stating, in the context of a race discrimination case, that "Title VII protects individuals who, though not members of a *protected class,* are victims of discriminatory animus toward protected third persons with whom the individuals associate" (internal quotation marks omitted) (emphasis added)).[25] We agree and we now hold that the prohibition on associational discrimination applies with equal force to all the classes protected by Title VII, including sex.

This conclusion is consistent with the text of Title VII, which "on its face treats each of the enumerated categories exactly the same" such that "principles ... announce[d]" with respect to sex discrimination "apply with equal force to discrimination based on race, religion, or national origin," and vice versa.[26] *Price Waterhouse,* 490 U.S. at 243 n.9, 109 S.Ct. 1775. It also accords with the Supreme Court's application of theories of discrimination developed in Title VII race discrimination cases to claims involving discrimination based on sex. *See Meritor,* 477 U.S. at 63-67, 106 S.Ct. 2399 (concluding that claims of hostile work environment, a theory of discrimination developed in the context of race, were equally applicable in the context of sex); *see also* William N. Eskridge, Jr., *Title VII's Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections,* 127 Yale L.J. 322, 349 (2017) (explaining that the 1972 amendments to Title VII "repeatedly equated the evils of sex discrimination with those of race discrimination").

As was observed in *Christiansen,* "[p]utting aside romantic associations," the notion that employees should not be discriminated against because of their association with persons of a particular sex "is not controversial." 852 F.3d at 204 (Katzmann, *C.J.,* concurring). If an employer disapproves of close friendships among persons of opposite sexes and fires a female employee because she has male friends, the employee has been discriminated against because of her own sex. "Once we accept this premise, it makes little sense to carve out same-sex [romantic] relationships as an association to which these protections do not apply." *Id.* Applying the reasoning of *Holcomb,* if a male employee married to a man is terminated because his employer disapproves of same-sex marriage, the employee has suffered associational discrimination based on his own sex because "the fact that the employee is a man instead of a woman motivated the employer's discrimination against him." *Baldwin,* 2015 WL 4397641, at *6.

In this scenario, it is no defense that an employer requires both men and women to refrain from same-sex attraction or relationships. In *Holcomb,* for example, the white plaintiff was fired for his marriage to a black woman. *See* 521 F.3d at 138. If the facts of *Holcomb* had also involved a black employee fired for his marriage to a white woman, would we have said that because both the white employee and black employee were fired for their marriages to people of different races, there was no discrimination "because of... race"? Of course not.[27] It is unthinkable that "tak[ing] action against an employee because of the employee's association with a person of

another race," *id.* at 139, would be excused because two employees of different races were both victims of an anti-miscegenation workplace policy. The same is true of discrimination based on sexual orientation.

Although this conclusion can rest on its own merits, it is reinforced by the reasoning of *Loving v. Virginia,* 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967). In *Loving,* the Commonwealth of Virginia argued that anti-miscegenation statutes did not violate the Equal Protection Clause because such statutes applied equally to white and black citizens. *See id.* at 7-8, 87 S.Ct. 1817. The Supreme Court disagreed, holding that "equal application" could not save the statute because it was based "upon distinctions drawn according to race." *Id.* at 10-11, 87 S.Ct. 1817. Constitutional cases like *Loving* "can provide helpful guidance in [the] statutory context" of Title VII. *Ricci v. DeStefano,* 557 U.S. 557, 582, 129 S.Ct. 2658, 174 L.Ed.2d 490 (2009); *see also* Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family,* 115 Harv. L. Rev. 947, 949 (2002) (arguing that, in the constitutional context, "the Supreme Court developed the law of sex discrimination by means of an analogy between sex and race discrimination"). Accordingly, we find that *Loving*'s insight — that policies that distinguish according to protected characteristics cannot be saved by equal application — extends to association based on sex.

Certain *amici* supporting the defendants disagree, arguing that applying *Holcomb* and *Loving* to same-sex relationships is not warranted because anti-miscegenation policies are motivated by racism, while sexual orientation discrimination is not rooted in sexism. Although these *amici* offer no empirical support for this contention, *amici* supporting Zarda cite research suggesting that sexual orientation discrimination has deep misogynistic roots. *See, e.g.,* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination,* 69 N.Y.U. L. Rev. 197 (1994). But the Court need not resolve this dispute because the *amici* supporting defendants identify no cases indicating that the scope of Title VII's protection against sex discrimination is limited to discrimination motivated by what would colloquially be described as sexism. To the contrary, this approach is squarely foreclosed by the Supreme Court's precedents. In *Oncale,* the Court explicitly rejected the argument that Title VII did not protect male employees from sexual harassment by male co-workers, holding that "Title VII's prohibition on discrimination `because of ... sex' protects men as well as women" and extends to instances where the "plaintiff and the defendant ... are of the same sex." 523 U.S. at 78-79, 118 S.Ct. 998. This male-on-male harassment is well-outside the bounds of what is traditionally conceptualized as sexism. Similarly, as we have discussed, in *Manhart* the Court invalidated a pension scheme that required female employees to contribute more than their male counterparts because women generally live longer than men. 435 U.S. at 711, 98 S.Ct. 1370. Again, the Court reached this conclusion notwithstanding the fact that some people might not describe this policy as sexist. By extension, even if sexual orientation discrimination does not evince conventional notions of sexism, this is not a legitimate basis for concluding that it does not constitute discrimination "because of... sex."

The fallback position for those opposing the associational framework is that associational discrimination can be based only on acts — such as Holcomb's act of getting married — whereas sexual orientation is a status. As an initial matter, the Supreme Court has rejected arguments that would treat acts as separate from status in the context of sexual orientation. In *Lawrence v.*

Texas, the state argued that its "sodomy law [did] not discriminate against homosexual persons," but "only against homosexual conduct." 539 U.S. 558, 583, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003) (O'Connor, *J.,* concurring). Justice O'Connor refuted this argument, reasoning that laws that target "homosexual conduct" are "an invitation to subject homosexual persons to discrimination." *Id.* More recently, in a First Amendment case addressing whether a public university could require student organizations to be open to all students, a religious student organization claimed that it should be permitted to exclude anyone who engaged in "unrepentant homosexual conduct," because such individuals were being excluded "on the basis of a conjunction of [their] conduct and [their] belief that the conduct is not wrong," not because of their sexual orientation. *Christian Legal Soc. Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez,* 561 U.S. 661, 672, 689, 130 S.Ct. 2971, 177 L.Ed.2d 838 (2010) (internal quotation marks omitted). Drawing on *Lawrence* and *Bray v. Alexandria Women's Health Clinic,* 506 U.S. 263, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993), a case brought under 42 U.S.C. § 1985(3), the Supreme Court rejected the invitation to treat discrimination based on acts as separate from discrimination based on status. *Christian Legal Soc.,* 561 U.S. at 689, 130 S.Ct. 2971; *see also Bray,* 506 U.S. at 270, 113 S.Ct. 753 (rejecting the act-status distinction by observing that "[a] tax on wearing yarmulkes is a tax on Jews"). Although *amici*'s argument inverts the previous defenses of policies targeting individuals attracted to persons of the same sex by arguing that Title VII's prohibition of associational discrimination protects only acts, not status, their proposed distinction is equally unavailing.

More fundamentally, *amici*'s argument is an inaccurate characterization of associational discrimination. First, the source of the Title VII claim is not the employee's associational act but rather the employer's discrimination, which is motivated by "disapprov[al] of [a particular type of] association." *See Holcomb,* 521 F.3d at 139; *see also* 42 U.S.C. § 2000e-2(m) (asking whether the protected trait was "a motivating factor"). In addition, as it pertains to the employee, what is protected is not the employee's act but rather the employee's protected characteristic, which is a status. *Holcomb,* 521 F.3d at 139; *Univ. of Tex. Sw. Med. Ctr. v. Nassar,* 570 U.S. 338, 133 S.Ct. 2517, 2522, 186 L.Ed.2d 503 (2013) (defining "status-based discrimination," which is "prohibited by Title VII," as "discrimination on the basis of race, color, religion, sex, or national origin"). Accordingly, associational discrimination is not limited to acts; instead, as with all other violations of Title VII, associational discrimination runs afoul of the statute by making the employee's protected characteristic a motivating factor for an adverse employment action. *See* 42 U.S.C. § 2000e-2(m).

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

C. Subsequent Legislative Developments

Although the conclusion that sexual orientation discrimination is a subset of sex discrimination follows naturally from existing Title VII doctrine, the *amici* supporting the defendants place

substantial weight on subsequent legislative developments that they argue militate against interpreting "because of ... sex" to include sexual orientation discrimination.[31] Having carefully considered each of *amici*'s arguments, we find them unpersuasive.

First, the government points to the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991), arguing that this amendment to Title VII ratified judicial decisions construing discrimination "because of ... sex" as excluding sexual orientation discrimination. Among other things, the 1991 amendment expressly "codif[ied] the concepts of `business necessity' and `job related'" as articulated in *Griggs,* 401 U.S. at 429-31, 91 S.Ct. 849, and rejected the Supreme Court's prior decision on that topic in *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989). *See* Civil Rights Act of 1991 §§ 2(2), 3(2), 105 Stat. at 1071. According to the government, this amendment also implicitly ratified the decisions of the four courts of appeals that had, as of 1991, held that Title VII does not bar discrimination based on sexual orientation.

In advancing this argument, the government attempts to analogize the 1991 amendment to the Supreme Court's recent discussion of an amendment to the Fair Housing Act ("FHA"). In *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.,* the Court considered whether disparate-impact claims were cognizable under the FHA by looking to, *inter alia,* a 1988 amendment to the statute. ___ U.S. ___, 135 S.Ct. 2507, 192 L.Ed.2d 514 (2015). The Court found it relevant that "all nine Courts of Appeals to have addressed the question" by 1988 "had concluded [that] the [FHA] encompassed disparate-impact claims." *Id.* at 2519. When concluding that Congress had implicitly ratified these holdings, the Court considered (1) the amendment's legislative history, which confirmed that "Congress was aware of this unanimous precedent," *id.,* and (2) the fact that the precedent was directly relevant to the amendment, which "included three exemptions from liability that assume the existence of disparate-impact claims," *id.* at 2520.

The statutory history of Title VII is markedly different. When we look at the 1991 amendment, we see no indication in the legislative history that Congress was aware of the circuit precedents identified by the government and, turning to the substance of the amendment, we have no reason to believe that the new provisions it enacted were in any way premised on or made assumptions about whether sexual orientation was protected by Title VII. It is also noteworthy that, when the statute was amended in 1991, only three of the thirteen courts of appeals had considered whether Title VII prohibited sexual orientation discrimination.[32] *See Williamson,* 876 F.2d 69; *DeSantis v. PT&T Co.,* 608 F.2d 327 (9th Cir. 1979); *Blum,* 597 F.2d 936. Mindful of this important context, this is not an instance where we can conclude that Congress was aware of, much less relied upon, the handful of Title VII cases discussing sexual orientation. Indeed, the inference suggested by the government is particularly suspect given that the text of the 1991 amendment emphasized that it was "respond[ing] to Supreme Court decisions by *expanding* the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." Civil Rights Act of 1991 §§ 2(2), 3(2), 105 Stat. at 1071 (emphasis added). For these reasons, we do not consider the 1991 amendment to have ratified the interpretation of Title VII as excluding sexual orientation discrimination.

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

This theory of ratification by silence is in direct tension with the Supreme Court's admonition that "subsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress," particularly when "it concerns, as it does here, a proposal that does not become law." *Pension Benefit Guar. Corp. v. LTV Corp.,* 496 U.S. 633, 650, 110 S.Ct. 2668, 110 L.Ed.2d 579 (1990) (citations and internal quotation marks omitted). This is because "[i]t is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of [a particular] statutory interpretation." *Patterson v. McLean Credit Union,* 491 (U.S. 164, 175 n.1, 109 S.Ct. 2363, 105 L.Ed.2d 132 1989) (internal quotation marks omitted). After all, "[t]here are many reasons Congress might not act on a decision ..., and most of them have nothing at all to do with Congress' desire to preserve the decision." *Michigan v. Bay Mills Indian Cmty.,* ___ U.S. ___, 134 S.Ct. 2024, 2052, 188 L.Ed.2d 1071 (2014) (Thomas, *J.,* dissenting). For example, Congress may be unaware of or indifferent to the status quo, or it may be unable "to agree upon how to alter the status quo." *Johnson v. Transp. Agency,* 480 U.S. 616, 672, 107 S.Ct. 1442, 94 L.Ed.2d 615 (1987) (Scalia, *J.,* dissenting). These concerns ring true here. We do not know why Congress did not act and we are thus unable to choose among the various inferences that could be drawn from Congress's inaction on the bills identified by the government. *See LTV Corp.*, 496 U.S. at 659, 110 S.Ct. 2668 ("Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." (internal quotation marks omitted)). Accordingly, we decline to assign congressional silence a meaning it will not bear.

Drawing on the dissent in *Hively,* the government also argues that Congress considers sexual orientation discrimination to be distinct from sex discrimination because it has expressly prohibited sexual orientation discrimination in certain statutes but not Title VII. *See* 853 F.3d at 363-64 (Sykes, *J.,* dissenting). While it is true that Congress has sometimes used the terms "sex" and "sexual orientation" separately, this observation is entitled to minimal weight in the context of Title VII.

The presumptions that terms are used consistently and that differences in terminology denote differences in meaning have the greatest force when the terms are used in "the same act." *See Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574, 127 S.Ct. 1423, 167 L.Ed.2d 295 (2007). By contrast, when drafting separate statutes, Congress is far less likely to use terms consistently, *see* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside — An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I,* 65 Stan. L. Rev. 901, 936 (2013), and these presumptions are entitled to less force where, as here, the government points to terms used in different statutes passed by different Congresses in different decades. *See* Violence Against Women Reauthorization Act of 2013, Pub L. No. 113-4, § 3(b)(4), 127 Stat. 54, 61 (2013); Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 5306(a)(3), 124 Stat. 119, 626 (2010); Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, §§ 4704(a)(1)(C), § 4704(a), 123 Stat. 2835, 2837, 2839 (2009); Higher

Education Amendments of 1998, Pub. L. No. 105-244, § 486(e)(1)(A), 112 Stat. 1581, 1743 (1998).

Moreover, insofar as the government argues that mention of "sexual orientation" elsewhere in the U.S. Code is evidence that "because of ... sex" should not be interpreted to include "sexual orientation," our race discrimination jurisprudence demonstrates that this is not dispositive. We have held that Title VII's prohibition on race discrimination encompasses discrimination on the basis of ethnicity, *see* *Vill. of Freeport v. Barrella,* 814 F.3d 594, 607 (2d Cir. 2016), notwithstanding the fact that other federal statutes now enumerate race and ethnicity separately, *see, e.g.,* 20 U.S.C. § 1092(f)(1)(F)(ii); 42 U.S.C. § 294e-1(b)(2). The same can be said of sex and sexual orientation because discrimination based on the former encompasses the latter.

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

. . . . . .

Dennis Jacobs, Circuit Judge, concurring:

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

I

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

First: this Circuit has already recognized associational discrimination as a Title VII violation. In Holcomb v. Iona Coll., 521 F.3d 130 (2d Cir. 2008), we considered a claim of discrimination under Title VII by a white man who alleged that he was fired because of his marriage to a black woman. We held that "an employer may violate Title VII if it takes action against an employee because of the employee's association with a person of another race ... The reason is simple: where an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's *own* race." Id. at 139 (emphasis in original).

Second: the analogy to same-sex relationships is valid because Title VII "on its face treats each of the enumerated categories exactly the same"; thus principles announced in regard to sex discrimination "apply with equal force to discrimination based on race, religion, or national origin." Price Waterhouse v. Hopkins, 490 U.S. 228, 243 n.9, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (plurality opinion). And, presumably, vice versa.

Third: There is no reason I can see why associational discrimination based on sex would not encompass association between persons of the same sex. In Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998), a case in which a man alleged same-sex harassment, the Supreme Court stated that Title VII prohibits "`discriminat[ion]... because of ... sex'" and that Title VII "protects men as well as women." Id. at 79-80, 118 S.Ct. 998.

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

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

This outcome is easy to analogize to Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967). While *Loving* was an Equal Protection challenge to Virginia's miscegenation law, the law was held unconstitutional because it impermissibly drew distinctions according to race. Id. at 10-11, 87 S.Ct. 1817. In the context of a person consorting with a person of the same sex, the distinction is similarly drawn according to sex, and is therefore unlawful under Title VII.

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

Mr. Mortara also argues that discrimination based on homosexual acts and relationships is analytically distinct from discrimination against homosexuals, who have a proclivity on which they may or may not act. Academics may seek to know whether discrimination is illegal if based on same-sex attraction itself: they have jurisdiction over interesting questions, and we do not. But the distinction is not decisive. See Christian Legal Soc. Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez, 561 U.S. 661, 689, 130 S.Ct. 2971, 177 L.Ed.2d 838 (2010) ("Our decisions have declined to distinguish between status and conduct in" the context of sexual

orientation.). In any event, the distinction between act and attraction does not arise in this case because Mr. Zarda's termination was sparked by his avowal of a same-sex relationship.

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

II

The opinion of the Court characterizes its definitional analysis as "the most natural reading of Title VII." Maj. Op. at 112. Not really. "Sex," which is used in series with "race" and "religion," is one of the words least likely to fluctuate in meaning. I do not think I am breaking new ground in saying that the word "sex" as a personal characteristic refers to the male and female of the species. Nor can there be doubt that, when Title VII was drafted in 1964, "sex" drew the distinction between men and women. "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." Perrin v. United States, 444 U.S. 37, 42, 100 S.Ct. 311, 62 L.Ed.2d 199 (1979).

In the opinion of the Court, the word "sex" undergoes modification and expansion. Thus the opinion reasons: "[l]ogically, because sexual orientation is a function of sex and sex is a protected characteristic under Title VII, it follows that sexual orientation is also protected." Maj. Op. at 113. It is undeniable that sexual orientation is a "function of sex" in the (unhelpful) sense that it cannot be defined or understood without reference to sex. But surely that is because it has to do with sex — as so many things do. *Everything* that cannot be understood without reference to sex does not amount to sex itself as a term in Title VII. So it seems to me that all of these arguments are circular as well as unnecessary.

III

The opinion of the Court relies in part on a comparator test, asking whether the employee would have been treated differently "but for" the employee's sex. But the comparator test is an evidentiary technique, not a tool for textual interpretation. "[T]he ultimate issue" for a court to decide in a Title VII case "is the reason for the individual plaintiff's treatment, not the relative treatment of different groups within the workplace." Back v. Hastings On Hudson Union Free Sch. Dist., 365 F.3d 107, 121 (2d Cir. 2004). The opinion of the Court builds on the concept of homosexuality as a subset of sex, and this analysis thus merges in a fuzzy way with the definitional analysis. But when the comparator test is used for textual interpretation, it carries in train ramifications that are sweeping and unpredictable: think fitness tests for different characteristics of men and women, not to mention restrooms.

IV

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

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

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

If this case did involve discrimination on the basis of sexual stereotype, it would have been remanded to the District Court on that basis, as was done in Christiansen v. Omnicom Grp., Inc., 852 F.3d 195 (2d Cir. 2017) (per curiam). The reason it could not be remanded on that basis is that the record does not associate Mr. Zarda with any sexual stereotyping. The case arises from his verbal disclosure of his sexual orientation during his employment as a skydiving instructor, and that is virtually all we know about him. It should not be surprising that a person of any particular sexual orientation would earn a living jumping out of airplanes; but Mr. Zarda cannot fairly be described as evoking somebody's sexual stereotype of homosexual men. So this case does not present the (settled) issue of sexual stereotype, which I think is the very reason we had to go in banc in order to decide this case. As was made clear as recently as March 2017, "being gay, lesbian, or bisexual, standing alone, does not constitute nonconformity with a gender stereotype that can give rise to a cognizable gender stereotyping claim." Id. at 201.

José A. Cabranes, Circuit Judge, concurring in the judgment:

I concur only in the judgment of the Court. It will take the courts years to sort out how each of the theories presented by the majority applies to other Title VII protected classes: "race, color, religion, ... [and] national origin." 42 U.S.C. § 2000e-2(a)(1).

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

That should be the end of the analysis.[1]

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

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

the possible consequences of being mistaken in one unnecessary aspect or another of our decision.

In my view, the law of this Circuit governing what is referred to in the majority opinion as "associational discrimination" — discrimination against a person because of his or her association with another — is unsettled. What was embraced by this Court in *Simonton v. Runyon,* 232 F.3d 33 (2d Cir. 2000) (holding, by implication, that associational discrimination on the basis of sex is not cognizable under Title VII), seems to have both been overtaken by, and to be inconsistent with, our later panel decision in *Holcomb v. Iona College,* 521 F.3d 130 (2d Cir. 2008) (holding directly that associational discrimination on account of race is unlawful under Title VII). Choosing between the two approaches, as I think we must, I agree with the majority that *Holcomb* is right and that *Simonton* is therefore wrong. It is principally on that basis that I concur in the judgment of the Court.

My declination to join other parts of the majority opinion does not signal my disagreement with them. Rather, inasmuch as, in my view, this appeal can be decided on the simpler and less fraught theory of associational discrimination, I think it best to stop there without then considering other possible bases for our judgment.

Raymond J. Lohier, Jr., Circuit Judge, concurring:

I agree with the majority opinion that there is no reasonable way to disentangle sex from sexual orientation in interpreting the plain meaning of the words "because of... sex." The first term clearly subsumes the second, just as race subsumes ethnicity. Oral Arg. Tr. at 53:5-6 (Government conceding that "ethnicity can be viewed as a subset of race"). From this central holding, the majority opinion explores the comparative approach, the stereotyping rationale, and the associational discrimination rationale to help determine "when a trait other than sex is ... a proxy for (or function of) sex." Maj. Op. at 116. But in my view, these rationales merely reflect nonexclusive "evidentiary technique[s]," Jacobs, J., Concurring Op. at 134, frameworks, or ways to determine whether sex is a motivating factor in a given case, rather than interpretive tools that apply necessarily across all Title VII cases. Zarda himself has described these three rationales as "evidentiary theories" or "routes." Oral Arg. Tr. at 4:17-18. On this understanding, I join the majority opinion as to Parts II.A and II.B.1.a, which reflect the textualist's approach, and join the remaining parts of the opinion only insofar as they can be said to apply to Zarda's particular case.

A word about the dissents. My dissenting colleagues focus on what they variously describe as the "ordinary, contemporary, common meaning" of the words "because of ... sex," Lynch, J., Dissenting Op. at 144 n.8; Livingston, J., Dissenting Op. at 167, or the "public meaning of [those] words adopted by Congress in light of the social problem it was addressing when it chose those words," Lynch, J., Dissenting Op. at 162. There are at least two problems with this position. First, as the majority opinion points out, cabining the words in this way makes little or no sense of *Oncale* or, for that matter, *Price Waterhouse*. See Maj. Op. at 113-14. Second, their hunt for the "contemporary" "public" meaning of the statute in this case seems to me little more than a roundabout search for legislative history. Judge Lynch's laudable call (either as a way to divine congressional intent or as an interpretive check on the plain text approach) to consider what the legislature would have decided if the issue had occurred to the legislators at the time of

enactment is, unfortunately, no longer an interpretive option of first resort. Time and time again, the Supreme Court has told us that the cart of legislative history is pulled by the plain text, not the other way around. The text here pulls in one direction, namely, that sex includes sexual orientation.

Gerard E. Lynch, Circuit Judge, with whom Judge Livingston joins as to Parts I, II, and III, dissenting:

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

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

I

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

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

It is perhaps difficult for people not then alive to understand that before the Civil Rights Act of 1964 became law, an employer could post a sign saying "Help Wanted; No Negroes Need Apply" without violating any federal law — and many employers did. Even the original House bill, introduced with the support of President Kennedy's Administration in 1963, did not prohibit racial discrimination by private employers. Language prohibiting employment discrimination by private employers on the grounds of "race, color, religion or national origin" was added later by a House subcommittee. *See* Francis J. Vaas, *Title VII: Legislative History,* 7 B.C. Indus. & Comm. L. Rev. 431, 434-35 (1966); Chuck Henson, *Title VII Works — That's Why We Don't Like It,* 2 U. Miami Race & Soc. Just. L. Rev. 41, 62-63, 64 n.103 (2012).

Movement on the bill was slow. It was only after the March on Washington in the summer of 1963, the assassination of President Kennedy in November of that year, and President Johnson's strong support for a civil rights bill that prohibited racial discrimination in employment, that the legislation made progress in Congress. Todd. S. Purdum, *An Idea Whose Time Has Come* 111-13, 151 (2014). But the private employment discrimination provision, like other sections of the

bill prohibiting racial discrimination in public accommodations and federally funded programs, was openly and bitterly opposed by a large contingent of southern members of Congress. *See* Louis Menand, *The Sex Amendment,* The New Yorker (July 21, 2014), http://www.newyorker.com/magazine/2014/07/21/sex-amendment. Its passage was by no means assured when the floor debates in the House began.

From the moment President Kennedy proposed the Civil Rights Act in 1963, women's rights groups, with the support of some members of Congress, had urged that sex discrimination be included as a target of the legislation. Purdum, *supra,* at 196. The movements in the United States for gender and racial equality have not always marched in tandem — although there was some overlap between abolitionists and supporters of women's suffrage, suffragists often relied on the racially offensive argument that it was outrageous that white women could not vote when black men could.[1] But by the 1960s, many feminist advocates consciously adopted arguments parallel to those of the civil rights movement, and there was growing recognition that the two causes were linked in fundamental ways.[2]

Women's rights groups had been arguing for laws prohibiting sex discrimination since at least World War II, and had been gaining recognition for the agenda of the women's rights movement in other arenas. In addition to supporting (at least rhetorically) civil rights for African-Americans, President Kennedy had taken tentative steps towards support of women's rights as well. In December 1961, he created the President's Commission on the Status of Women, chaired until her death by Eleanor Roosevelt. Exec. Order No. 10980, 26 Fed. Reg. 12,059 (Dec. 14, 1961). Among other goals, the Commission was charged with developing recommendations for "overcoming discriminations in ... employment on the basis of sex," and suggesting "services which will enable women to continue their role []as wives and mothers while making a maximum contribution to the world around them." *Id.*

The Commission's report highlighted the increasing role of women in the workplace, noting (in an era when the primacy of women's role in child-rearing and home-making was taken for granted) that even women with children generally spent no more than a decade or so of their lives engaged in full-time child care, allowing a significant portion of women's lives to be dedicated to education and employment. *American Women: Report of The President's Commission on the Status of Women* 6-7 (1963). Accordingly, the Commission advocated a variety of steps to improve women's economic position. *Id.* at 6-7, 10. While those recommendations did not include federal legislation prohibiting employment discrimination on the basis of sex, they did include a commitment to equal opportunity in employment by federal contractors and proposed such equality as a goal for private employers — as well as proposing other innovations, such as paid maternity leave and universal high-quality public child care, that have yet to become the law of the land. *Id.* at 20, 30, 43.

Nevertheless, the notion that women should be treated equally at work remained controversial. By 1964, only two states, Hawaii and Wisconsin, prohibited sex discrimination in employment. Purdum, *supra,* at 196. Although decades had passed since the Supreme Court announced in *Muller v. Oregon,* 208 U.S. 412, 28 S.Ct. 324, 52 L.Ed. 551 (1908), that laws limiting the hours that women could work did not violate the Fourteenth Amendment, but rather were an appropriate accommodation for women's fragile constitutions and more pressing maternal

obligations, *id.* at 420-21, 28 S.Ct. 324, state laws "protecting" women from the rigors of the workplace remained commonplace. Purdum, *supra,* at 196; *see also* Hoyt v. Florida, 368 U.S. 57, 62, 82 S.Ct. 159, 7 L.Ed.2d 118 (1961) (upholding a law requiring women, specifically, to opt in to jury service, in part because "woman is still regarded as the center of home and family life").

Accordingly, when Representative Howard W. Smith of Virginia, a die-hard opponent of integration and federal legislation to enforce civil rights for African-Americans, proposed that "sex" be added to the prohibited grounds of discrimination in the Civil Rights Act, there was reason to suspect that his amendment was an intentional effort to render the Act so divisive and controversial that it would be impossible to pass. *See, e.g.,* Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984) (suggesting that the "sex amendment was the gambit of a congressman seeking to scuttle adoption of the Civil Rights Act"); Comment, *Sex Discrimination in Employment,* 35 Fordham L. Rev. 503, 504 n.16 (1967). That might not have been the case, however. Like those early suffragettes who were ambivalent about, or hostile to, racial equality, Smith also had a prior history of support for (presumably white) women's equality. For example, he had been a longstanding supporter of a constitutional amendment guaranteeing equal rights to women. Purdum, *supra,* at 196; *see also* Gillian Thomas, *Because of Sex* 2 (2016).

Whatever Smith's subjective motivations for proposing it, the amendment was adamantly opposed by many northern liberals on the ground that it would undermine support for the Act as a whole. Purdum, *supra,* at 197; Menand, *supra.* Indeed, the *New York Times* ridiculed the amendment, suggesting that, among other alleged absurdities, it would require Radio City Music Hall to hire male Rockettes, and concluding that "it would have been better if Congress had just abolished sex itself." Editorial, *De-Sexing the Job Market,* N.Y. Times, August 21, 1965.

But despite its contested origins, the adoption of the amendment prohibiting sex discrimination was not an accident or a stunt. Once the amendment was on the floor, it was aggressively championed by a coalition comprising most of the (few) women members of the House. Purdum, *supra,* at 197. Its subsequent adoption was consistent with a long history of women's rights advocacy that had increasingly been gaining mainstream recognition and acceptance.

Discrimination against gay women and men, by contrast, was not on the table for public debate. In those dark, pre-Stonewall days, same-sex sexual relations were criminalized in nearly all states. Only three years before the passage of Title VII, Illinois, under the influence of the American Law Institute's proposed Model Penal Code, had become the first state to repeal laws prohibiting private consensual adult relations between members of the same sex. Salvatore J. Licata, *The Homosexual Rights Movement in the United States: A Traditionally Overlooked Area of American History,* 6 J. Homosexuality 161, 171 (1981).

In addition to criminalization, gay men and women were stigmatized as suffering from mental illness. In 1964, both the American Psychiatric Association and the American Psychological Association regrettably classified homosexuality as a mental illness or disorder. As the Supreme Court recently explained, "[f]or much of the 20th century ... homosexuality was treated as an illness. When the American Psychiatric Association published the first Diagnostic and Statistical Manual of Mental Disorders in 1952, homosexuality was classified as a mental disorder, a

position adhered to until 1973." *Obergefell v. Hodges,* ___ U.S. ___, 135 S.Ct. 2584, 2596, 192 L.Ed.2d 609 (2015), citing Position Statement on Homosexuality and Civil Rights, 1973, in 131 Am. J. Psychiatry 497 (1974). It was not until two years later, in 1975, that the American Psychological Association followed suit and "adopted the same position [as the American Psychiatric Association], urging all mental health professionals to work to dispel the stigma of mental illness long associated with homosexual orientation." Brief of Am. Psychological Ass'n as *Amicus Curiae, Boy Scouts of Am. v. Dale,* 530 U.S. 640, 120 S.Ct. 2446, 2454, 147 L.Ed.2d 554 (2000), citing Am. Psychological Ass'n, *Minutes of the Annual Meeting of the Council of Representatives,* in 30 Am. Psychologist 620, 633 (1975). Because gay identity was viewed as a mental illness and was, in effect, defined by participation in a criminal act, the employment situation for openly gay Americans was bleak.

Consider the rules regarding employment by the federal government. Starting in the 1940s and continuing through the 1960s, thanks to a series of executive orders repealing long-standing discriminatory policies, federal employment opportunities for African-Americans began to open up significantly. *See, e.g.,* Exec. Order No. 9980, 13 Fed. Reg. 4,311 (July 26, 1948) (prohibiting racial discrimination in civilian agencies); Exec. Order No. 10308, 16 Fed. Reg. 12,303 (December 3, 1951) (creating the Committee on Government Compliance to enforce the prohibition against racial discrimination by firms contracting with the government); Exec. Order No. 11114, 28 Fed. Reg. 6,485 (June 22, 1963) (extending prohibition against discrimination to all federally-funded construction projects). In sharp contrast, in 1953 President Eisenhower signed an executive order *excluding* persons guilty of "sexual perversion" from government employment. Exec. Order No. 10450, 18 Fed. Reg. 2,489 (April 27, 1953); *see also* Licata, *supra,* at 167-68. During the same period, gay federal employees, or employees even suspected of being gay, were systematically hounded out of the service as "security risks" during Cold-War witchhunts. Licata, *supra,* at 167-68.

Civil rights and civil liberties organizations were largely silent. Licata, *supra,* at 168. In an influential book about the political plight of gay people, Edward Sagarin, writing under the pseudonym Donald Webster Cory, sharply criticized the silence of the bar. Donald Webster Cory, *The Homosexual in America: A Subjective Approach* (1951). For instance, he described the response to the abusive tactics used against members of the military discharged for homosexual conduct as follows: "And who raises a voice in protest against such discrimination? No one. Where was the American Civil Liberties Union? Nowhere." *Id.* at 45. To the extent that civil rights organizations did begin to engage with gay rights during the early 1960s, they did so through the lens of sexual liberty, rather than equality, grouping the prohibition of laws against same-sex relations with prohibitions of birth control, abortion, and adultery. Even by the mid-1960s, the ACLU was identified by *Newsweek* as the only group "apart from the homophile organizations" that opposed laws criminalizing homosexual acts. Leigh Ann Wheeler, *How Sex Became a Civil Liberty* 155 (2013).

Given the criminalization of same-sex relationships and arbitrary and abusive police harassment of gay and lesbian citizens, nascent gay rights organizations had more urgent concerns than private employment discrimination. As late as 1968, four years *after* the passage of Title VII, the North American Conference of Homophile Organizations proposed a "Homosexual Bill of Rights" that demanded five fundamental rights: that private consensual sex between adults not be

a crime; that solicitation of sex acts not be prosecuted except on a complaint by someone other than an undercover officer; that sexual orientation not be a factor in granting security clearances, visas, or citizenship; that homosexuality not be a barrier to service in the military; and that sexual orientation not affect eligibility for employment *with federal, state, or local governments.* Licata, *supra,* at 177 (emphasis added). Those proposals, which pointedly did not include a ban on private sector employment discrimination against gays, evidently had little traction with many Americans at the time. The first state to prohibit employment discrimination on the basis of sexual orientation even in the public sector was Pennsylvania, by executive order of the governor, in 1975 — more than a decade after the Civil Rights Act had become law. James W. Button et al., *The Politics of Gay Rights at the Local and State Level,* in *The Politics of Gay Rights* 269, 272 (Craig A. Rimmerman et al. eds., 2000). It was not until 1982 that Wisconsin became the first state to ban both public and private sector discrimination based on sexual orientation. *Id.* at 273; *see also* Linda A. Mooney et al., *Understanding Social Problems* 467 (6th ed. 2009). Massachusetts followed in 1989. Button et al., *supra,* at 273. Notably, as discussed more fully below, these states did so by explicit legislative action adding "sexual orientation" to pre-existing anti-discrimination laws that already prohibited discrimination based on sex; they did not purport to "recognize" that sexual orientation discrimination was merely an aspect of already-prohibited discrimination based on sex.

In light of that history, it is perhaps needless to say that there was no discussion of sexual orientation discrimination in the debates on Title VII of the Civil Rights Act. If some sexist legislators considered the inclusion of sex discrimination in the bill something of a joke, or perhaps a poison pill to make civil rights legislation even more controversial, evidently no one thought that adding sexual orientation to the list of forbidden categories was worth using even in that way. Nor did those who opposed the sex provision in Title VII include the possibility that prohibiting sex discrimination would also prevent sexual orientation discrimination in their parade of supposed horribles. When Representative Emanuel Celler of New York, floor manager for the Civil Rights Bill in the House, rose to oppose Representative Smith's proposed amendment, he expressed concern that it would lead to such supposed travesties as the elimination of "protective" employment laws regulating working conditions for women, drafting women for military service, and revisions of rape and alimony laws. *See* 110 Cong. Rec. 2,577 (1964). He did not reference the prohibition of sexual orientation discrimination. The idea was nowhere on the horizon.

II

I do not cite this sorry history of opposition to equality for African-Americans, women, and gay women and men, and of the biases prevailing a half-century ago, to argue that the private intentions and motivations of the members of Congress can trump the plain language or clear implications of a legislative enactment. (Still less, of course, do I endorse the views of those who opposed racial equality, ridiculed women's rights, and persecuted people for their sexual orientation.) Although Chief Judge Katzmann has observed elsewhere that judicial warnings about relying on legislative history as an interpretive aid have been overstated, *see* Robert A. Katzmann, *Judging Statutes* 35-39 (2014), I agree with him, and with my other colleagues in the majority, that the implications of legislation flatly prohibiting sex discrimination in employment, duly enacted by Congress and signed by the President, cannot be cabined by citing the private

prejudices or blind spots of those members of Congress who voted for it. The above history makes it obvious to me, however, that the majority misconceives the fundamental *public* meaning of the language of the Civil Rights Act. The problem sought to be remedied by adding "sex" to the prohibited bases of employment discrimination was the pervasive discrimination against women in the employment market, and the chosen remedy was to prohibit discrimination that adversely affected members of one sex or the other. By prohibiting discrimination against people based on their sex, it did not, and does not, prohibit discrimination against people because of their sexual orientation.

A

To start, the history of the overlapping movements for equality for blacks, women, and gays, and the differing pace of their progress, as outlined in the previous section, tells us something important about what the language of Title VII must have meant to any reasonable member of Congress, and indeed to any literate American, when it was passed — what Judge Sykes has called the "original *public* meaning" of the statute. *Hively v. Ivy Tech Cmty. Coll. of Ind.,* 853 F.3d 339, 362 (7th Cir. 2017) (*en banc*) (Sykes, *J.,* dissenting) (emphasis added). That history tells us a great deal about why the legislators who constructed and voted for the Act used the specific language that they did.

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

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

If the specifically *legislative* history of the "sex amendment" is relatively sparse in light of its adoption as a floor amendment, *see* Maj. Op. at 128 n.31, the broader *political and social* history

of the prohibition of sex discrimination in employment is plain for all to read. The history of the 20th century is, among other things, a history of increasing equality of men and women. Recent events remind us of how spotty that equality remains, and how inequality persists even with respect to the basic right of women to physical security and control of their own bodies. But the trend is clear, and it is particularly emphatic in the workplace.

That history makes it equally clear that the prohibition of discrimination "based on sex" was intended to secure the rights of women to equal protection in employment. Put simply, the addition of "sex" to a bill to prohibit employers from "discriminat[ing] against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion,... or national origin," 42 U.S.C. § 2000e-2(a)(1), was intended to eliminate workplace inequalities that held women back from advancing in the economy, just as the original bill aimed to protect African-Americans and other racial, national, and religious minorities from similar discrimination. The language of the Act itself would have been so understood not only by members of Congress, but by any politically engaged citizen deciding whether to urge his or her representatives to vote for it. As Judge Sykes noted in her dissent in the Seventh Circuit's encounter with the same issue we face today, citing a 1960s dictionary, "In common, ordinary usage in 1964 — and now, for that matter — the word `sex' means biologically *male* or *female*; it does not also refer to sexual orientation." *Hively,* 853 F.3d at 362-63 (Sykes, *J.,* dissenting) (emphasis in original). On the verge of the adoption of historic legislation to address bigotry against African-Americans on the basis of race, women in effect stood up and said "us, too," and Congress agreed.

The majority cites judicial interpretations of Title VII as prohibiting sexual harassment, and allowing hostile work environment claims, in an effort to argue that the expansion they are making simply follows in this line. Maj. Op. at 114, 115. But the fact that a prohibition on discrimination against members of one sex may have unanticipated consequences when courts are asked to consider carefully whether a given practice does, in fact, discriminate against members of one sex in the workplace does not support extending Title VII by judicial construction to protect an entirely different category of people. It is true that what *counts* as discrimination against members of one sex may not have been fully fleshed out in the minds of supporters of the legislation, but it is easy enough to illustrate how the language of a provision enacted to accomplish the goal of equal treatment of the sexes compels results that may not have been specifically intended by its enacters.

To begin with, just as laws prohibiting racial discrimination, adopted principally to address some of the festering national wrongs done to African-Americans, protect members of *all* races, including then-majority white European-Americans, the prohibition of sex discrimination by its plain language protects men as well as women, whether or not anyone who voted on the bill specifically considered whether and under what circumstances men could be victims of gender-based discrimination. That is not an expansion of Title VII, but is a conclusion mandated by its text: Congress deliberately chose to protect women and minorities not by prohibiting discrimination against "African-Americans" or "Jews" or "women," but by neutrally prohibiting discrimination against any individual "based on race, ... religion, [or] sex." 42 U.S.C. § 2000e-2(a)(1). That choice of words is clearly intentional, and represents a commitment to a principle of equal treatment of races, religions, and sexes that is important, even if the primary intended

beneficiaries of the legislation — those most in need of its protection — are members of the races, religions, and gender that have suffered the most from *in*equality in the past.

Other interpretations of the statute that may not have occurred to members of the overwhelmingly male Congress that adopted it seem equally straightforward. Perhaps it did not occur to some of those male members of Congress that sexual harassment of women in the workplace was a form of employment discrimination, or that Title VII was inconsistent with a "Mad Men" culture in the office. But although a few judges were slow to recognize this point, *see, e.g.,* 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), as soon as the issue began to arise in litigation, courts quickly recognized that for an employer to expect members of one sex to provide sexual favors as a condition of employment from which members of the other sex are exempt, or to view the only value of female employees as stemming from their sexualization, constitutes a fundamental type of discrimination in conditions of employment based on sex. *See, e.g.,* Barnes v. Costle, 561 F.2d at 989 (finding that retaliation by plaintiff's supervisor when she resisted his sexual advances "was plainly based on [plaintiff's] gender").

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

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

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

Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986) (internal quotation marks, brackets and emphasis omitted).

But such interpretations of employment "discrimination against any individual ... based on sex" do not say anything about whether discrimination based on *other* social categories is covered by the statute. Just as Congress adopted broader language than discrimination "against women," it adopted narrower language than "discrimination based on personal characteristics or

classifications unrelated to job performance." Title VII does not adopt a broad principle of equal protection in the workplace; rather, its language singles out for prohibition discrimination based on particular categories and classifications that have been used to perpetuate injustice — but not all such categories and classifications. That is not a matter of abstract justice, but of political reality. Those groups that had succeeded by 1964 in persuading a majority of the members of Congress that unfair treatment of them ought to be prohibited were included; those who had not yet achieved that political objective were not.

Thus, if Representative Smith's amendment had been defeated, Title VII would still be a landmark prohibition of the kinds of race-, religion-, and national origin-based employment discrimination that had historically disadvantaged blacks, Jews, Catholics, or Mexican-Americans. But it would not have protected women, and a subsequent shift in popular support for such protection would not have changed that fact, without legislative action. Similarly, the statute did not protect those discriminated against, similarly unfairly, on the basis of age or disability; that required later legislation. *See, e.g.,* Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.*; Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.*

None of this, of course, is remotely to suggest that employment discrimination on the basis of sexual orientation is somehow not invidious and wrong. But not everything that is offensive or immoral or economically inefficient is illegal, and if the view that a practice is offensive or immoral or economically inefficient does not command sufficiently broad and deep political support to produce legislation prohibiting it, that practice will remain legal. In the context of private-sector employment, racial discrimination was just as indefensible before 1964 as it is today, but it was not illegal. Discrimination against women, as President Kennedy's commission understood, was just as unfair, and just as harmful to our economy, before Title VII prohibited it as it is now, but if Congress had not adopted Representative Smith's amendment, it would have remained legal. Employment discrimination against older workers, and against qualified individuals with disabilities, imposed unfair burdens on those categories of individuals in 1964, yet it remained legal after the Civil Rights Act of 1964 became law, because Congress did not at that time choose to prohibit such discrimination. Congress is permitted to choose what types of social problems to attack and by which means. The majority says that "we have stated that `Title VII should be interpreted broadly to achieve equal employment opportunity,'" Maj. Op. at 111, quoting *Huntington Branch, N.A.A.C.P. v. Town of Huntington,* 844 F.2d 926, 935 (2d Cir. 1988), but of course that dictum[13] appeared in the context of a discussion of racial discrimination. Congress, in fact, did not legislate in 1964 "broadly to achieve equal employment opportunity" for *all* Americans, but instead opted to prohibit only certain categories of unfair discrimination. It did not then prohibit, and alas has not since prohibited, discrimination based on sexual orientation.

B

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

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

Hively, 853 F.3d at 363 (Sykes, *J.*, dissenting) (footnote omitted).

Of course, the majority does not really dispute this common-sense proposition. It does not say that "sex discrimination" in the ordinary meaning of the term is literally the same thing as "sexual orientation discrimination." Rather, the majority argues that discrimination based on sex encompasses discrimination against gay people because discrimination based on sex encompasses any distinction between the sexes that an employer might make for any reason. The argument essentially reads "discriminate" to mean pretty much the same thing as "distinguish." And indeed, there are recognized English uses of "discriminate," particularly when followed with "between" or "from," that imply nothing invidious, but merely mean "to perceive, observe or note [a] difference," or "[t]o make or recognize a distinction." The Oxford English Dictionary Online, http://www.oed.com (search for "Discriminate," verb, definitions 2a and 2b). For example, a person with perfect pitch is capable of discriminating a C from a C-sharp. But in the language of civil rights, a different and stronger meaning applies, that references *invidious* distinctions: "To treat a person or group in an unjust or prejudicial manner, esp[ecially] on the grounds of race, gender, sexual orientation, etc.; frequently with *against.*" *Id.* (definition 4).

And that is indeed the sense in which Title VII uses the word: the statute prohibits such practices as "fail[ing] or refus[ing] to hire or to discharge" persons on account of their race or sex or other protected characteristic, or "otherwise to discriminate *against* any individual" with respect to employment terms. 42 U.S.C. § 2000e-2(a)(1) (emphasis added). In other words, it is an oversimplification to treat the statute as prohibiting any distinction *between* men and women in the workplace, still less any distinction that so much as requires the employer to *know* an employee's sex in order to be applied, *cf.* Maj. Op. at 112-13; the law prohibits discriminating *against* members of one sex or the other in the workplace.

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

however, in either case, are those that operate to the disadvantage of (principally) the disfavored race or sex. That is the social problem that the statute aimed to correct.

Opponents of Title VII, and later of the Equal Rights Amendment ("ERA"), were fond of conjuring what they thought of as unthinkable or absurd consequences of gender equality. Some of those proved not so unthinkable or absurd at all. Workplace "protective" legislation that applied only to women soon fell by the wayside, *see* 29 C.F.R. § 1604.2(b)(1) (stating that protective laws for women "conflict with and are superseded by [T]itle VII"), despite Representative Cellar's fears, without adverse consequences. But other distinctions based on sex remain, and their legality is either assumed, or at a minimum requires more thought than just "but that's a distinction based on sex, so it's illegal."

Distinctions based on personal privacy, for example, remain in place. When opponents of the ERA, like Senator Ervin, argued that under the ERA "there can be no exception for elements of publically [*sic*] imposed sexual segregation on the basis of privacy between men and women," 118 Cong. Rec. 9,564 (1972), that objection was derided by Senator Marlow Cook of Kentucky as the "potty" argument, *id.* at 9,531. Title VII too does not prohibit an employer from having separate men's and women's toilet facilities. Nor does it prohibit employer policies that differentiate between men and women in setting requirements regarding hair lengths. Thus, in *Longo v. Carlisle DeCoppet & Co.,* we held that a policy "requiring short hair on men and not on women" did not violate Title VII. 537 F.2d 685, 685 (2d Cir. 1976); *see also* *Tavora v. N.Y. Mercantile Exch.,* 101 F.3d 907, 908-09 (2d Cir. 1996) (same).

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

More controversial distinctions, such as different fitness requirements for men and women applying for jobs involving physical strength, have also been upheld. In a recent case, the Fourth Circuit rejected the notion that Title VII prohibits gender-normed physical fitness benchmarks pursuant to which male FBI agent trainees must perform 30 push-ups, while female trainees need only do 14. *Bauer v. Lynch,* 812 F.3d 340, 342, 351 (4th Cir.), cert. denied, ___ U.S. ___, 137 S.Ct. 372, 196 L.Ed.2d 290 (2016). In upholding this distinction, the court noted that of "the few decisions to confront the use of gender-normed physical fitness standards in the Title VII context, none has deemed such standards to be unlawful," *id.* at 348, because courts have recognized that some physiological differences between men and women "impact their relative abilities to demonstrate the same levels of physical fitness," *id.* at 351. Thus, the court in *Bauer* recognized that to distinguish between the sexes is not always to discriminate against one or the other. Indeed, a *failure* to impose distinct fitness requirements for men and women may be found to violate Title VII, if it has a disparate impact on one sex and the employer cannot justify the

requirement as a business necessity. *See* Lanning v. Se. Pa. Transp. Auth. (SEPTA), 181 F.3d 478, 494 (3d Cir. 1999) (applying Civil Rights Act of 1991 and finding that time cutoff for 1.5 mile run for officers had a disparate impact, when women had a pass rate of only 6.7%, compared to a 55.6% pass rate for men, and remanding to district court to determine whether the score represents "the minimum qualifications necessary for successful performance of the job in question"). Taken to its logical conclusion, though, the majority's interpretation of Title VII would do away with this understanding of the Act.

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

Nor does the example of "discrimination based on traits that are a function of sex, such as life expectancy," Maj. Op. at 112, help the majority's cause. Discrimination of that sort, as the majority notes, could permit gross discrimination against female employees "by using traits that are associated with sex as a proxy for sex." *Id.* at 112. That is certainly so as to "traits that are a function of sex," such as pregnancy or the capacity to become pregnant. But it is not so as to discrimination based on sexual orientation. Same-sex attraction is not "a function of sex" or "associated with sex" in the sense that life expectancy or childbearing capacity are. A refusal to hire gay people cannot serve as a covert means of limiting employment opportunities for men or for women as such; a minority of both men and women are gay, and discriminating against them discriminates against *them,* as gay people, and does not differentially disadvantage employees or applicants of either sex. That is not the case with other forms of "sex-plus" discrimination that single out for disfavored status traits that are, for example, common to women but rare in men.

C

That "because of ... sex" did not, and still does not, cover sexual orientation, is further supported by the movement, in both Congress and state legislatures, to enact legislation protecting gay men and women against employment discrimination. This movement, which has now been successful in twenty-two states — including all three in our Circuit — and the District of Columbia, has proceeded by expanding the categories of prohibited discrimination in state anti-discrimination laws. In none of those states did the prohibition of sexual orientation discrimination come by judicial interpretation of a pre-existing prohibition on gender-based discrimination to encompass discrimination on the basis of sexual orientation. Similarly, the Executive Branch has prohibited discrimination against gay men and lesbians in federal employment by adding "sexual orientation" to previously protected grounds. *See* Exec. Order No. 13087, 63 Fed. Reg 30,097 (May 28, 1998). Finally, the same approach has been reflected in the repeated (but so far unsuccessful) introduction of bills in Congress to add "sexual orientation" to the list of prohibited grounds of employment discrimination in Title VII.

The Department of Justice argues, relying on *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, ___ U.S. ___, 135 S. Ct. 2507, 192 L.Ed.2d 514 (2015), that Congress ratified judicial interpretations of "sex" in Title VII as excluding sexual orientation when it amended the Civil Rights Act in 1991 and failed to overrule judicial decisions holding that the sex discrimination provision of Title VII did not cover sexual orientation discrimination. *See* Brief of United States as *Amicus Curiae* 8-14. In *Inclusive Communities,* the Supreme Court held that disparate-impact claims are cognizable under the Fair Housing Act ("FHA"). 135 S. Ct. at 2525. In so holding, the Court found it relevant that Congress had amended the FHA after nine Courts of Appeals had held that the FHA allowed for disparate-impact claims, and did not alter the text of the Act in a way that would make it clear that disparate-impact claims were not contemplated by the FHA. *Id.* at 2519. Furthermore, the Court found it significant that the legislative history of the FHA amendment made it clear that Congress was aware of those Court of Appeals decisions. *Id.* at 2519-20. The majority dismisses this argument because at the time of the 1991 amendment to the Civil Rights Act, only three Courts of Appeals had ruled that Title VII did not cover sexual orientation, and Congress did not make clear, in the legislative history of the 1991 amendment, that it was aware of this precedent. Maj. Op. at 127-28.

In light of the clear textual and historical meaning of the sex provision that I have discussed above, I do not find it necessary to rely heavily on the more technical argument that strives to interpret the meaning of statutes by congressional actions and omissions that might be taken as ratifying Court of Appeals decisions. But I do think it is worth noting that the Supreme Court also found it relevant, in *Inclusive Communities,* that Congress had *rejected* a proposed amendment "that would have eliminated disparate-impact liability for certain zoning decisions." 135 S. Ct. at 2520. Here, while only three Courts of Appeals may have ruled on the issue by 1991, over twenty-five amendments had been proposed to add sexual orientation to Title VII between 1964 and 1991. All had been rejected. In fact, two amendments were proposed in 1991, one in the House and one in the Senate, Civil Rights Amendments Act of 1991, S. 574, 102d Congress; Civil Rights Amendments Act of 1991, H.R. 1430, 102d Congress, and neither of those amendments found its way into the omnibus bill that overruled other judicial interpretations of the Civil Rights Act. Moreover, in addition to the three Courts of Appeals that had ruled on the issue, the EEOC — the primary agency charged by Congress with interpreting and enforcing Title VII — had also held, by 1991, that sexual orientation discrimination fell "outside the purview of Title VII." *Dillon v. Frank,* EEOC Doc. No. 01900157, 1990 WL 1111074, at *3 (Feb. 14, 1990).

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

Although the Supreme Court has rightly cautioned against relying on legislative inaction as evidence of congressional intent, because "several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the

offered change," *Pension Benefit Guar. Corp. v. LTV Corp.,* 496 U.S. 633, 650, 110 S. Ct. 2668, 110 L.Ed.2d 579 (1990) (internal quotation marks omitted), surely the proposal and rejection of over fifty amendments to add sexual orientation to Title VII means something. *Supra* note 23. And it is pretty clear what it does *not* mean. It is hardly reasonable, in light of the EEOC and judicial consensus that sex discrimination did not encompass sexual orientation discrimination, to conclude that Congress rejected the proposed amendments because senators and representatives believed that Title VII "already incorporated the offered change." *Pension Benefit Guar. Corp.,* 496 U.S. at 650, 110 S. Ct. 2668. There may be many reasons why each proposal ultimately failed, but it cannot reasonably be claimed that the basic reason that Congress did not pass such an amendment year in and year out was anything other than that there was not yet the political will to do so.

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

In short, Title VII's prohibition of employment discrimination against individuals on the basis of their sex is aimed at employment practices that differentially disadvantage men vis-à-vis women or women vis-à-vis men. That is what the language of the statute means to an ordinary "fluent speaker of the English language," *Hively,* 853 F.3d at 363 (Sykes, *J.*, dissenting), that is the social practice that Congress chose to legislate against, and in light of that understanding, certain laws and practices that distinguish between men and women have been found to violate Title VII, and certain others have not. Discrimination against persons whose sexual orientation is homosexual rather than heterosexual, however offensive such discrimination may be to me and to many others, is not discrimination that treats men and women differently. The simplistic argument that discrimination against gay men and women is sex discrimination because targeting persons sexually attracted to others of the same sex requires *noticing* the gender of the person in question is not a fair reading of the text of the statute, and has nothing to do with the type of unfairness in employment that Congress legislated against in adding "sex" to the list of prohibited categories of discrimination in Title VII.

III

The majority opinion goes on to identify two other arguments in support of its holding: (1) that sexual orientation discrimination is actually "gender stereotyping" that constitutes discrimination against individuals based on their sex, and (2) that such discrimination constitutes prohibited

"associational discrimination" analogous to discriminating against employees who are married to members of a different race.

These arguments have the merit of attempting to link discrimination based on sexual orientation to the social problem of gender discrimination at which Title VII is aimed. But just as the "differential treatment" argument attempts to shoehorn sexual orientation discrimination into the statute's verbal template of discrimination based on sex, these arguments attempt a similar (also unsuccessful) maneuver with lines of case law. While certain Supreme Court cases identify clear-cut examples of sex or race discrimination that may have a superficial similarity to the practice at issue here, the majority mistakes that similarity for a substantive one.

A

Perhaps the most appealing of the majority's approaches is its effort to treat sexual orientation discrimination as an instance of sexual stereotyping. The argument proceeds from the premises that "sex stereotyping violates Title VII," Maj. Op. at 120, and that "same-sex orientation `represents the ultimate case of failure to conform' to gender stereotypes," *id.* at 121, quoting *Hively*, 853 F.3d at 346, and concludes that an employer who discriminates against gay people is therefore "sex stereotyping" and thus violating Title VII. But like the other arguments adopted by the majority, this approach rests more on verbal facility than on social reality.

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

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

them undesirable for the position, and that because this applicant is gay, he must also possess that trait. Although that is certainly stereotyping, and invidiously so, it does not stereotype a group protected by Title VII, and is therefore not (yet) illegal.

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

That is the situation that a plurality of the Supreme Court identified in *Price Waterhouse v. Hopkins,* 490 U.S. 228, 109 S. Ct. 1775, 104 L.Ed.2d 268 (1989), the key case the majority relies on for its "sex stereotyping" argument. As that opinion pointed out, "[a]n employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind." *Id.* at 251, 109 S. Ct. 1775. The two horns of the dilemma described in *Price Waterhouse* have slightly different, yet equally problematic, sexist foundations: a female employee or applicant may be prejudiced by a negative assumption that women *aren't* or *can't be* sufficiently dominant for a position that requires leadership or strength or aggression, but when a woman unquestionably does show the putatively desired traits, she is held back because of the different but related notion that women *shouldn't be* aggressive or dominant. The latter is not an assumption about how *most* women *are,* it is a normative belief about how *all* women *should be.*

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

But as Judge Sykes points out in her *Hively* dissent, the homophobic employer is not deploying a stereotype about men or about women to the disadvantage of either sex. Such an employer is expressing disapproval of the behavior or identity of a class of people that includes both men and women. 853 F.3d at 370. That disapproval does not stem from a desire to discriminate against either sex, nor does it result from any sex-specific stereotype, nor does it differentially harm either men or women vis-à-vis the other sex. Rather, it results from a distinct type of objection to anyone, of whatever gender, who is identified as homosexual. The belief on which it rests is not a belief about what men or women ought to be or do; it is a belief about what *all* people ought to

be or do — to be heterosexual, and to have sexual attraction to or relations with only members of the opposite sex. That does not make workplace discrimination based on this belief better or worse than other kinds of discrimination, but it does make it something different from sex discrimination, and therefore something that is not prohibited by Title VII.

B

The "associational discrimination" theory is no more persuasive. That theory rests on cases involving race discrimination. Many courts have found that Title VII prohibits discrimination in cases in which, as in our case of *Holcomb v. Iona College,* 521 F.3d 130 (2d Cir. 2008), a white plaintiff alleged that he was fired because he was married to a person of a different race.

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

Thus, as the Supreme Court noted in striking down Virginia's law prohibiting marriage between a white person and a person of color, the Supreme Court of Virginia had upheld the statute because Virginia defined its "legitimate" purposes as "`preserv[ing] the racial integrity of [the state's] citizens,' and [] prevent[ing] `the corruption of blood,' `a mongrel breed of citizens,' and `the obliteration of racial pride,'" purposes the Court correctly identified and rejected as "obviously an endorsement of the doctrine of White Supremacy." *Loving v. Virginia,* 388 U.S. 1, 7 (1967), quoting *Naim v. Naim,* 197 Va. 80, 87 S.E.2d 749, 756 (1955). The racist hostility to "race-mixing" extended well beyond a prohibition against interracial marriage. The beatings of "freedom riders" attempting to integrate interstate bus lines in the South in the early 1960s, inflicted on white as well as black participants in the protests, demonstrated that racial bigotry against African-Americans manifested itself in direct attacks not only on African-Americans, but also on whites who associated with African-Americans as equals. The entire system of "separate but equal" segregation in both state-owned and private facilities and places of public accommodation was designed, as Charles Black made plain in a classic deconstruction of the legal fiction of "separate but equal," to confine black people to "a position of inferiority." Charles Black, *The Lawfulness of the Segregation Decision,* 69 Yale L.J. 421, 424 (1960). Thus, the associational discrimination reflected in cases such as *Loving* and *Holcomb* was a product of bigotry against a single race by another. That discrimination is expressly prohibited in employment by Title VII.

Workplace equality for racial minorities is thus blatantly incompatible with a practice that ostracizes, demeans, or inflicts adverse conditions on white employees for marrying, dating, or otherwise associating with, people of color. The prohibition of that kind of discrimination is not

simply a matter of noting that, in order to effectuate it, the employer must identify the races of the employee and the person(s) with whom he or she associates. Just as sexual harassment against female employees presents a serious obstacle to the full and equal participation of women in the workplace, discrimination against members of a favored race who so much as associate with persons of another race reflects a deep-seated bigotry against the disfavored race(s) that Title VII undertakes to banish from the workplace. The principle was well stated by the Sixth Circuit in a case cited by the majority, *Barrett v. Whirlpool Corporation:*

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

556 F.3d 502, 512 (6th Cir. 2009) (internal quotation marks and brackets omitted).[28]

Discrimination on the basis of sexual orientation, however, is not discrimination of the sort at issue in *Holcomb* and *Barrett.* In those cases, the plaintiffs alleged that they were discriminated against because the employer was biased — that is, had a "discriminatory animus" — *against members of the race with whom the plaintiffs associated.* There is no allegation in this case, nor could there plausibly be, that the defendant discriminated against Zarda because it had something against *men,* and therefore discriminated not only against men, but also against anyone, male or female, who associated with them. I have no trouble assuming that the principle of *Holcomb* and *Barrett* applies beyond the category of race discrimination: an employer who fired or refused to promote an Anglo-American, Christian employee because she associated with Latinos or Jews would presumably run afoul of that principle just as much as one whose animus ran against black Americans. Such an employer would clearly be discriminating against the employee on the basis of her friends' ethnicity or religion — in the formulation from the *Barrett* opinion, that employer would be victimizing an employee out of "discriminatory animus toward protected third persons with whom the [employee] associate[d]." 556 F.3d at 512 (internal quotation marks and alterations omitted).

It is more difficult to imagine realistic hypotheticals in which an employer discriminated against anyone who so much as associated with men or with women, though I suppose academic examples of such behavior could be conjured. But whatever such a case might look like, discrimination against gay people is not it. Discrimination against gay men, for example, plainly is not rooted in animus toward "protected third persons with whom [they] associate." *Id.,* 556 F.3d at 512. An employer who practices such discrimination is hostile to gay men, not to men in general; the animus runs not, as in the race and religion cases discussed above, against a "protected group" to which the employee's associates belong, but against an (alas) *unprotected* group to which they belong: other gay men.

The majority tries to rebut this straightforward distinction in various ways. First, it notes — but declines to rely on — academic "research suggesting that sexual orientation discrimination has deep misogynistic roots." Maj. Op. at 126. It is certainly plausible to me that the "deep roots" of hostility to homosexuals are in some way related to the same sorts of beliefs about the proper roles of men and women in family life that underlie at least some employment discrimination against women. *See, e.g.,* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay*

Men Is Sex Discrimination, 69 N.Y.U. L. Rev. 197, 234 (1994) (noting that "[i]t should be clear from ordinary experience that the stigmatization of the homosexual has *something* to do with the homosexual's supposed deviance from traditional sex roles") (emphasis in original). It may also be that the "roots" of all forms of discrimination against people who are different in some way from a socially defined dominant group can be found in similar psychological processes of discomfort with change or difference, or with "authoritarian personality traits" — or that there are other links among different forms of prejudice. And it can plausibly be argued that homosexual men have historically been derided because they were seen as abdicating their masculinity, and therefore the advantage they have over women. *See, e.g.,* Joseph H. Pleck, *Men's Power with Women, Other Men, and Society: A Men's Movement Analysis, in* The American Man 417, 424 (Elizabeth H. Pleck & Joseph H. Pleck eds., 1980).

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

Second, the majority suggests that my analysis of associational discrimination is "squarely foreclosed by" cases like *Oncale.* Maj. Op. at 127. It is not. As noted above, I do not maintain that Title VII prohibits only those practices that its framers might have been principally concerned with, or only what was "traditionally," *id.,* seen as sex discrimination. To reiterate: sexual harassment plays a large role in hindering women's entry into, and advancement in, the workplace, and thus it is no surprise that courts have interpreted Title VII to prohibit it. And because Title VII protects both men and women from such practices, it does not matter whether the victim is male or female. Sexual harassment in the workplace quite literally imposes conditions of employment on one sex that are not imposed on the other, and it does not matter whether the employer who perpetrates such discriminatory disadvantage is male or female, or of the same or different sex than the employee. The victim of discrimination in such situations is selected by his or her sex, and the disadvantage is imposed on him or her by reason of his or her membership in the protected class. It is not a question of what is "traditionally conceptualized as sexism." Maj. Op. at 127. It is a question of the public meaning of the words adopted by Congress in light of the social problem it was addressing when it chose those words.

C

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

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

IV

The law with respect to the rights of gay people has advanced considerably since 1964. Much of that development has been by state legislation. As noted above, for example, twenty-two states now prohibit, by explicit legislative pronouncement, employment discrimination on the basis of sexual orientation. *See supra* note 21. But other advances have come by means of Supreme Court decisions interpreting the Constitution. Perhaps the most striking advance, from the vantage of the early 1960s, has been the legalization of same-sex marriage as a matter of constitutional law

Nothing that I have said in this opinion should be interpreted as expressing any disagreement with the line of cases running from *Lawrence v. Texas,* 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003) (invalidating criminal prohibitions of consensual sexual relations between members of the same sex), through *Obergefell v. Hodges,* ___ U.S. ___, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015) (holding that persons of the same sex have a constitutional right to marry). But those cases provide no support for the plaintiff's position in this case, or for the method of interpretation utilized by the majority.

For one thing, it is noteworthy that none of the Supreme Court's landmark constitutional decisions upholding the rights of gay Americans depend on the argument that laws disadvantaging homosexuals constitute merely a species of the denial of equal protection of the laws on the basis of gender, or attempt to assimilate discrimination against gay people to the kinds of sex discrimination that were found to violate equal protection in cases like *Frontiero v. Richardson,* 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973), *Craig v. Boren,* 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976), and *Orr v. Orr,* 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979), in the 1970s. Instead, the Court's gay rights cases were based on the guarantee of "liberty" embodied in the Fourteenth Amendment.

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

First, the entire point of the Constitution is to delimit the powers that have been granted by the people to their government. Our Constitution creates a republican form of government, in which the democratically elected representatives of the majority of the people are granted the power to set policy. But the powers of those representatives are constrained by a written text, which prevents a popular majority — both in the federal Congress and, since the Civil War Amendments, in state legislatures — from violating certain fundamental rights. As every law student reads in his or her first-year constitutional law class, "[t]he powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison,* 1 Cranch 137, 176, 2 L.Ed. 60 (1803). To the extent that the courts exercise a non-democratic or counter-majoritarian power, they do so in the name of those rights. *See City of Richmond v. J.A. Croson Co.,* 488 U.S. 469, 495, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (quoting *United States v. Carolene Products,* 304 U.S. 144, 153 n.4, 58 S.Ct. 778, 82 L.Ed. 1234 (1938) to explain that "one aspect of the judiciary's role under the Equal Protection Clause is to protect `discrete and insular minorities' from majoritarian prejudice or indifference"). Particular exercises of that power, including the gay rights decisions of this new millennium, may be controversial, and fierce disagreements exist over the legitimacy of various methods of constitutional interpretation. And it is *not* controversial that the power to assess the constitutionality of legislation must be exercised with restraint, and with a due deference to the judgments of elected officials who themselves have taken an oath to defend the Constitution. But it has long been generally accepted that the courts have a special role to play in defending the liberties enshrined in the Constitution against encroachment even by the people's elected representatives. *See City of Boerne v. Flores,* 521 U.S. 507, 536 (1997) (explaining that "Congress' discretion [to enact legislation] is not unlimited, however, and the courts retain the power, as they have since *Marbury v. Madison,* to determine if Congress has exceeded its authority under the Constitution").

Within the limits imposed by constitutional principles, however, the will of the majority, as expressed in legislation adopted by the people's representatives, governs. As the Supreme Court has instructed, the role of courts with respect to statutes is simply "to apply the statute as it is written — even if we think some other approach might accord with good policy." *Sandifer v. U.S. Steel Corp.,* ___ U.S. ___, 134 S. Ct. 870, 878 (2014), quoting *Burrage v. United States,*

___ U.S. ___, 134 S. Ct. 881, 892 (2014). Just last Term, a unanimous Supreme Court foreclosed judicial efforts to "update" statutes, declaring that, although "reasonable people can disagree" whether, following the passage of time, "Congress should reenter the field and alter the judgments it made in the past[,] ... the proper role of the judiciary in that process ... [is] to apply, not amend, the work of the People's representatives." *Henson v. Santander Consumer USA Inc.*, ___ U.S. ___, 137 S. Ct. 1718, 1725-26 (2017). In interpreting statutes, courts must not merely show deference or restraint; their obligation is to do their best to understand, in a socially and politically realistic way, what decisions the democratic branches of government have embodied in the language they voted for (and what they have not), and to interpret statutes accordingly in deciding cases.

Second, the rights conferred by the Constitution are written in broad language. As the great Chief Justice Marshall commented, our Constitution is "one of enumeration, and not of definition." *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1, 72, 6 L.Ed. 23 (1824). Examples are easily cited: The Constitution does not contain a list of specific punishments that are too cruel to be imposed; it prohibits, in general language, "cruel and unusual punishments." U.S. Const. amend. VIII. It does not enact a code of police procedure that explains exactly what kinds of searches the police may conduct, under what particular circumstances; it prohibits "unreasonable searches and seizures." U.S. Const. amend. IV. It does not, as relevant here, identify particular types of discriminatory actions by state governments that it undertakes to forbid; it demands that those governments provide to all people within our borders "the equal protection of the laws." U.S. Const. amend. XIV.

Legislation, in contrast, can and often does set policy in minute detail. It does not necessarily concern itself with deep general principles. Rather, legislators are entitled to pick and choose which problems to address, and how far to go in addressing them. Within the limits of constitutional guarantees, Congress is given "wide latitude" to legislate, *City of Boerne*, 521 U.S. at 520, but courts must struggle to define those limits by giving coherent meaning to broad constitutional principles. The majestic guarantee of equal protection in the Fourteenth Amendment is a very different kind of pronouncement than the prohibition, in Title VII, of specific kinds of discrimination, by a specified subset of employers, based on clearly defined categories. The language of the Constitution thus allows a broader scope for interpretation.

Third, and following in part from above, the Constitution requires some flexibility of interpretation, because it is intended to endure; it was deliberately designed to be difficult to amend.[35] It is difficult to amend because the framers believed that certain principles were foundational and, for practical purposes, all but eternal, and should not be subject to the political winds of the moment. A constitution is, to quote Chief Justice Marshall yet again, "framed for ages to come, and is designed to approach immortality as nearly as human institutions can approach it." *Cohens v. State of Virginia,* 19 U.S. (6 Wheat.) 264, 387, 5 L.Ed. 257 (1821). The choice of broad language reflects the framers' goal: they did not choose to prohibit "cruel and unusual punishments," rather than listing prohibited punishments, simply to save space, on the assumption that future courts could consult extra-constitutional sources to identify what particular penalties they had in mind; they did so in order to enshrine a general principle, leaving its instantiation and elaboration to future interpreters.

Those enduring principles would not, could not, endure if they were incapable of adaptation — at times via judicial interpretation — to new social circumstances, as well as new understandings of old problems. That idea is not new. In 1910, the Supreme Court wrote, in the context of the Eighth Amendment, that "[t]ime works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions." *Weems v. United States,* 217 U.S. 349, 373 (1910). More recently, in *Obergefell,* the Court noted that "in interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged." 135 S. Ct. at 2603.

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

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

The question of how the government, acting at the behest of a possibly temporary political majority, is permitted to treat the people it governs, is a different question, and is answered by reference to different principles, [rather] than the question of what obligations should be imposed on private citizens. The former question must ultimately be answered by courts under the principles adopted in the Constitution. The latter is entrusted primarily to the legislative process. Courts interpreting statutes are not in the business of imposing on private actors new rules that have not been embodied in legislative decision. It is for that reason that segregation in public facilities was struck down by constitutional command, long before segregation of private facilities was prohibited by federal legislation adopted by Congress. Whether or not the Fifth and Fourteenth Amendments have something to say about whether *the state and federal governments* may discriminate in employment against gay Americans — a question that is not before us, and about which I express no view — it is the prerogative of Congress or a state legislature to decide whether private employers may do so.

In its *amicus* submission, the EEOC quite reasonably asks whether it is just that a gay employee can be married on Sunday, and fired on Monday — discriminated against at his or her job for exercising a right that is protected by the Constitution. Brief of the Equal Employment Opportunity Commission as *Amicus Curiae* 22. I would answer that it is not just. But at the same time, I recognize that the law does not prohibit every injustice. The Constitution protects the liberty of gay people to marry against deprivation by their government, but it does not promise

freedom from discrimination by their fellow citizens. That is hardly a novel proposition: absent Title VII, the same injustice could have been inflicted on the *Lovings* themselves. The Constitution protected them against *governmental* discrimination, but (except for specific vestiges of slavery prohibited by the Thirteenth Amendment) only an act of Congress can prohibit one individual from discriminating against another in housing, public accommodations, and employment. It is well to remember that whether to prohibit race and sex discrimination was a controversial political question in 1964. Imposing an obligation on private employers to treat women and minorities fairly required political organizing and a political fight.

At the end of the day, to paraphrase Chief Justice Marshall, in interpreting statutes we must never forget that it is *not* a Constitution we are expounding. *Cf.* *M'Culloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 407, 4 L.Ed. 579 (1819). When interpreting an act of Congress, we need to respect the choices made by Congress about which social problems to address, and how to address them. In 1964, Congress — belatedly — prohibited employment discrimination based on race, sex, religion, ethnicity, and national origin. Many states have similarly recognized the injustice of discrimination on the basis of sexual orientation. In doing so, they have called such discrimination by its right name, and taken a firm and explicit stand against it. I hope that one day soon Congress will join them, and adopt that principle on a national basis. But it has not done so yet.

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

Debra Ann Livingston, Circuit Judge, dissenting:

. . . The majority's efforts founder on the simple question of how a reasonable reader, competent in the language and its use, would have understood Title VII's text when it was written — on the question of its public meaning at the time of enactment. The majority acknowledges the argument "that it is not `even remotely plausible that in 1964, when Title VII was adopted, a reasonable person competent in the English language would have understood that a law banning employment discrimination `because of sex' also banned discrimination because of sexual orientation.'" *Id.* at 114 (citation omitted). It does not contest the point, however, but seeks merely to justify its departure from ordinary, contemporary meaning by claiming that "[e]ven if that [is] so," its approach no more departs from the ordinary meaning of words in their contemporary context than supposedly occurred when sexual harassment and hostile work environment claims were first recognized by courts. *Id.* at 114-15. But as Judge Lynch has cogently explained, that is simply not the case. Dissenting Op. at 144-47. The majority does not discover a "plain" yet hidden meaning in Title VII, sufficiently obscure as to wholly elude every appellate court, including this one, until the Seventh Circuit's decision in *Hively v. Ivy Tech Cmty. Coll. of Ind.,* 853 F.3d 339 (7th Cir. 2017) (en banc), last year. Instead, it *sub silentio* abandons our usual approach to statutory interpretation. *See, e.g., Sandifer v. U.S. Steel Corp.,* ___ U.S. ___, 134 S.Ct. 870, 876 (2014) (noting the "`fundamental canon of statutory construction' that, `unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning'" (quoting *Perrin v. United States,* 444 U.S. 37, 42 (1979))); *Bilski v. Kappos,* 561 U.S. 593, 603 (2010) (quoting *Perrin* and applying the same canon of statutory interpretation); *Diamond v. Diehr,* 450 U.S. 175, 182 (1981) (same).

Because Sections I, II, and III of Judge Lynch's dissent are sufficient to answer the statutory question that this case presents, I do not go further to address the subject of constitutional interpretation, and do not join in Section IV. . .

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[This case was not selected for publication in West's Federal Reporter.]

Gerald Lynn BOSTOCK, Plaintiff-Appellant,

v.

CLAYTON COUNTY BOARD OF COMMISSIONERS, Defendant

United States Court of Appeals, Eleventh Circuit.

723 Fed. Appx. 964 (2018)

Question Presented in Petition for Certiorari:

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

11th Circuit Decision and Dissent from Denial of En Banc Review:

PER CURIAM:

Gerald Lynn Bostock appeals the district court's dismissal of his employment discrimination suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2(a)(1), against Clayton County, Georgia, for failure to state a claim. On appeal, Bostock argues that the County discriminated against him based on sexual orientation and gender stereotyping. After a careful review of the record and the parties' briefs, we affirm.

Title VII prohibits employers from discriminating against employees on the basis of their sex. 42 U.S.C. § 2000e-2(a). This circuit has previously held that "[d]ischarge for homosexuality is not prohibited by Title VII." Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979)1 (per curiam) (emphasis added). And we recently confirmed that Blum remains binding precedent in this circuit. See Evans v. Ga. Reg'l Hosp., 850 F.3d 1248, 1256 (11th Cir. 2017), cert. denied, 138 S. Ct. 557 (2017). In Evans, we specifically rejected the argument that Supreme Court precedent in Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 79, 118 S. Ct. 998 (1998), and Price Waterhouse v. Hopkins, 490 U.S. 228, 250–51, 109 S. Ct. 1775, 104 L.Ed.2d 268 (1989), supported a cause of action for sexual orientation discrimination under Title VII.

As an initial matter, Bostock has abandoned any challenge to the district court's dismissal of his gender stereotyping claim under Glen [v. Brumby] because he does not specifically appeal the dismissal of this claim. See Timson, 518 F.3d at 874. Moreover, the district court did not err in dismissing Bostock's complaint for sexual orientation discrimination under Title VII because our holding in Evans forecloses Bostock's claim. And under our prior panel precedent rule, we cannot overrule a prior panel's holding, regardless of whether we think it was wrong, unless an intervening Supreme Court or Eleventh Circuit en banc decision is issued. United States v. Kaley, 579 F.3d 1246, 1255–56 (11th Cir. 2009); United States v. Steele, 147 F.3d 1316, 1317–18 (11th Cir. 1998) (en banc). AFFIRMED.

894 F.3d 1335

Gerald Lynn BOSTOCK, Plaintiff–Appellant,

v.

CLAYTON COUNTY BOARD OF COMMISSIONERS, Defendant, Clayton County, Defendant–Appellee.

United States Court of Appeals, Eleventh Circuit.

Date Filed: 07/18/2018

Before ED CARNES, Chief Judge, TJOFLAT, MARCUS, WILSON, WILLIAM PRYOR, MARTIN, JORDAN, ROSENBAUM, JILL PRYOR, NEWSOM, and BRANCH, Circuit Judges.

BY THE COURT:

A member of this Court in active service having requested a poll on whether this case should be reheard by the Court sitting en banc, and a majority of the judges in active service on this Court having voted against granting a rehearing en banc, it is ORDERED that this case will not be reheard en banc.

ROSENBAUM, Circuit Judge, joined by JILL PRYOR, Circuit Judge, dissenting from the denial of rehearing en banc:

The issue this case raises—whether Title VII protects gay and lesbian individuals from discrimination because their sexual preferences do not conform to their employers' views of whom individuals of their respective genders should love—is indisputably en-banc-worthy. Indeed, within the last fifteen months, two of our sister Circuits have found the issue of such extraordinary importance that they have each addressed it en banc. See Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018) (en banc); Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339 (7th Cir. 2017) (en banc).

No wonder. In 2011, about 8 million Americans identified as lesbian, gay, or bisexual. See Gary J. Gates, How Many People are Lesbian, Gay, Bisexual, and Transgender?, The Williams Inst., 1, 3, 6 (Apr. 2011), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-ManyPeople-LGBT-Apr-2011.pdf (last visited July 10, 2018). Of those who so identify, roughly

25% report experiencing workplace discrimination because their sexual preferences do not match their employers' expectations. That's a whole lot of people potentially affected by this issue.

Yet rather than address this objectively en-banc-worthy issue, we instead cling to a 39-year-old precedent, Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979), that was decided ten years before Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S, Ct. 1775 (1989), the Supreme Court precedent that governs the issue and requires us to reach the opposite conclusion of Blum. Worse still, Blum's "analysis" of the issue is as conclusory as it gets, consisting of a single sentence that, as relevant to Title VII, states in its entirety, "Discharge for homosexuality is not prohibited by Title VII." Blum, 597 F.2d at 938.5 And if that's not bad enough, to support this proposition, Blum relies solely on Smith v. Liberty Mutual Insurance Co., 569 F.2d 325 (5th Cir. 1978)—a case that itself has been necessarily abrogated not only by Price Waterhouse but also by our own precedent in the form of Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011). I cannot explain why a majority of our Court is content to rely on the precedential equivalent of an Edsel with a missing engine, when it comes to an issue that affects so many people.

I have previously explained why Price Waterhouse abrogates Blum and requires the conclusion that Title VII prohibits discrimination against gay and lesbian individuals because their sexual preferences do not conform to their employers' views of whom individuals of their respective genders should love. See Evans v. Ga. Reg'l Hosp., 850 F.3d 1248, 1261-73 (11th Cir.) (Rosenbaum, J., dissenting), cert. denied, 138 S. Ct. 557 (2017). Both the Second and Seventh Circuits have likewise concluded that their respective pre-Price Waterhouse precedents reaching the same conclusion as Blum cannot stand. See Zarda, 883 F.3d at 113 (observing that attempts to distinguish Price Waterhouse amount to "semantic sleight[s] of hand ... not a defense ... a distraction"); Hively, 853 F.3d at 350-51 ("It would require considerable calisthenics to remove 'sex' from 'sexual orientation' .... The logic of the Supreme Court's decisions, as well as the common-sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex, persuade us that the time has come to overrule our previous cases that have endeavored to find and observe that line."). I continue to firmly believe that Title VII prohibits discrimination against gay and lesbian individuals because they fail to conform to their employers' views when it comes to whom they should love.

But I dissent today for an even more basic reason: regardless of whatever a majority of this Court's views may turn out to be on the substantive issue that Bostock raises, we have an obligation to, as a Court, at least subject the issue to the "crucial" "crucible of adversarial testing," and after that trial "yield[s] insights or reveal[s] pitfalls we cannot muster guided only by our own lights, to give a reasoned and principled explanation for our position on this issue—something we have never done.

Particularly considering the amount of the public affected by this issue, the legitimacy of the law demands we explain ourselves. See Harvie Wilkinson III, The Role of Reason in the Rule of Law, 56 U. Chi. L. Rev. 779, 798 (1989) ("Reason ... defines the federal judicial system. Nothing in the Constitution requires the written justification of judicial decisions, but a judiciary accountable to reason cannot resort to arbitrary acts. It requires candor from judges in addressing the strongest arguments against their own views."); Conn. Bd. of Pardons v. Dumschat, 452 U.S.

458, 472, 101 S. Ct. 2460 (1981) (Stevens, J., dissenting) ("[Common law judges'] explanations of why they decided cases as they did provided guideposts for future decisions .... Many of us believe that those statements of reasons provided a better guarantee of justice than ... a code written in sufficient detail to be fit for Napoleon."); Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 19-20 (1959) ("The virtue or demerit of a judgment turns, therefore, entirely on the reasons that support it."); 1 Blackstone, Commentaries 71 (1803) (observing that written court decisions have long been "held in the highest regard" because the public can examine and understand "the reasons the court gave for [its] judgment.").

Despite never offering a reasoned explanation tested by the adversarial process, a majority of this Court apparently believes that Blum somehow prophesized the correct post-Price Waterhouse legal conclusion in its one-sentence "analysis" that relies solely on authority itself abrogated by Price Waterhouse. If the majority truly believes that, it should grant en banc rehearing and perform the "considerable calisthenics" to explain why gender nonconformity claims are cognizable except for when a person fails to conform to the "ultimate" gender stereotype by being attracted to the "wrong" gender. Hively, 853 F.3d at 346, 350. And if it doesn't or if it believes—as I and others do—that these "calisthenics" are simply "impossible," Hively, 853 F.3d at 350-51, it should not sit idly by and leave victims of discrimination remediless by allowing Blum to continue to stand.

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff-Appellant, Aimee Stephens, Intervenor,

v.

R.G. &. G.R. HARRIS FUNERAL HOMES, INC., Defendant-Appellee.

United States Court of Appeals, Sixth Circuit.

884 F.3d 560 (2018)

<u>Questions Presented by Petition for Certiorari:</u>

1. Whether the word "sex" in Title VII's prohibition on discrimination 'because of . . . sex,' 42 U.S.C. Sec. 2000e-2(a)(1), meant 'gender identity' and included 'transgender status' when Congress enacted Title VII in 1964.
2. Whether Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), prohibits employers from applying sex-specific policies according to their employees' sex rather than their gender identity.

Question on Which Certiorari was Granted as Re-Written by the Supreme Court:

The Petition "is granted limited to the following question: Whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under Price Waterhouse v. Hopkins."

KAREN NELSON MOORE, Circuit Judge.

Aimee Stephens (formerly known as Anthony Stephens) was born biologically male. While living and presenting as a man, she worked as a funeral director at R.G. & G.R. Harris Funeral Homes, Inc. ("the Funeral Home"), a closely held for-profit corporation that operates three funeral homes in Michigan. Stephens was terminated from the Funeral Home by its owner and operator, Thomas Rost, shortly after Stephens informed Rost that she intended to transition from male to female and would represent herself and dress as a woman while at work. Stephens filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), which investigated Stephens's allegations that she had been terminated as a result of unlawful sex discrimination. During the course of its investigation, the EEOC learned that the Funeral Home provided its male public-facing employees with clothing that complied with the company's dress code while female public-facing employees received no such allowance. The EEOC subsequently brought suit against the Funeral Home in which the EEOC charged the Funeral Home with violating Title VII of the Civil Rights Act of 1964 ("Title VII") by (1) terminating Stephens's employment on the basis of her transgender or transitioning status and her refusal to conform to sex-based stereotypes; and (2) administering a discriminatory-clothing-allowance policy.

The parties submitted dueling motions for summary judgment. The EEOC argued that it was entitled to judgment as a matter of law on both of its claims. For its part, the Funeral Home argued that it did not violate Title VII by requiring Stephens to comply with a sex-specific dress code that it asserts equally burdens male and female employees, and, in the alternative, that Title VII should not be enforced against the Funeral Home because requiring the Funeral Home to employ Stephens while she dresses and represents herself as a woman would constitute an unjustified substantial burden upon Rost's (and thereby the Funeral Home's) sincerely held religious beliefs, in violation of the Religious Freedom Restoration Act ("RFRA"). As to the EEOC's discriminatory-clothing-allowance claim, the Funeral Home argued that Sixth Circuit case law precludes the EEOC from bringing this claim in a complaint that arose out of Stephens's original charge of discrimination because the Funeral Home could not reasonably expect a clothing-allowance claim to emerge from an investigation into Stephens's termination.

The district court granted summary judgment in favor of the Funeral Home on both claims. For the reasons set forth below, we hold that (1) the Funeral Home engaged in unlawful discrimination against Stephens on the basis of her sex; (2) the Funeral Home has not established that applying Title VII's proscriptions against sex discrimination to the Funeral Home would substantially burden Rost's religious exercise, and therefore the Funeral Home is not entitled to a defense under RFRA; (3) even if Rost's religious exercise were substantially burdened, the EEOC has established that enforcing Title VII is the least restrictive means of furthering the

government's compelling interest in eradicating workplace discrimination against Stephens; and (4) the EEOC may bring a discriminatory-clothing-allowance claim in this case because such an investigation into the Funeral Home's clothing-allowance policy was reasonably expected to grow out of the original charge of sex discrimination that Stephens submitted to the EEOC. Accordingly, we REVERSE the district court's grant of summary judgment on both the unlawful-termination and discriminatory-clothing-allowance claims, GRANT summary judgment to the EEOC on its unlawful-termination claim, and REMAND the case to the district court for further proceedings consistent with this opinion.

[More detailed statement of facts and rulings by the trial court omitted.]

II. DISCUSSION

[Omitted is the court's discussion of why the way that the Funeral Home sought to apply its dress code to Stephens constituted discrimination because of sex, declining to follow the 9th Circuit's ruling in Jespersen.]

2. Discrimination on the Basis of Transgender/Transitioning Status

We also hold that discrimination on the basis of transgender and transitioning status violates Title VII. The district court rejected this theory of liability at the motion-to-dismiss stage, holding that "transgender or transsexual status is currently not a protected class under Title VII." R.G. & G.R. Harris Funeral Homes, Inc., 100 F.Supp.3d at 598. The EEOC and Stephens argue that the district court's determination was erroneous because Title VII protects against sex stereotyping and "transgender discrimination is based on the non-conformance of an individual's gender identity and appearance with sex-based norms or expectations"; therefore, "discrimination because of an individual's transgender status is always based on gender-stereotypes: the stereotype that individuals will conform their appearance and behavior—whether their dress, the name they use, or other ways they present themselves—to the sex assigned them at birth." Appellant Br. at 24; see also Intervenor Br. at 10–15. The Funeral Home, in turn, argues that Title VII does not prohibit discrimination based on a person's transgender or transitioning status because "sex," for the purposes of Title VII, "refers to a binary characteristic for which there are only two classifications, male and female," and "which classification arises in a person based on their chromosomally driven physiology and reproductive function." Appellee Br. at 26. According to the Funeral Home, transgender status refers to "a person's self-assigned 'gender identity'" rather than a person's sex, and therefore such a status is not protected under Title VII. Id. at 26–27.

For two reasons, the EEOC and Stephens have the better argument. First, it is analytically impossible to fire an employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex. The Seventh Circuit's method of "isolat[ing] the significance of the plaintiff's sex to the employer's decision" to determine whether Title VII has been triggered illustrates this point. See Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 345 (7th Cir. 2017). In Hively, the Seventh Circuit determined that Title VII prohibits discrimination on the basis of sexual orientation—a different question than the issue before this court—by asking whether the plaintiff, a self-described lesbian, would have been

fired "if she had been a man married to a woman (or living with a woman, or dating a woman) and everything else had stayed the same." Id. If the answer to that question is no, then the plaintiff has stated a "paradigmatic sex discrimination" claim. Here, we ask whether Stephens would have been fired if Stephens had been a woman who sought to comply with the women's dress code. The answer quite obviously is no. This, in and of itself, confirms that Stephens's sex impermissibly affected Rost's decision to fire Stephens.

The court's analysis in Schroer v. Billington, 577 F.Supp.2d 293 (D.D.C. 2008), provides another useful way of framing the inquiry. There, the court noted that an employer who fires an employee because the employee converted from Christianity to Judaism has discriminated against the employee "because of religion," regardless of whether the employer feels any animus against either Christianity or Judaism, because "[d]iscrimination 'because of religion' easily encompasses discrimination because of a *change* of religion.'" Id. at 306 (emphasis in original). By the same token, discrimination "because of sex" inherently includes discrimination against employees because of a *change* in their sex. See id. at 307–08.4 Here, there is evidence that Rost at least partially based his employment decision on Stephens's desire to change her sex: Rost justified firing Stephens by explaining that Rost "sincerely believes that 'the Bible teaches that a person's sex (whether male or female) is an immutable God-given gift and that it is wrong for a person to deny his or her God-given sex,' " and "the Bible teaches that it is wrong for a biological male to deny his sex by dressing as a woman."5 R.G. & G.R. Harris Funeral Homes, Inc., 201 F.Supp.3d at 848 (quoting R. 55 (Def.'s Statement of Facts ¶ 28) (Page ID #1687); R. 53-3 (Rost 30(b)(6) Dep. ¶ 44) (Page ID #936)). As amici point out in their briefing, such statements demonstrate that "Ms. Stephens's sex necessarily factored into the decision to fire her." Equality Ohio Br. at 12; cf. Hively, 853 F.3d at 359 (Flaum, J., concurring) (arguing discrimination against a female employee because she is a lesbian is necessarily "motivated, in part, by ... the employee's sex" because the employer is discriminating against the employee "because she is (A) a woman who is (B) sexually attracted to women").

The Funeral Home argues that Schroer's analogy is "structurally flawed" because, unlike religion, a person's sex cannot be changed; it is, instead, a biologically immutable trait. We need not decide that issue; even if true, the Funeral Home's point is immaterial. As noted above, the Supreme Court made clear in Price Waterhouse that Title VII requires "gender [to] be irrelevant to employment decisions." 490 U.S. at 240. Gender (or sex) is not being treated as "irrelevant to employment decisions" if an employee's attempt or desire to change his or her sex leads to an adverse employment decision.

Second, discrimination against transgender persons necessarily implicates Title VII's proscriptions against sex stereotyping. As we recognized in Smith, a transgender person is someone who "fails to act and/or identify with his or her gender"—i.e., someone who is inherently "gender non-conforming." 378 F.3d at 575; see also id. at 568 (explaining that transgender status is characterized by the American Psychiatric Association as "a disjunction between an individual's sexual organs and sexual identity"). Thus, an employer cannot discriminate on the basis of transgender status without imposing its stereotypical notions of how sexual organs and gender identity ought to align. There is no way to disaggregate discrimination

on the basis of transgender status from discrimination on the basis of gender non-conformity, and we see no reason to try.

We did not expressly hold in Smith that discrimination on the basis of transgender status is unlawful, though the opinion has been read to say as much—both by this circuit and others. In G.G. v. Gloucester County School Board, 654 Fed. Appx. 606 (4th Cir. 2016), for instance, the Fourth Circuit described Smith as holding "that discrimination against a transgender individual based on that person's transgender status is discrimination because of sex under federal civil rights statutes." Id. at 607. And in Dodds v. United States Department of Education, 845 F.3d 217 (6th Cir. 2016), we refused to stay "a preliminary injunction ordering the school district to treat an eleven-year old transgender girl as a female and permit her to use the girls' restroom" because, among other things, the school district failed to show that it would likely succeed on the merits. Id. at 220–21. In so holding, we cited Smith as evidence that this circuit's "settled law" prohibits "[s]ex stereotyping based on a person's gender non-conforming behavior," id. at 221 (second quote quoting Smith, 378 F.3d at 575), and then pointed to out-of-circuit cases for the propositions that "[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes," id. (citing Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011)), and "[t]he weight of authority establishes that discrimination based on transgender status is already prohibited by the language of federal civil rights statutes," id. (quoting G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 729 (4th Cir.) (Davis, J., concurring), cert. granted in part, 137 S. Ct. 369, 196 L.Ed.2d 283 (2016), and vacated and remanded, 137 S. Ct. 1239 (2017)). Such references support what we now directly hold: Title VII protects transgender persons because of their transgender or transitioning status, because transgender or transitioning status constitutes an inherently gender non-conforming trait.

The Funeral Home raises several arguments against this interpretation of Title VII, none of which we find persuasive. First, the Funeral Home contends that the Congress enacting Title VII understood "sex" to refer only to a person's "physiology and reproductive role," and not a person's "self-assigned 'gender identity.'". But the drafters' failure to anticipate that Title VII would cover transgender status is of little interpretive value, because "statutory 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." Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998); see also Zarda, 883 F.3d at 113–16 (majority opinion) (rejecting the argument that Title VII was not originally intended to protect employees against discrimination on the basis of sexual orientation, in part because the same argument "could also be said of multiple forms of discrimination that are [now] indisputably prohibited by Title VII ... [but] were initially believed to fall outside the scope of Title VII's prohibition," such as "sexual harassment and hostile work environment claims"). And in any event, Smith and Price Waterhouse preclude an interpretation of Title VII that reads "sex" to mean only individuals' "chromosomally driven physiology and reproductive function."

Indeed, we criticized the district court in Smith for "relying on a series of pre-Price Waterhouse cases from other federal appellate courts holding that transsexuals, as a class, are not entitled to

Title VII protection because 'Congress had a narrow view of sex in mind' and 'never considered nor intended that [Title VII] apply to anything other than the traditional concept of sex.'" 378 F.3d at 572 (quoting Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984)). According to Smith, such a limited view of Title VII's protections had been "eviscerated by Price Waterhouse." Id. at 573. The Funeral Home's attempt to resurrect the reasoning of these earlier cases thus runs directly counter to Smith's holding.

In a related argument, the Funeral Home notes that both biologically male and biologically female persons may consider themselves transgender, such that transgender status is not unique to one biological sex. It is true, of course, that an individual's biological sex does not dictate her transgender status; the two traits are not coterminous. But a trait need not be exclusive to one sex to nevertheless be a function of sex. As the Second Circuit explained in Zarda,

> Title VII does not ask whether a particular sex is discriminated against; it asks whether a particular "individual" is discriminated against "because of such individual's ... sex." Taking individuals as the unit of analysis, the question is not whether discrimination is borne only by men or only by women or even by both men and women; instead, the question is whether an individual is discriminated against because of his or her sex.

883 F.3d at 123 n.23 (plurality opinion) (emphasis in original) (quoting 42 U.S.C. § 2000e-2(a)(1)). Because an employer cannot discriminate against an employee for being transgender without considering that employee's biological sex, discrimination on the basis of transgender status necessarily entails discrimination on the basis of sex—no matter what sex the employee was born or wishes to be. By the same token, an employer need not discriminate based on a trait common to all men or women to violate Title VII. After all, a subset of both women and men decline to wear dresses or makeup, but discrimination against any woman on this basis would constitute sex discrimination under Price Waterhouse. See Hively, 853 F.3d at 346 n.3 ("[T]he Supreme Court has made it clear that a policy need not affect every woman [or every man] to constitute sex discrimination. ... A failure to discriminate against all women does not mean that an employer has not discriminated against one woman on the basis of sex.").

Nor can much be gleaned from the fact that later statutes, such as the Violence Against Women Act, expressly prohibit discrimination on the basis of "gender identity," while Title VII does not, see Appellee Br. at 28, because "Congress may certainly choose to use both a belt and suspenders to achieve its objectives," Hively, 853 F.3d at 344; see also Yates v. United States, 135 S.Ct. 1074, 1096 (2015) (Kagan, J., dissenting) (noting presence of two overlapping provisions in a statute "may have reflected belt-and-suspenders caution"). We have, in fact, already read Title VII to provide redundant statutory protections in a different context. In In re Rodriguez, 487 F.3d 1001 (6th Cir. 2007), for instance, we recognized that claims alleging discrimination on the basis of ethnicity may fall within Title VII's prohibition on discrimination on the basis of national origin, see id. at 1006 n.1, even though at least one other federal statute treats "national origin" and "ethnicity" as separate traits, see 20 U.S.C. § 1092(f)(1)(F)(ii). Moreover, Congress's failure to modify Title VII to include expressly gender identity "lacks 'persuasive significance' because 'several equally tenable inferences' may be drawn from such inaction, 'including the inference that the existing legislation already incorporated the offered

change.'" Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990) (quoting United States v. Wise, 370 U.S. 405, 411 (1962)). In short, nothing precludes discrimination based on transgender status from being viewed both as discrimination based on "gender identity" for certain statutes and, for the purposes of Title VII, discrimination on the basis of sex.

The Funeral Home places great emphasis on the fact that our published decision in Smith superseded an earlier decision that stated explicitly, as opposed to obliquely, that a plaintiff who "alleges discrimination based solely on his identification as a transsexual ... has alleged a claim of sex stereotyping pursuant to Title VII." Smith v. City of Salem, 369 F.3d 912, 922 (6th Cir.), opinion amended and superseded, 378 F.3d 566 (6th Cir. 2004). But such an amendment does not mean, as the Funeral Home contends, that the now-binding Smith opinion "directly rejected" the notion that Title VII prohibits discrimination on the basis of transgender status. The elimination of the language, which was not necessary to the decision, simply means that Smith did not expressly recognize Title VII protections for transgender persons based on identity. But Smith's reasoning still leads us to the same conclusion.

We are also unpersuaded that our decision in Vickers v. Fairfield Medical Center, 453 F.3d 757 (6th Cir. 2006), precludes the holding we issue today. We held in Vickers that a plaintiff cannot pursue a claim for impermissible sex stereotyping on the ground that his perceived sexual orientation fails to conform to gender norms unless he alleges that he was discriminated against for failing to "conform to traditional gender stereotypes in any observable way at work." Vickers thus rejected the notion that "the act of identification with a particular group, in itself, is sufficiently gender non-conforming such that an employee who so identifies would, by this very identification, engage in conduct that would enable him to assert a successful sex stereotyping claim." Id. The Vickers court reasoned that recognizing such a claim would impermissibly "bootstrap protection for sexual orientation into Title VII." Id. (quoting Dawson v. Bumble & Bumble, 398 F.3d 211, 218 (2d Cir. 2005)). The Funeral Home insists that, under Vickers, Stephens's sex-stereotyping claim survives only to the extent that it concerns her "appearance or mannerisms on the job," see id. at 763, but not as it pertains to her underlying status as a transgender person.

The Funeral Home is wrong. First, Vickers does not control this case because Vickers concerned a different legal question. As the EEOC and amici Equality Ohio note, Vickers "addressed only whether Title VII forbids sexual orientation discrimination, not discrimination against a transgender individual." While it is indisputable that "[a] panel of this Court cannot overrule the decision of another panel" when the "prior decision [constitutes] controlling authority." One case is not "controlling authority" over another if the two address substantially different legal issues, cf. Int'l Ins. Co. v. Stonewall Ins. Co., 86 F.3d 601, 608 (6th Cir. 1996) (noting two panel decisions that "on the surface may appear contradictory" were reconcilable because "the result [in both cases wa]s heavily fact driven"). After all, we do not overrule a case by distinguishing it.

Second, we are not bound by Vickers to the extent that it contravenes Smith. See Darrah, 255 F.3d at 310 ("[W]hen a later decision of this court conflicts with one of our prior published decisions, we are still bound by the holding of the earlier case."). As noted above, Vickers indicated that a sex-stereotyping claim is viable under Title VII only if a plaintiff alleges that he

was discriminated against for failing to "conform to traditional gender stereotypes in any observable way at work." 453 F.3d at 764. The Vickers court's new "observable-at-work" requirement is at odds with the holding in Smith, which did not limit sex-stereotyping claims to traits that are observable in the workplace. The "observable-at-work" requirement also contravenes our reasoning in Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005)—a binding decision that predated Vickers by more than a year—in which we held that a reasonable jury could conclude that a transgender plaintiff was discriminated against on the basis of his sex when, among other factors, his "ambiguous sexuality and his practice of dressing as a woman outside of work were well-known within the [workplace]." Id. at 738 (emphasis added). From Smith and Barnes, it is clear that a plaintiff may state a claim under Title VII for discrimination based on gender nonconformance that is expressed outside of work. The Vickers court's efforts to develop a narrower rule are therefore not binding in this circuit.

Therefore, for the reasons set forth above, we hold that the EEOC could pursue a claim under Title VII on the ground that the Funeral Home discriminated against Stephens on the basis of her transgender status and transitioning identity. The EEOC should have had the opportunity, either through a motion for summary judgment or at trial, to establish that the Funeral Home violated Title VII's prohibition on discrimination on the basis of sex by firing Stephens because she was transgender and transitioning from male to female.

3. Defenses to Title VII Liability

Having determined that the Funeral Home violated Title VII's prohibition on sex discrimination, we must now consider whether any defenses preclude enforcement of Title VII in this case. As noted above, the district court held that the EEOC's enforcement efforts must give way to the Religious Freedom Restoration Act ("RFRA"), which prohibits the government from enforcing a religiously neutral law against an individual if that law substantially burdens the individual's religious exercise and is not the least restrictive way to further a compelling government interest. R.G. & G.R. Harris Funeral Homes, Inc., 201 F.Supp.3d at 857–64. The EEOC seeks reversal of this decision; the Funeral Home urges affirmance. [Omitted here is the court's discussion rejecting the Religious Freedom Restoration Act defense, finding that complying with Title VII on these facts did not impose an undue burden on the defendant. The court also rejected the argument that the Funeral Home's decision to dismiss the plaintiff violated the Funeral Home's 1st Amendment rights under the "ministerial" exemption the Supreme Court has recognized in other cases. The court concluded that the funeral home was not a religious institution and Stephens was not a ministerial employee.]

C. Clothing-Benefit Discrimination Claim

[Omitted here is the court's discussion of why the clothing-benefit discrimination claim could be brought despite not being mentioned in the plaintiff's original EEOC charge, because under the nature of this gender identity discrimination claim and the factual allegations of the charge that was filed, the discovery of the discrepant policy was a logical outgrowth of the EEOCs investigation.]

III. CONCLUSION

Discrimination against employees, either because of their failure to conform to sex stereotypes or their transgender and transitioning status, is illegal under Title VII. The unrefuted facts show that the Funeral Home fired Stephens because she refused to abide by her employer's stereotypical conception of her sex, and therefore the EEOC is entitled to summary judgment as to its unlawful-termination claim. RFRA provides the Funeral Home with no relief because continuing to employ Stephens would not, as a matter of law, substantially burden Rost's religious exercise, and even if it did, the EEOC has shown that enforcing Title VII here is the least restrictive means of furthering its compelling interest in combating and eradicating sex discrimination. We therefore REVERSE the district court's grant of summary judgment in favor of the Funeral Home and GRANT summary judgment to the EEOC on its unlawful-termination claim. We also REVERSE the district court's grant of summary judgment on the EEOC's discriminatory-clothing-allowance claim, as the district court erred in failing to consider the EEOC's claim on the merits. We REMAND this case to the district court for further proceedings consistent with this opinion.