**Nos. 17-1618, 17-1623**
**IN THE SUPREME COURT OF THE UNITED STATES**

**Gerald Lynn Bostock,**
**Petitioner,**
**v.**
**Clayton County, Georgia,**
**Respondent.**

**On Writ of Certiorari to the U.S. Court of Appeals for the Eleventh Circuit**

**Altitude Express, Inc., *et al.*,**
**Petitioners,**
**v.**
**Melissa Zarda, *et al.*,**
**Respondents.**

**On Writ of Certiorari to the U.S. Court of Appeals for the Second Circuit**

# BRIEF OF AMICUS CURIAE LIBERTY COUNSEL IN SUPPORT OF CLAYTON COUNTY, GEORGIA, ALTITUDE EXPRESS, AND RAY MAYNARD


Mathew D. Staver
(Counsel of Record)
Anita L. Staver
Horatio G. Mihet
Roger K. Gannam
Rena M. Lindevaldsen
Daniel J. Schmid

LIBERTY COUNSEL
PO Box 540774
Orlando, FL 32854
(407) 875-1776
court@lc.org
*Attorneys for Amicus Curiae*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**CASES**

**STATUTES**



**OTHER MATERIALS**

## INTEREST OF AMICUS[1]

Liberty Counsel has been substantially involved in advocating for the right of individuals to receive, and licensed medical professionals to provide, counseling for unwanted same-sex attractions, behaviors, or identity; for marriage as the union of one man and one woman; and for the religious liberty of Americans whose sincerely held religious belief compel adherence to Biblical positions on sexual orientation and marriage. Liberty Counsel has developed a substantial body of information regarding the issues presented by the ultimate question in this case. Amicus believes that the information provided in this Brief regarding "sexual orientation" as medically and legally distinct from the meaning of "sex" within Title VII and the threats to First Amendment rights posed by interpreting sex to include sexual orientation are critical to this Court's consideration of the important questions at issue. This Brief is submitted pursuant to Rule 37 of the Rules of the Supreme Court of the United States, with the consent of all parties.

---

[1] Counsel for a party did not author this Brief in whole or in part, and no such counsel or party made a monetary contribution to fund the preparation or submission of this Brief. No person or entity, other than *Amicus Curiae* or its counsel made a monetary contribution to the preparation and submission of this Brief. Petitioners and Respondents have filed blanket consents to the filing of Amicus Briefs in favor of either party or no party.

## SUMMARY OF ARGUMENT

This case presents the straight-forward question of whether discrimination on the basis of "sex" in Title VII includes "sexual orientation" discrimination. Although the common sense, medical, and legal meanings of "sex" are based on the biological distinctions between men and women, the lower courts have reached conflicting conclusions on whether Title VII's prohibition against discrimination on the basis of "sex" subsumes within it discrimination on the basis of "sexual orientation".

This Court's precedent makes clear that Title VII's prohibition against "sex" discrimination targets discrimination that is based on the "immutable" characteristics that divide men and women into one of two, separately-identifiable groups. Additionally, Title VII's sex discrimination provision targets discrimination based on stereotypes about how men, *as a class*, and women, *as a class*, should look and act.

"Sexual orientation" discrimination, however, does not target men or women as a class but, rather, targets a subset of both men and women – those men and women who identify as same-sex attracted. Thus, including "sexual orientation" within the meaning of "sex" discrimination does not protect men, as a class, or women, as a class, based on their status in one of the two unique and separately, identifiable classes, but would protect individuals based on their sexuality or sexual identity, which is not a characteristic unique to women, as a class, or men as a class.

Finally, interpreting "sex" according to its common sense, medical, and legal meanings leaves the question for Congress whether to add "sexual orientation" as a separate class. A significant policy question that Congress would need to address in making that determination is to properly weigh the First Amendment free speech and free exercise concerns implicated by adding sexual orientation to Title VII.

Liberty Counsel respectfully asks this Court to interpret "sex" within Title VII consistently with its common-sense understanding as identifying one of two, biologically distinct categories.

## ARGUMENT

### I. A Common Sense Approach Dictates that Title VII's Prohibition Against "Sex" Discrimination Does Not Include "Sexual Orientation."

#### A. Title VII Prohibits Discrimination on the Basis of "Sex".

Title VII prohibits *specific* types of employment discrimination against an employee or prospective employee "because of such individual's race, color, religion, *sex*, or national origin . . . ." 42 U.S.C. § 2000e-2 (emphasis added). At the heart of this case is whether the word "sex" in Title VII includes "sexual orientation." Although Bostock and Zarda's representatives ask this Court to interpret the word "sex" to broadly include "sexual orientation" because those categories are so closely connected to one's sex, the reality is that "sex" and

"sexual orientation" have medically and legally distinct meanings. As a result, this Court should conclude that Title VII's prohibition of sex discrimination does not include a prohibition against discrimination based on sexual orientation.

This Court has explained that "[w]e need not leave our common sense at the doorstep when we interpret a statute." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989). Common sense dictates that the word "sex" is not synonymous with "sexual orientation." That understanding comports with dictionary definitions, medical professionals, and this Court's precedent. According to both the Oxford and Webster dictionaries, "sex" refers to the "[e]ither of two main categories (male and female) into which humans and most other living things are divided on the basis of their reproductive functions." Oxford Dictionary, available at https://www.lexico.com/en/definitions/sex (last visited Aug. 19, 2019); *see also* Merriam-Webster's Dictionary, available at https://www.merriam-webster.com/dictionary/sex (last visited Aug. 19, 2019) ("either of the two major forms of individuals that occur in many species and that are distinguished respectively as female or male especially on the basis of their reproductive organs and structures"). The American Psychological Association similarly defines "sex" as the "biological status as male or female" with "attributes that characterize biological maleness and femaleness." Report of the APA Task Force on Gender Identity and Gender Variance 28 & Appendix C (2008), available at

www.apa.org/pi/lgbc/transgender/2008TaskForceReport.html (last visited August 19, 2019).

This Court has repeatedly acknowledged the biological reality that men and women fall into two distinct groups, most notably distinguishable by their reproductive capacities. "We need not be medical doctors to discern that young men and young women are not similarly situated with respect to the problems and the risks of sexual intercourse. Only women may become pregnant . . . ." *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 471 (1981) (upholding the constitutionality of a law that prohibited statutory rape of a female under the age of 18, but not of men under the age of 18); *see also Coleman v. Court of Appeals of Maryland*, 566 U.S. 30, 56 (2012) (Ginsburg, J., dissenting) (explaining that childbearing is a "biological function unique to women"); *General Electric Co. v. Gilbert*, 429 U.S. 125, 161-62 (1976) (Stevens, J., dissenting) ("for it is the capacity to become pregnant which primarily differentiates the female from the male").

The different reproductive capacities between men and women are, in part, what has led this Court to characterize "sex" as an *immutable* characteristic that falls into one of two, separately-identifiable groups. In *Frontiero v. Richardson*, 411 U.S. 677 (1973), this Court declared unconstitutional a federal statute that prevented a female member of the uniformed services from claiming her husband as a dependent for the purpose of obtaining increased quarters allowances and medical benefits without proving her husband was actually dependent on her income. The statute, however,

permitted a male member of the uniformed services to claim his wife as a dependent without offering such proof of financial dependency. *Id.* at 679. This Court discussed the "long and unfortunate history of sex discrimination" in this Nation that "was rationalized by an attitude of 'romantic paternalism,'" which led to "gross, stereotyped distinctions between the sexes . . . ." *Id.* at 684-85.

In striking down the federal statute, this Court recognized that "sex, like race and national origin, is an *immutable characteristic*" that "frequently bears no relation to ability to perform or contribute to society." *Id.* at 686 (emphasis added); *see also Kahn v. Shevin*, 416 U.S. 351, 357 (1974) (Brennan, J., dissenting) (gender-based distinctions, "like classifications based upon race, alienage, and national origin, must be subjected to close judicial scrutiny, because it focuses upon generally immutable characteristics over which individuals have little or no control"). Thus, "statutory distinctions between the sexes often have the effect of invidiously relegating the *entire class of females* to inferior legal status without regard to the actual capabilities of its individual members." *Id.* at 687 (emphasis added). Five years later, this Court explained that

> Before the Civil Rights Act of 1964 was enacted, an employer could fashion his personnel policies on the basis of assumptions about the differences between men and women, whether or not the assumptions were valid. It is now well recognized that employment decisions cannot be predicated on mere

> "stereotyped" impressions about the characteristics of males or females. Myths and purely habitual assumptions about a woman's ability to perform certain kinds of work are no longer acceptable reasons for refusing to employ qualified individuals, or for paying them less.

*City of Los Angeles, Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707 (1978).

The common-sense reality is that men and women are biologically distinct. That reality led to overt and pervasive discrimination against women as a class, which eventually resulted in legal protections for women in employment. After Title VII's implementation, to comply with equal protection guarantees, this Court held that Title VII protects both men and women from sex discrimination in the employment context, regardless of whether the employer is in the same class (male or female) as the employee. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) ("it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group"). At its core, Title VII is designed to prevent discrimination against men, *as a class*, and women, *as a class*, based on notions of how men, *as a class*, or women, *as a class*, should look or act.

A few of this Court's sex discrimination cases from the 1970s highlight the pervasive discrimination women faced in the workplace that were premised on certain roles for men and women. In *Weinberger v. Wiesenfeld*, this Court confronted

the question of whether a federal statute violated the equal protection secured by the due process clause of the Fifth Amendment because it afforded benefits to male wage earners that were not provided to female wage earners. 420 U.S. 636, 637 (1975). Specifically, death benefits of male wage earners were payable to the widow and the couple's minor children while death benefits of female wage earners were payable only to the minor children. *Id.* at 637-38. After his wife passed away, Mr. Wiesenfeld was denied social security survivors' benefits for himself because those benefits "were available only to women." *Id.* at 639-40.

After acknowledging the reality in the 1970s that it was more likely that men would be the primary supporters of their spouses, the Court explained that "such a gender-based generalization cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support." *Id.* at 645. Refusing to pay survivor benefits to the husband of a female wage earner fails to equally protect the efforts of female workers. "[S]he not only failed to receive for her family the same protection which a similarly situated male worker would have received, but she also was deprived of a portion of her own earnings in order to contribute to the fund out of which benefits would be paid to others." *Id.* at 645.

This Court concluded that the sex-based distinction was irrelevant to the statutory purpose of enabling the surviving parent to remain at home to care for a child. *Id.* at 651. The rationale in *Weinberger* echoed this Court's rationale in

*Frontiero*, decided two years earlier. "[S]tatutory distinctions between the sexes often have the effect of invidiously relegating the *entire class of females* to inferior legal status without regard to the actual capabilities of its individual members." *Frontiero*, 411 U.S. at 686-87 (emphasis added).

In a strikingly similar case, this Court struck down a provision in the Federal Old-Age, Survivors, and Disability Insurance Benefits program because survivors' benefits were payable to the husband of a deceased wife only if he could prove he was receiving at least one-half of his support from his deceased wife, whereas a surviving wife did not have to satisfy the support requirement. *Califano v. Goldfard*, 430 U.S. 199, 201 (1977). Relying on *Frontiero*, this Court explained that the statutory support requirement "operates to deprive women of protection for their families which men receive as a result of their employment . . . ." *Id.* at 207. The statute "disadvantages women contributors to the social security system as compared to similarly situated men." *Id.* at 208. This Court characterized the presumption that wives are usually dependent on their husbands as based on "'archaic and overbroad' generalizations . . . ." *Id.* at 217.

Title VII's prohibition on sex discrimination in the workplace equally protects against discrimination by men against women; women against men; men against men; and women against women. What the common-sense understanding, and historical purpose, of the statute does not do is protect against differential treatment based on one's sexual orientation. "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." *Zarda*, 883 F.3d at 156 (Lynch, J., dissenting).

### B. A Person's Sexual Orientation is Distinct from His or Her Sex.

Although a person's sexual orientation is *related* to his or her sex, insofar as it is part of identifying whether a person is sexually attracted to someone of the same or opposite sex, "sexual orientation" and "sex" are not the same and should not be collapsed into a catch-all category of "sex" discrimination. Yet, that is exactly what Zarda's representatives and Bostock argue -- that because one's biological sex is "necessarily a factor in sexual orientation," sexual orientation is a "subset of sex discrimination." *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 112 (2d Cir. 2018); *see also* Br. for Respondents Zarda, *et al.* at 25 ("[T]he notion that men should be attracted only to women and women should only be attracted to men is a normative sex-based stereotype"); Br. for Respondent Bostock at 13-14 ("one simply cannot consider one's sexual orientation without first considering his sex;" "[b]ecause a person's sex is a necessary element of his sexual orientation, it follows without question that one cannot define a person's sexual orientation without first taking his sex into account").

Agreeing with that argument, the Second Circuit in *Zarda* explained that because sexual orientation "refers to 'a person's predisposition or inclination toward sexual activity or behavior with other males or females' . . . '[o]ne cannot consider a person's homosexuality without also accounting for their sex . . . .'" *Zarda*, 883 F.3d at 113 (quoting *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 358 (7th Cir. 2017) (Flaum, J., concurring)). In reaching its conclusion, the Second Circuit relied on this Court's statement that Title VII is a "'broad rule of workplace equality' [that] 'strikes at the entire spectrum of disparate treatment' based on protected characteristics." *Zarda*, 883 F.3d at 111 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993) and *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)). The dissent in *Zarda* properly points out, however, that Title VII is not a broad, catch-all statute that seeks to eradicate *all* workplace discrimination. Rather, it "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." *Id.* at 147 (Lynch, J., dissenting). There is a difference between interpreting a word broadly to give it full meaning and interpreting it so broadly that it changes the meaning.

While "sex" classifies men and women into two groups based on immutable, biological distinctions, "[s]exual orientation" refers to a person's sexual identity and sexuality and does not classify individuals based on whether they are a man or woman. *See* Merriam-Webster Online Dictionary, available at https://www.merriam-

websiter.com/dictionary/sexual orientation ("Sexual orientation" is a "person's sexual identity or self-identification as bisexual, heterosexual, homosexual, pansexual, etc."); Lexicon Dictionary by Oxford, available at https://www.lexico.com/en/definition/sexual_orientation (a "person's sexual identity in relation to the gender to which they are attracted; the fact of being heterosexual, homosexual, or bisexual"). As the *Zarda* dissent explained, "'to 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 words plainly describe different traits.'" *Zarda*, 883 F.3d at 148 (Lynch, J., dissenting (quoting *Hively*, 853 F.3d at 363 (Sykes, J., dissenting))).

The American Psychological Association has explained that "*sexual orientation is distinct from other components of sex and gender*, including biological sex (the anatomical, physiological and genetic characteristics associated with being male or female), gender identity (the psychological sense of being male or female) and social gender role (the cultural norms that define feminine and masculine behavior)." American Psychological Association, *Sexual Orientation & Homosexuality*, available at https://www.apa.org/topics/lbgt/orientation (emphasis added) (last visited August 19, 2019). "[S]exual orientation refers to an enduring pattern of emotional, romantic and/or sexual attractions to men, women, or both sexes. Sexual orientation also refers to a person's sense of identity based on those attractions . . . ." *Id.*; *see also* American Psychological Association, *Report of the Task Force on Gender*

*Identity and Gender Variance* 28 (2009), available at https://www.apa.org/pi/lgbt/resources/policy/gender-identity-report.pdf (last visited August 19, 2019) (sexual orientation refers to "the tendency to be sexually attracted to persons of the same sex, the opposite sex, both sexes, or neither sex").

This Court also has recognized that one's sexual orientation concerns matters of sexuality, not biological sex. In *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), this Court explained that *Lawrence* confirmed a dimension of freedom for same-sex couples to enjoy intimate association, recognizing that "when *sexuality* finds *overt expression* in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring." 135 S. Ct. at 2600 (emphasis added) (quoting *Lawrence v. Texas*, 539 U.S. 558, 567 (2003)). This Court did not strike the Texas law down because it discriminated based on one's "sex," but, rather, because it discriminated based on one's intimate sexual choices – one's sexuality.

"Sexuality" is different than "sex." "Sexuality is the "quality or state of being sexual," or "the condition of having sex," "sexual activity." Merriam-Webster Online Dictionary, available at https://www.merriam-webster.com/dictionary/sexuality; Lexico Dictionaries by Oxford, available at https://www.lexico.com/en/definition/sexuality (defining "sexuality" as a person's "capacity for sexual feelings," "a person's sexual orientation or preference," or "sexual activity"). To request that one's sexuality, sexual identity, and sexual orientation be subsumed within Title VII's

prohibition against sex discrimination is to fundamentally change the meaning of "sex" discrimination and to undermine the purpose of the law.

The *Zarda* dissent explained why it is inappropriate to interpret "sex" discrimination to include "sexual orientation." First, as discussed above, "sex" and "sexual orientation" have distinct linguistic meanings – "'[t]he two terms are never used interchangeably, and the latter is not subsumed within the former.'" *Id.* at 148 (quoting *Hively*, 853 F.3d at 363 (Sykes, J., dissenting)). Second, same-sex attraction is "not 'a function of sex' or 'associated with sex' in the sense that life expectancy or childbearing capacity are." *Id.* at 151.

> 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 disadvantage employees or applications 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.

*Id.* at 151-52 (dissenting opinion). Thus, unlike discriminating against women, as a class, that is premised on the notion that they should stay at home – which is rooted in their biologically distinct reproductive capacities – sexual orientation

discrimination is not rooted in any distinction between men, as a class, and women, as a class. Rather, it is based on notions about how all people (men and women alike) should behave sexually. To the extent such beliefs categorize people, it is not based on their sex, but rather on heterosexuals, as a class, homosexuals, as a class, and bisexuals, as a class.

If sexuality were protected as sex discrimination, it would transform legal protections afforded to men or women based on stereotypical notions of what role women or men, *as a class*, should have in the workplace into protections based on a myriad of ways people can choose to express their sexuality. Nothing in this Court's prior Title VII jurisprudence suggests that one's sexuality, sexual activity, or sexual preferences were what Congress intended to protect. If Congress desires to protect sexual orientation, then it would need to amend Title VII to add another category.

### C. Congress Did Not Intend Discrimination on the Basis of "Sex" to Include Sexual Orientation.

Recognizing the limitations on devising Congressional intent, there are nevertheless several reasons to conclude that Congress did not intend for "sex" to include sexual orientation or gender identity. First, the fact that Congress has added sexual orientation as an additional protected category in other statutes is evidence that Congress understands that the words have different

meanings.[2] "[O]ne of the most basic interpretive canons" is that "'a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.'" *Corley v. U.S.*, 556 U.S. 303, 314 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004))); *see also Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 562 (1990) (expressing "deep reluctance" to interpret statutory provisions "so as to render superfluous other provisions in the same enactment"). If sexual orientation discrimination is itself sex discrimination, as is argued in this case, then it would render sexual orientation superfluous in those statutes.

---

[2] Sexual orientation is protected as a separate category under the Violence Against Women Act, 42 U.S.C. §13701, *et seq.*, as well as federal statutes providing funding to state and local authorities for investigation and prosecution of certain crimes motivated by prejudice based on the specified categories. A federal statute also requires colleges and universities to report information about crimes on campus, including crimes involving bodily injury, to any person in which the victim is targeted because of his or her protected status, which includes sexual orientation and gender identity. 20 U.S.C. §1092, *et seq*. The *Hively* dissent identifies other federal and state statutes that specifically prohibit discrimination based on sexual orientation and gender identity as classes distinct from sex. *Hively*, 853 F.3d at 363-64.

Another relevant canon of construction is *noscitur a sociis*, which instructs courts that "'a word is known by the company it keeps . . . .'" *S.D. Warren Co. v. Maine Bd. Of Environmental Protection*, 547 U.S. 370, 378 (2006) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995)). That canon is "invoked when a string of statutory terms raises the implication that the 'words grouped in a list should be given related meaning.'" *Id.* (quoting *Dole v. Steelworkers*, 494 U.S. 26, 36 (1990)).

The fact that Congress has chosen in other statutes to include "sexual orientation" alongside "sex" reflects its understanding that the terms are distinct, even if related in some way.[3] In fact,

---

[3] The gradual changes to President Nixon's original executive order concerning equal employment in the federal government shows that the Executive Branch understands the terms are distinct. In 1969, the Executive Order discussed the language in Title VII, explaining that employment discrimination in the federal government would prohibit discrimination based on race, color, religion, sex, or national origin. Executive Order 11478, 34 FR 12985 (Aug. 8, 1969). In 1978, President Carter amended the executive order to include "handicap." 44 FR 1053 (Dec. 28, 1978). In 1998, President Clinton again amended the executive order to include "sexual orientation." 63 FR 30097 (May 28, 1998). He amended it in 2000 to add "or status as a parent." 65 FR 26115 (May 2, 2000). Then, in 2014, President Obama amended it to add "gender identity," such that the original Executive Order's prohibition against "sex, or national origin" was revised by

arguing that one must necessarily consider a person's sex to consider his or her sexual orientation only proves that the terms reflect related, but distinct, concepts. One's sex refers to the biological fact of being male or female. How that male or female identifies or expresses him or herself sexually reflects that person's sexual orientation. To conclude that "sexual orientation" is subsumed within the prohibition against discrimination "because of sex" would violate the canon of construction against construing words in a statute so as to render any of them "superfluous, void, or insignificant." If Congress understands them to be distinct concepts in other statutes, this Court should not read sex in Title VII to also include sexual orientation.

Using those same canons of construction, but turning to the specific language of Title VII, "sex" should be interpreted as one word in a group of words with some related meaning. Except for religion, all of the categories listed in section 2000e-2 are based on immutable characteristics. 42 U.S.C. §2000e-2(a)(1); *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). Sexual orientation, however, is not an immutable characteristic in the same way that one's race, national origin, or biological sex are. "Same-sex sexual attractions and behavior occur in the context of a variety of sexual orientations and sexual orientation identities, and for some, sexual orientation identity (i.e., individual or group membership and affiliation, self-labeling) is fluid or

---

substituting it with "sex, sexual orientation, gender identity, or national origin." 79 FR 42971.

has an indefinite outcome." American Psychological Association, *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation* 2 (2009), available at http://www.apa.org/pi/lbgc/publications/therapeutic-resp.html (last visited August 19, 2019).

There is medical research, consistent with many real-life examples, demonstrating that some people do change how they sexually express themselves. *Id.* Thus, except for religion, which has its own historical basis for inclusion in Title VII, the categories presently listed include immutable characteristics over which individuals have no choice and cannot change. To interpret "sex" to include "sexual orientation" would ignore the cannon giving items grouped in a list as related in some way.

Second, the ordinary meaning of "sex" does not subsume within it "sexual orientation." When interpreting a statute, the Court looks "'first to its language, giving the words used their ordinary meaning.'" *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 100 (2012); *see also Schindler Elevator Corp. v. U.S. ex rel. Kirk*, 563 U.S. 401, 407 (2011) ("'When terms used in a statute are undefined, we give them their ordinary meaning'" (quoting *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995)). Here, "sex" is not defined in Title VII. However, as discussed above, the common sense, ordinary meaning of "sex" refers to the immutable, biological characteristics of a man or woman, frequently tied to their distinct reproductive capabilities. "Sexual orientation," however, refers to one's sexuality; more specifically,

it identifies who the person is attracted to. They are not the same and do not serve Congress' intent in prohibiting sex discrimination.

Third, Congress can be presumed to have expected "sex" to be interpreted consistently with the then-existing Circuit Court decisions, which adopted the ordinary meanings of "sex" and "sexual orientation." As the *Zarda* dissent explained, "[t]he 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." *Zarda*, 883 F.3d at 167 (Livingston, J., dissenting).

> [T]o the extent 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.

*Id.* at 155 (Lynch, J., dissenting).

The Second Circuit in *Zarda*, however, insisted that when Congress amended Title VII in 1991 there was "no indication in the legislative

history that Congress was aware of the circuit precedents . . .." *Zarda*, 883 F.3d at 129. Even though this Court does not presume that Congress was aware of the lower court opinions, that cannot justify the conclusion that Congress therefore intended to treat "sex" inconsistently with court decisions that followed the ordinary meaning and historical understanding of sex discrimination. Such an assumption would mean Congress intended "sex" and "sexual orientation" to mean something other than the then-existing judicial, medical, and layman understandings of the terms.

## II. Sexual Orientation is Not *Per Se* Sex Stereotyping.

### A. Sex Stereotyping Is Not A Separately-Protected Class Under Title VII.

In *Price Waterhouse*, this Court concluded that sex stereotyping is a form of sex discrimination. Specifically, sex stereotyping is sex discrimination because "an employer acts on the basis of a belief that a woman cannot be aggressive, or that she must not be . . . ." 490 U.S. at 249. Sex stereotyping is a form of sex discrimination because Congress intended to "'strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'" *Id.* at 251 (quoting *L.A. Dep't of Water*, 435 U.S. at 707 n.13)). This Court explained that "[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. "[W]e are beyond the day when an employer could evaluate employees by assuming that they matched the stereotype associated with *their group* . . . . '" *Id.* (emphasis added).

The *Zarda* dissent aptly explained the distinction between sex stereotyping based on being a member of one of the protected groups in Title VII and discrimination based on sexual orientation. When an employer refuses to hire someone based on a stereotype of what men, as a class, or women, as a class, should look or act like, the employer "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." *Zarda*, 883 F.3d at 157 (Lynch, J., dissenting).

Sexual orientation discrimination, however, is not an example of sex stereotyping prohibited by Title VII. "[A]n 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." *Id.* at 157 (Lynch, J., dissenting) (emphasis original). The 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." *Id.* at 158. Stated differently, "heterosexuality is not a *female* stereotype; it is not a *male* stereotype; it is not a sex-specific stereotype at all." *Hively*, 853 F.3d at 370 (Sykes, J., dissenting) (emphasis original).

Discrimination based on sexual orientation is not discrimination based on the "belief about what men or women ought to do or be," but rests on the "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." *Zarda*, 883 F.3d at 158 (Lynch, J., dissenting) (emphasis original). Such beliefs are different than stereotypes about how all men and women (regardless of sexual orientation) should behave.

To conclude that sex stereotyping, as a form of sex discrimination, does not include stereotyping based on homosexuality is not a conclusion that such discrimination is appropriate. Rather, it means that in order for "sexual orientation" to be a protected class, Congress will need to amend Title VII to add sexual orientation as a separately-identified category.

### B. It Would Require A Court To Engage In Sex Stereotyping To Conclude That All Sexual Orientation Discrimination Constituted Sex Discrimination Based On Sex Stereotypes.

Not only is sexual orientation discrimination outside the purview of Title VII's prohibition against sex discrimination, but to include sexual orientation

within the meaning of sex discrimination based on sex stereotypes actually requires the Court to adopt sex stereotypes. At its core, a sex stereotyping claim seeks to prevent employment decisions based on an employer's stereotypes about how all men, as a class, and how all women, as a class, should look at act. A sex stereotyping claim that rests on a person's sexual orientation would require the Court to conclude that all men or women who are gay act a certain way; that they act in a way distinct from how non-gay men or women act; and that the employer discriminated against the employee based on the way the employee, as a gay man or woman, acted.

Not only should this Court avoid an interpretation that relies on stereotypes to state a successful claim, but it should not subsume within a sex discrimination claim based on *sex* stereotypes a claim based on *sexuality* stereotypes.

## III. Interpreting "Sex" to Include "Sexual Orientation" or "Gender Identity" Would Threaten First Amendment Rights.[4]

[4] This brief addresses both gender identity and sexual orientation in the discussion of threats posted to First Amendment rights because (1) the questions of whether gender identity and sexual orientation are included in Title VII are both before the Court in related cases; (2) the two categories are often added together when nondiscrimination provisions are amended; and (3) the threats to First Amendment rights are similar in nature under both circumstances.

When discussions take place on how to accommodate a person's sexual orientation or gender identity, they often ignore the impact those decisions will have on those who must conform their actions to avoid violating nondiscrimination provisions. The plaintiffs' asserted interests in those cases generally rest on the idea that failure to accommodate his or her sexual orientation or gender identity causes harm, isolation, discrimination, or stigmatization. Those interests, however, should be weighed against the significant interests of those who might be forced to change their policies or actions. All too often, those interests are ignored or trivialized. Whether it is a school forced to grant boys access to the girls' locker room, a physician who is forced to perform a double mastectomy on a woman who wants to be a man, prisons required to house men in women's facilities, or businesses forced to compromise their sincerely held religious beliefs or other business standards, courts often overlook the religious, scientific, medical beliefs, or other significant interests of those required to accommodate a person's sexual orientation or gender identity.

Controversies surrounding accommodations or nondiscrimination codes in schools based on sexual orientation or gender identity arise in the context of curriculum decisions, anti-bullying policies, access to restrooms and locker rooms, and counseling services. The three significant interests implicated in these situations are parental rights, the health and safety of children, and privacy interests. Although some courts have refused to acknowledge parents have rights concerning the

curriculum once the parents make the choice to place their children in the public school,[5] the fact is that the goal of curriculum and anti-bullying policies is to change the way students perceive and understand sexuality and gender.

As a promotional video for a public school in California demonstrates, the curriculum goes beyond trying to dispel certain stereotypes about what toys girls and boys should play with or what jobs they should pursue. *Creating Gender Inclusive Schools Trailer,* NEW DAY FILMS, https://www.newday.com/film/creating-gender-inclusive-schools (last visited Aug. 19, 2019). The schools encourage students to perceive sex and gender as fluid and, therefore, perhaps that they should identify as a gender inconsistent with their biological sex. In the video, the teachers explain the success they have had in getting children to reconsider their views on gender identity. The video shows each young child in the classroom going up to the white board and placing an "x" on a line representing where on the spectrum they would place themselves in terms of identifying as a boy or a girl. *Id.*

These curriculum decisions implicate the rights of parents to direct the education and upbringing of their children on issues where many

---

[5] *See, e.g., Fields v. Palmdale Sch. Dist.*, 427 F3d 1197, 1200 (9th Cir. 2005), *amended by* 447 F.3d 1187, 1191 (9th Cir. 2006) (student survey); *Brown v. Hot, Sexy & Safer Prod., Inc.*, 68 F.3d 525, 529 (1st Cir. 1995) (school assembly involving sexually explicit content).

people have legitimate, conflicting opinions. In addition, when schools are introducing young, elementary-aged, students to these materials, parents might not be prepared to have their child exposed to some of these issues at such an early age.

The curriculum decisions also implicate the health of children. There is a medical consensus that seventy-seven to ninety-four percent of all children with gender dysphoria reconcile their gender identity to their biological sex as they progress through puberty into young adulthood. The World Professional Association for Transgender Health (WPATH) Standards of Care at 11, available at https://www.wpath.org/media/cms/Documents/SOC%20v7/Standards%20of%20Care_V7%20Full%20Book_English.pdf (last visited Aug. 19, 2019). When schools use curriculum emphasizing to children that gender confusion might mean they have a gender identity that does not match biological sex, they ignore the realities that such confusion is a natural part of becoming comfortable with being a male or female. As a result, there is concern that more children are opting to label themselves with a gender that is inconsistent with their biological sex, which can cause them to become entrenched in that belief. One expert explained the impact this way:

> It appears likely that being conditioned to believe you are the opposite sex creates ever-greater pressure to continue to present in this way, especially in young children. Once one has made the investment of coming out to friends and family, having teachers refer to you by a new name and

> pronoun, will it really be so easy to change back? Pediatric transition doctors in the Netherlands who first pioneered the use of puberty blockers in dysphoric children caution against social transition before puberty precisely because of the high desistance rates and the likelihood that social transition will encourage persistence.

Lisa Marchiano, *Outbreak: On Transgender Teens and Psychic Epidemics* 60 Psychol. Persp. 345, 351 (2017).

Steering children toward adopting a gender identity different than their biological sex is, at best, a risky course to pursue. Not only are there are many known medical and psychological health risks as they pursue a path that seeks to alter their sexual characteristics to align with their gender identity, but the dearth of research on the long-term consequences of puberty-suppressing and cross-gender hormones should caution against so quickly encouraging children to explore a gender identity different than their biological sex. *Id.* at 351.

The anti-bullying or anti-discrimination policies similarly seek to change how people perceive sexual orientation or gender identity by penalizing noncompliance. One situation arising with some frequency is how people must address someone who identifies as a gender different than his or her biological sex. In an Oregon case, a transgender schoolteacher won a $60,000 settlement after co-workers allegedly failed to address a biological male teacher as "they." Bradford Richardson, *Transgender teacher wins $60k settlement for co-*

*workers' improper gender pronouns*, WASH. POST (May 25, 2016), https://www.washingtontimes.com/news/2016/may/25/transgender-teacher-awarded-60k-improper-pronouns/. In the settlement, the school also agreed to build gender-neutral restrooms at all district schools. *Id.* An Indiana school teacher was forced to resign because he refused to refer to students by their chosen gender identity rather than their biological sex. Brianna Heldt, *Indiana Teacher Forced to Resign Over Refusal to Use Transgender Pronouns*, TOWNHALL (June 6, 2018), https://townhall.com/tipsheet/briannaheldt/2018/06/06/indiana-teacher-forced-to-resign-over-refusal-to-use-transgender-pronouns-n2487919. Initially, he reached an agreement with the school where he would refer to all students by their last name rather than a pronoun. He was then told that he would have to use the student's preferred pronoun. *Id.*

In a Wisconsin case, a high school girl who identified as a boy sued the school district after the school she attended refused to permit her to use the boys' restroom. Jacey Fortin, *Transgender Students Discrimination Suit is Settled for $800,000* NYT, *available at* https://www.nytimes.com/2018/01/10/us/transgender-wisconsin-school-lawsuit.html. The student alleged in her complaint that she would be humiliated if required to use the girls' restroom. The school district reached an $800,000 settlement for its "discrimination." *Id.* In a Florida case, a school disciplined a teacher for refusing to monitor the boys' locker room as the middle school students undressed, because a girl, who identified as a boy,

was using the boys' locker room. *See Adams v. Sch. Bd. of St. John's County*, 318 F. Supp. 3d 1293, 1296-97 (M.D. Fla. 2018).

The anti-bullying and anti-discrimination policies, even outside the school context, leave no room for disagreement. For example, New York City recently passed an ordinance that requires employers, landlords, and other businesses to use the preferred name and pronoun of the employee, tenant, or client regardless of an individual's biological sex. Eugene Volokh, *You Can Be Fined for Not Calling People 'Ze' or 'Hir,' If That's the Pronoun That They Demand You Use,* VOLOKH CONSPIRACY OPINION: WASH. POST (May 17, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/17/you-can-be-fined-for-not-calling-people-ze-or-hir-if-thats-the-pronoun-they-demand-that-you-use/?utm_term=.6e876b84a4da. Noncompliance can be met with fines up to $250,000. *Id.*

A recent Canadian case arose when a man identifying as a female filed a human rights complaint against a local waxing spa that turned him away when he requested a bikini wax. Mary Caton, *Transgender Woman Files Human Rights Complaint Against Windsor Spa*, WINDSOR STAR (May 13, 2018), https://windsorstar.com/news/local-news/transgender-woman-files-human-rights-complaint-against-windsor-spa. The spa explained to the man that it could not perform the service because the spa's only employee who performed the services was a Muslim who held religious beliefs that precluded her from physical contact with males outside her family. Although the spa did have one

employee who performed waxing services on men, that employee was on sick leave. *Id.* In late 2018, a nonprofit, evangelical organization in Austin, Texas filed suit seeking an injunction against a local Austin, Texas ordinance that would require it to hire or retain homosexuals or transgendered individuals. Alexia Fernandez Campbell, *Texas Evangelical Groups Are Suing for the Right to Discriminate Against LGBTQ Workers*, VOX (Oct. 11, 2018), https://www.vox.com/2018/10/11/17961620/texas-evangelical-lgbtq-discrimination-lawsuit. The organization explained that those "lifestyles are contrary to the biblical, Judeo-Christian understandings of sexuality and gender." *Id.*

Controversies surrounding medical professionals involve two sides of the same coin: (1) prohibiting medical professionals from taking non-hormonal or surgical steps they believe would help a person struggling with gender identity issues, or (2) requiring medical professionals to perform medical procedures they believe violate their duty to "do no harm." The claims concerning denial of care have included a hospital's refusal to perform a double mastectomy on the healthy breasts of a female college student, a physician's refusal to provide female hormones to a male, a hospital's refusal to perform a hysterectomy on a healthy uterus, and a hospital's refusal to perform chest reconstruction surgery on a female who had her healthy breasts removed as part of her transition to adopting a male identity. Amy Littlefield, *Meet the Trans Law Student Suing His Doctor for Canceling His Gender Affirming Surgery*, REWIRE (Jan. 3, 2018), https://rewire.news/article/2018/01/03/meet-trans-

law-student-suing-doctor-canceling-gender-affirmation-surgery/ (refusal to provide male hormones to female); Claudi Buck & Sammy Caiola, *Transgender Patient Sues Dignity Health for Discrimination over Hysterectomy Denial*, SACRAMENTO BEE (Apr. 20, 2017), https://www.sacbee.com/news/local/health-and-medicine/article145477264.html (refusal to perform hysterectomy); *States Largest Healthcare Network Sued for Refusing to Provide Care to Transgender Man*, ACLU WASH. (Dec. 20, 2017), https://www.aclu-wa.org/news/states-largest-healthcare-network-sued-refusing-provide-care-transgender-man (refusal to perform chest reconstruction).

Forcing medical professionals to perform these procedures violates the rights of conscience medical professionals hold to help heal their patients. In some situations, the policies also violate the free speech and free exercise rights of medical professionals. Not only are doctors being sued for their refusal to surgically alter or remove healthy body parts, but licensed mental health professionals are increasingly being prohibited from counseling minors who are struggling with *unwanted* gender confusion or same-sex attractions. *See* Rena M. Lindevaldsen, *An Ethically Appropriate Response to Individuals with Gender Dysphoria*, 13 Liberty U. L. Rev. 295, 296, 318 (2019) (identifying the state statutes and discussing the litigation). Eleven states prohibit mental health providers from counseling patients to help them align their gender identity with their biological sex. *Id.* at 296. Eighteen (18) states and a host of municipalities similarly prohibit

licensed mental health providers from counseling patients who are struggling with unwanted same-sex attractions. *See* Movement Advancement Project, *Conversion Therapy Laws*, available at https://www.lgbtmap.org/equality-maps/conversion_therapy (last visited Aug. 19, 2019). Instead, the counselors can only affirm existing gender identity or sexual orientation, *even if the patient does not desire that gender identity or sexual attraction*. Thus, youth who need help working through natural feelings during their formative years are denied that help. *See* Lindevaldsen, *supra*, at 318-319 (discussing the legislative efforts to ban such counseling and the court decisions involving challenging to those bans); *cf. Pickup v. Brown*, 740 F3d 1208, 1238 (9th Cir. 2014) (after concluding that speech by medical professionals is exempt from First Amendment protection, upholding a ban prohibiting counseling to individuals who would like to align their gender identity with their biological sex), *abrogated by Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018); *King v. Governor of the State of New Jersey*, 767 F.3d 216 (3d Cir. 2014) (affirming a ban on counseling to help minors deal with unwanted same-sex attractions), *abrogated by Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018).

The controversies surrounding business owners forced to accommodate a person's perceived gender identity mirror the legal issues that have arisen in the context of businesses forced to comply with sexual orientation nondiscrimination policies. When faced with public accommodations laws that

prohibit discrimination based on sexual orientation, flower-shop owners, bakers, photographers, and wedding-venue providers, asserting that their sincerely-held religious beliefs prevent them from providing the service, have received court decisions, often involving sizeable monetary penalties, holding that they engaged in unlawful discrimination. *See State v. Arlene's Flowers, Inc.*, 441 P.3d 1203 (Wash. 2019) (flower shop); *Gifford v. McCarthy*, 137 A.D.3d 30(N.Y. App. Div. 3d Dep't 2016) (wedding venue); *Klein v. Oregon Bureau of Labor and Indus.*, 289 Or. App. 507 (2017) (refused to bake a wedding cake); *Telescope Media Grp. v. Lindsey*, 271 F. Supp. 3d 1090 (D. Minn. 2017) (wedding videographers); *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013) (photographer).

At least one business owner has been subjected to litigation involving claims that he engaged in discrimination based on gender identity and sexual orientation. On the same day that Jack Phillips of Masterpiece Cakeshop obtained a favorable ruling from this Court for refusing to bake a custom cake for a same-sex wedding ceremony, he had a complaint filed against him at the Colorado Civil Rights Commission for refusing to bake a cake celebrating a person's gender transition. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1723, 1732 (2018); Scott Shackford, *Can a Baker Be Forced to Make a Transgender Celebration Cake?*, REASON.COM (Aug. 15, 2018), https://reason.com/blog/2018/08/15/can-a-baker-be-forced-to-make-a-transgen.

In *Masterpiece*, this Court reversed the decisions below, which held that Phillips engaged in

sexual orientation discrimination when he refused to bake a custom cake for a same-sex wedding reception. 138 S. Ct. at 1723, 1732. During the entire litigation, which worked its way to the United States Supreme Court, Phillips asserted that his strong, religious beliefs prevented him from baking a custom cake celebrating a marriage contrary to the Bible. *Id.* at 1723-24. Thus, when he was asked to bake the gender transition cake, he again refused based on his religious beliefs. In June 2018, the attorney who requested the custom cake filed a complaint with the Colorado Civil Rights Commission against Jack Phillips and Masterpiece Cakeshop. Scott Shackford, *Can a Baker Be Forced to Make a Transgender Celebration Cake?*, REASON.COM (Aug. 15, 2018), https://reason.com/blog/2018/08/15/can-a-baker-be-forced-to-make-a-transgen.

These business situations implicate First Amendment free speech and free exercise of religion issues. When businesses are compelled to refer to a person by his or her gender identity rather than biological sex, or based on choices concerning sexuality, it infringes the free speech rights of the business. Similarly, forcing business owners to make business decisions that conflict with the sincerely-held religious beliefs of the owners of the entity raises free exercise of religion issues. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2767, 2785 (2014) (United States Department of Health and Human Services (HHS) mandate required closely held corporations to provide health-insurance coverage for methods of contraception contrary to the sincerely held religious beliefs of the companies'

owners is unconstitutional under the Religious Freedom Restoration Act).

## CONCLUSION

This case presents an opportunity for this Court to clarify for lower courts that sexual orientation is not subsumed within Title VII's prohibition against sex discrimination. That conclusion would leave Congress to decide whether to add sexual orientation as a separate category and, in the process, weigh the significant First Amendment concerns raised by adding that new category.

Dated: August 23, 2019.

Mathew D. Staver
(Counsel of Record)
Anita L. Staver
Horatio G. Mihet
Roger K. Gannam
Rena M. Lindevaldsen
Daniel J. Schmid
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
(407) 875-1776
court@lc.org