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

IN THE

Supreme Court of the United States

GERALD LYNN BOSTOCK,

Petitioner,

v.

CLAYTON COUNTY, GEORGIA,

Respondent.

ALTITUDE EXPRESS, INC., AND RAY MAYNARD,

Petitioners,

v.

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

Respondents.

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

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEAL FOR THE ELEVENTH, SECOND AND SIXTH CIRCUITS

BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF THE EMPLOYEES

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Speaker of the House of Representatives

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Ranking Member, Senate Committee on Health, Education, Labor and Pensions

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INTEREST OF *AMICI CURIAE*[1]

Amici are 39 United States Senators and 114 Members of the United States House of Representatives (together, "Members of Congress").[2]

As Members of Congress, we have a unique interest in the proper application of federal laws, including Title VII of the Civil Rights Act of 1964 ("Title VII"). This is particularly true given that Title VII is a remedial statute Congress enacted to vindicate the rights of many of the constituents we represent. We firmly believe the language of Title VII makes clear that workplace discrimination based on an individual's sexual orientation or gender identity is unlawful. Title VII prohibits sex discrimination, and sexual orientation and gender identity discrimination are forms of sex discrimination. *Amici* write here to urge the Court to affirm what we and various federal regulatory and judicial bodies already

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[1] Pursuant to Supreme Court Rule 37.3(a), *amici* certify that Petitioners Altitude Express, Inc., et al., and R.G. & G.R. Harris Funeral Homes, Inc., as well as Respondents Equal Employment Opportunity Commission and Clayton County, Georgia, have given blanket consent to the filing of amicus briefs. Petitioners Gerald Lynn Bostock and Respondents Melissa Zarda and William Moore, Jr., Co-Independent Executors of the Estate of Donald Zarda, and Respondent Aimee Stephens have given written consent to the filing of this brief. Pursuant to Supreme Court Rule 37.6, counsel for *amici* certifies that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] A complete list of *amici* appears in the appendix to this brief.

recognize: lesbian, gay, bisexual and transgender ("LGBT") Americans are already protected by Title VII against discrimination on the basis of sexual orientation and gender identity because both sexual orientation and gender identity are inherently related to a person's "sex".

Title VII was passed with a broad remedial purpose: to protect historically marginalized communities of Americans from discrimination based on characteristics entirely unrelated to one's job qualifications and skills. But despite Title VII's blanket prohibition on sex discrimination and this Court's repeated admonition that remedial legislation like Title VII should be construed broadly to effectuate its purpose of eradicating discrimination, some courts effectively have created an LGBT exception to Title VII based on presumed legislative intent at the time Title VII was passed as well as subsequent legislative history. This runs counter to well-established law that the supposed intent of individual Members of Congress cannot alter the words of the law they ultimately passed: "discrimination . . . on the basis of sex" is per se unlawful. Moreover, subsequent legislation cannot and should not be used to circumscribe the protections of Title VII. Discrimination on the basis of sexual orientation and gender identity are necessarily forms of sex discrimination under Title VII regardless of the fact that Congress has considered but not yet enacted legislation that would make this even more explicit—and regardless of whether Congress has in *other* statutes separately addressed "sex", "sexual orientation" and "gender identity".

Amici also are uniquely able to advise the Court on legislation that is currently pending. All of the Members of Congress who write here are co-sponsors of the Equality Act of 2019, which clarifies and expands current civil rights laws to more explicitly protect people of color, women and LGBT Americans from discrimination. Because of inconsistent interpretations among the federal courts of Title VII's prohibition on sex discrimination, the Equality Act of 2019 uses a "belt-and-suspenders" approach to further codify what we *already* know—that LGBT Americans are protected from sexual orientation and gender identity discrimination by Title VII's bar on discrimination on the basis of sex.

As Members of Congress, we are concerned about the misuse of supposed legislative intent and subsequent legislative history—particularly where they are being advanced in favor of a cramped reading of a broadly worded remedial statute intended to protect individual rights. Thus, we urge this Court to reject the Eleventh Circuit's hampered reading of Title VII and affirm the Second and Sixth Circuits' proper understanding of the law. To do otherwise would ignore the language of Title VII, undermine this Court's established precedents and leave LGBT Americans without recourse from the very workplace discrimination Title VII was designed to eradicate.

SUMMARY OF ARGUMENT

Title VII, as written, protects Americans in the workplace from discrimination "because of such individual's . . . sex". It follows naturally from this prohibition on sex discrimination that an employer may not discriminate against employees on the basis of their sexual orientation or gender identity because such discrimination is inherently a form of sex discrimination. Recognizing the obvious connection between sex and sex-related characteristics, this Court has read the phrase "because of . . . sex" in the statute broadly to encompass a prohibition on a range of discriminatory behavior that is related to an individual's sex, such as discrimination based on sex stereotypes and sexual harassment. And those conclusions are consistent with this Court's admonition that Title VII was intended to strike at "the entire spectrum of disparate treatment of men and women resulting from sex stereotypes". *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality).

At bottom, the cases now before the Court pose only a single, simple question: does Title VII's prohibition on sex discrimination encompass discrimination that cannot be understood without reference to a person's sex, such as sexual orientation and gender identity? The answer to that question is equally simple: yes. Title VII prohibits sex-based discrimination, and it is impossible to divorce an employee's sexual orientation or gender identity from their sex. Thus, discrimination on all bases that are related to a person's sex, including sexual orientation, gender identity and nonconformance with sex stereotypes, is prohibited. Indeed, absolutely nothing

in Title VII (or this Court's precedents) suggests otherwise, and this Court should decline any invitation to exempt any form of sex discrimination from Title VII's sweeping prohibition.

Because the language of Title VII is clear on its face, the inquiry should begin and end there. But to the extent legislative intent is considered, the relevant benchmark must be the broad remedial purpose for which the statute was passed—to eradicate discrimination based on non-merit based traits—and not the conjectural, subjective understanding of individual Members of the 88th Congress that enacted Title VII.

As this Court has recognized, it is also perilous to rely on subsequent legislative history to try to understand the meaning of words written years earlier. This applies to bills such as the Equality Act of 2019 that Members of Congress have proposed but not yet enacted in order to clarify, in a belt-and-suspenders way, that sex discrimination under Title VII includes discrimination on the basis of sexual orientation and gender identity. It also applies to attempts to enshrine a cramped reading of "because of . . . sex" under Title VII because subsequently enacted laws have referred separately to "sex", "sexual orientation" and "gender identity".

* * *

Title VII was enacted in 1964 to protect historically marginalized communities from workplace discrimination. Yet, more than five decades later, millions of LGBT Americans still suffer from fear of discrimination in the workplace, and

many others face actual discrimination, on the basis of sexual orientation and gender identity—unfortunately, Donald Zarda, Gerald Bostock and Aimee Stephens are not alone in their experiences. The plain text of Title VII commands that Title VII's prohibition on discrimination on the basis of sex encompasses discrimination on the basis of sexual orientation and gender identity.

ARGUMENT

I. By Its Language, Title VII Prohibits Discrimination Based On Sexual Orientation and Gender Identity.

Title VII's plain text bars discrimination on the basis of sex. As this Court has held, this language strikes at "the entire spectrum of disparate treatment of men and women resulting from sex stereotypes" and prohibits employers from "rel[ying] upon sex-based considerations". *Price Waterhouse*, 490 U.S. at 242, 251. In construing Title VII, this Court has also observed that "statutory prohibitions often go beyond the principal evil [they were passed to prohibit] to cover reasonably comparable evils". *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).

The cases at bar ask whether Title VII's broad protections nonetheless include an implied, unwritten exception for discrimination based on sexual orientation and gender identity. They do not.

A. "Because of … Sex" Under Title VII Necessarily Includes Sexual Orientation and Gender Identity Discrimination.

Title VII prohibits discrimination "because of such individual's . . . sex," 42 U.S.C. § 2000e-2(a), and discrimination based on sexual orientation is a form of discrimination based on one's sex. "It would require considerable calisthenics to remove the 'sex' from 'sexual orientation.'" *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 350 (7th Cir. 2017) (en banc). And because "[s]tatutory words are uniformly presumed . . . to be used in their ordinary and usual sense, and with the meaning commonly attributed to them", *Caminetti v. U.S.*, 242 U.S. 470, 485-86 (1917), discrimination that is based "on sex-based preferences, assumptions, expectations, stereotypes, or norms" *is* sex discrimination. *Baldwin v. Foxx,* E.E.O.C. Decision No. 0120133080, 2015 WL 4397641 at *5 (July 15, 2015).

Indeed, "'[s]exual orientation' as a concept cannot be defined or understood without reference to sex". *Id*. It is impossible to discuss an employee's sexual orientation without "tak[ing] gender into account". *Price Waterhouse*, 490 U.S. at 239. For example, if a man is discriminated against in the workplace because he dates men, but his female coworkers who also date men are not discriminated against for the same conduct, sex is clearly both a "but for" cause and a motivating factor in that discrimination. Therefore, the connection between an employee's sex and their

sexual orientation is inescapable.[3] *See Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 125 (2d Cir. 2018) (en banc) ("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.").

Similarly, an employee's gender identity is a paradigmatic example of a "sex-based consideration" because it is directly connected to one's sex. As the Sixth Circuit properly noted, "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." *Equal Employment Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes Inc.*, 884 F.3d 560, 575 (6th Cir. 2018) (discrimination because of sex "inherently includes discrimination against employees because of a change in their sex"). Because sexual orientation and gender identity are inseparable from sex, and Title VII's language

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[3] The dictionary definition of "sexual orientation" reinforces that it is impossible to consider sexual orientation without reference to one's sex. Black's Law Dictionary defines "sexual orientation" as a "person's predisposition or inclination toward sexual activity with other males or females". *Black's Law Dictionary* (11th ed. 2019). Similarly, it defines two well-known sexual orientations in terms of sex. "Homosexual" is defined as "characterized by sexual desire for a person of the *same sex*" and "heterosexual" as "characterized by sexual desire for a person of the *opposite sex*". *Id.* (emphases added). Because the very meaning of the term "sexual orientation" requires considering one's sex, it is inherently a sex-based consideration that cannot be relied upon in employment decisions.

prohibits discrimination "because of . . . sex", discrimination on these bases is plainly barred.

B. Sexual Orientation and Gender Identity Discrimination Are Forms of Impermissible Sex Stereotype Discrimination.

Not only is it clear that discrimination on the basis of sexual orientation and gender identity inherently is sex discrimination, but it is also clear that such behavior constitutes prohibited sex stereotype discrimination. It is well-established under this Court's binding precedents that Title VII's bar on sex discrimination includes discrimination on the basis of sex stereotypes. *See, e.g.*, *Price Waterhouse*, 490 U.S. at 251; *City of Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978). In *Price Waterhouse*, this Court held that discrimination against a female employee for behaving in a "masculine" manner was sex discrimination prohibited by Title VII. 490 U.S. at 235, 251. In so holding, this Court affirmed that Congress intended Title VII to prevent the disparate treatment of men and women resulting from an employer's stereotypical views of their sex. *Id.*

There is no principled difference between sex discrimination based on a failure to conform to a sex stereotype and sexual orientation discrimination. The Seventh Circuit found that same-sex orientation "represents the *ultimate case* of failure to conform to [gender] stereotype[s]". *Hively,* 853 F.3d at 346 (emphasis added). Consistent with this Court's holding in *Price Waterhouse*, sexual orientation discrimination *is* discrimination on the basis of sex

stereotypes. And as the Equal Employment Opportunity Commission explained in *Baldwin v. Foxx,* "[d]iscrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms". 2015 WL 4397641 at *5 (July 15, 2015).

In the same way, there is no difference between sex discrimination based on a failure to conform to a sex stereotype and gender identity discrimination. Courts have recognized that a transgender person is someone who is inherently "gender non-conforming". *Smith v. City of Salem, Ohio*, 378 F.3d 566, 575 (6th Cir. 2004). Indeed, "[b]y definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth." *Whitaker By Whitaker v. Kenosha Unified School District No. 1 Bd. of Educ.*, 858 F.3d 1034, 1048 (7th Cir. 2017); *see also Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) ("A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes."). An employer cannot discriminate against an employee based on that employee's gender identity without necessarily basing such discrimination on stereotypical notions of how one's sex at birth and gender identity ought to align.

This Court should reaffirm its holding in *Price Waterhouse* and make clear that there is no difference between discrimination on the basis of sex stereotypes and discrimination on the basis of sexual orientation or gender identity. It cannot be that Title VII protects Americans in the workplace from discrimination on the basis of sex stereotypes—except when those stereotypes concern who men and women should be

attracted to or how they express their gender identity. Discriminating against a man who is attracted to men because he is so attracted is no different than discriminating against a man who is attracted to men because he fails to conform to traditional "male" stereotypes—here, the stereotype that men should be attracted only to women (and, reciprocally, that women should be attracted only to men). Similarly, discriminating against an employee transitioning from a man to a woman (or vice versa) necessarily discriminates against the employee for failing to conform to the sex-based stereotypes of the sex assigned at birth. Thus, both sexual orientation and gender identity discrimination are forms of impermissible sex discrimination on the basis of non-conformance with sex stereotypes.

II. Title VII's Plain Language and Broad Remedial Purpose Are Determinative of Title VII's Scope.

When the language of a statute is clear, legislative intent and history need not be considered. However, to the extent legislative intent is considered here, it supports reading Title VII's ban on sex discrimination as prohibiting discrimination based on sexual orientation and gender identity. There is scant discussion in the legislative history of the specific term "sex". But Congress unquestionably intended to prohibit workplace discrimination that reflects beliefs about the abilities, preferences, behaviors and roles of employees based on their "sex". The Court has recognized this in several contexts over the years and should do the same here.

The efforts of some to circumvent the plain language of Title VII by declaring that the 88th Congress could not have intended to cover LGBT employees ignores the broad remedial purpose for which Title VII's prohibitions were designed as well as its specific prohibition of sex discrimination. These efforts strain to read "sex" out of sexual orientation and gender identity, and to conclude from subsequent legislation and legislative efforts designed to clarify that sexual orientation and gender identity discrimination are forms of sex discrimination somehow that they are not. For the reasons discussed below, all of these arguments fail.

A. The Broad Remedial Purpose For Which Congress Enacted Title VII Supports the Conclusion that Title VII Prohibits Sex Discrimination in All Its Forms.

As described *supra* Section I, the plain language of Title VII prohibits sex discrimination in all of its forms—including sexual orientation, gender identity and other sex stereotype discrimination. Where, as here, the language of a statute is unambiguous, the Court need not try to divine the specific intent of the Members of Congress that passed the law. *See Caminetti*, 242 U.S. at 490 (acknowledging as a "recognized rule" of statutory interpretation that "it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning" when the language of the statute is clear). Indeed, a statute's plain language "is the sole evidence of the ultimate legislative intent." *Id.* (internal citation omitted); *see also Chung Fook v. White*, 264 U.S. 443, 445-46 (1924) (noting that the duty of the courts "is

simply to enforce the law as it is written" and the courts "cannot interpolate the [statutory] words [] without usurping the legislative function); *Hively*, 853 F.3d at 343 ("Few people would insist that there is a need to delve into secondary sources if the statute is plain on its face.").

Given Title VII's clear language, there is no need to delve into the presumed intentions of the individual legislators of the 88th Congress, and this Court has cautioned against just such attempts. *See, e.g.*, *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1487 (2018) ("More fundamentally, even if courts could discern Congress' hypothetical intentions, intentions do not count unless they are enshrined in a text that makes it through the constitutional processes of bicameralism and presentment."); *see also United States v. Games-Perez*, 695 F.3d 1104, 1118 (10th Cir. 2012) (Gorsuch, J., dissenting from denial of rehearing en banc) (recognizing that it is difficult "to say anything definitive about the intent of 535 legislators").

Indeed, to the extent that legislative intent underlying Title VII is considered, the relevant intent is Congress's desire to enact a broad remedial statute that would eradicate employment discrimination based on non-merit based characteristics. The overarching reason Congress passed Title VII was to allow employees to succeed on their individual merits, regardless of their race, color, religion, sex and national origin. *See Manhart*, 435 U.S. at 709 ("Even if the statutory language were less clear, the basic policy of [Title VII] requires that we focus on fairness to individuals rather than fairness to classes. Practices that classify employees in terms of religion,

race, or sex tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals.").

And because Congress's intent in passing Title VII was to prevent invidious workplace discrimination, the statute is entitled to a broad construction and should not be read in an artificially restrictive way that would leave many Americans unprotected from sex-based discrimination. As this Court has noted in the context of interpreting laws intended to remedy past harms, "we are guided by the familiar canon of statutory construction that *remedial legislation should be construed broadly to effectuate its purposes*". *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) (emphasis added). "[O]f course, remedial legislation such as Title VII of the Civil Rights Act of 1964 is entitled to the benefit of liberal construction." *Reeb v. Econ. Opportunity Atlanta, Inc.*, 516 F.2d 924, 928 (5th Cir. 1975); *see Pullman-Standard v. Swint*, 456 U.S. 273, 276 (1982) ("Title VII is a broad remedial measure, designed to assure equality of employment opportunities.") (internal quotations and citation omitted); *Moyo v. Gomez*, 40 F.3d 982, 985 (9th Cir. 1994) ("We also note that it has been long established that Title VII, as remedial legislation, is construed broadly."); *Bethel v. Jefferson*, 589 F.2d 631, 642 (D.C. Cir. 1978) ("Title VII is remedial legislation").

Consistent with Title VII's broad remedial purpose, this Court has held certain types of employment discrimination to be actionable under Title VII because the plain language of Title VII demands it—even though such discrimination may not have been considered by the 88th Congress in

1964 to fall within the scope of Title VII's protections. For example, this Court recognizes that sexual harassment claims are actionable under Title VII, as a plaintiff's gender is necessarily a contributing factor to such sexual harassment, regardless of whether individual Members of the 88th Congress specifically envisioned that when they enacted Title VII. *See, e.g.*, *Meritor Sav. Bank, FBS v. Vinson*, 477 U.S. 57, 66-67 (1986). In *Oncale*, this Court further held that Title VII barred male-on-male sexual harassment, recognizing that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils". 523 U.S. at 79-80. And no one has ever legitimately suggested that individual Members of the 88th Congress envisioned that Title VII prohibited male-on-male sexual harassment.

Because of the inherent link between one's sex and one's sexual orientation or gender identity, discrimination on those bases are "reasonably comparable evils" prohibited by Title VII. *See Zarda*, 883 F.3d at 115 ("[B]ecause Congress could not anticipate the full spectrum of employment discrimination that would be directed at the protected categories, it falls to the courts to give effect to the broad language that Congress used."). Therefore, whether Title VII's legislative history suggests that individual Members of the 88th Congress understood Title VII to prohibit discrimination based on sexual orientation or gender identity is immaterial. As discussed *supra*, the legislative history of Title VII references neither same-sex sexual harassment nor sex stereotype discrimination, yet this Court did not hesitate to find those forms of discrimination outlawed. Title VII's plain language and the broad

remedial purpose for which it was enacted—to end workplace discrimination based on non-merit based characteristics—mandate that the statute be read to prohibit discrimination based on sexual orientation and gender identity.

B. This Court Should Not Consider Subsequent Legislative History in Interpreting Title VII's Scope.

Earlier briefing before this Court has emphasized that Congress has introduced, but not enacted, legislation that would amend Title VII to explicitly include sexual orientation and gender identity. *See Altitude Express v. Zarda*, No. 17-1623, Petition for a Writ of Certiorari at 20-21; *Bostock v. Clayton County*, No. 17-1618, Brief in Opposition to Petition for Writ of Certiorari at 20-22; *R.G. & G.R. Harris Funeral Homes, Inc. v. E.E.O.C.*, No. 18-107, Petition for a Writ of Certiorari at 28-29. Similarly, some have argued that subsequently passed laws should inform this Court's analysis—either because such laws include or exclude a reference to sexual orientation or gender identity. *See, e.g.*, *Zarda*, 883 F.3d at 153-54 (Lynch, J., dissenting).

However, it would be improper for this Court to infer, based on subsequent Congressional action or inaction, that Title VII's scope excludes sexual orientation or gender identity discrimination.

1. Unenacted Legislation Does Not Offer Insight Into the Meaning of Enacted Laws and Should Not Be Considered When Defining a Statute's Scope.

This Court has recognized that introduced, but unenacted, legislation lacks persuasive force in interpreting existing laws. *See, e.g., Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989) ("It is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of [a particular] statutory interpretation.") (internal quotations omitted). This is particularly true where unenacted legislation seeks to clarify existing law using a belt-and-suspenders approach, as efforts made to clarify laws should not be used to limit the meaning of enacted statutes.

As drafters and proponents of the Equality Act of 2019, H.R. 5, S. 788, 116th Cong. (2019), which was passed in the House but has not yet been enacted, *amici* are uniquely well-suited to advise the Court on these issues. The Equality Act was designed both to codify current case law and to confirm, using a belt-and-suspenders approach, that sexual orientation and gender identity discrimination are already prohibited by Title VII's bar on sex discrimination. The Act would explicitly prohibit discrimination based on "sexual orientation" or "gender identity" under Title VII by including them within its definition of prohibited sex discrimination. *See* H.R. 5 § 7 (amending Title VII to prohibit discrimination "because of … sex (including sexual orientation and gender identity)"). This change was meant to clarify,

rather than alter, Title VII. *See* H.R. 5 § 2(b) ("It is the purpose of this Act to expand as well as clarify, confirm and create greater consistency in the protections against discrimination on the basis of all covered characteristics and to provide guidance and notice to individuals, organizations, corporations, and agencies regarding their obligations under the law.").[4] The Equality Act of 2019 was designed to make explicit what Members of Congress already understand—that sexual orientation and gender identity discrimination claims are cognizable under

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[4] Although the Equality Act was intended "to *expand* as well as clarify" nondiscrimination protections, H.R. 5 § 2(b) (emphasis added), the accompanying House Report makes clear that the Act was not designed to expand the definition of sex discrimination to include sexual orientation and gender identity discrimination, but merely to clarify that sex discrimination already includes discrimination on these bases. *See* H. Rep. No. 116-56, at 8-9 (2019). For example, the House Report states in its purpose and findings section that the Act codifies recent federal judicial and administrative decisions "by explicitly *clarifying* that unlawful sex discrimination includes discrimination on the basis of sexual orientation or gender identity". *Id.* (emphasis added); *see also id.* at 38 (noting that the Act "would explicitly *clarify* that 'sex' as used in this provision includes sexual orientation and gender identity") (emphasis added). The reference to the Act "expand[ing]" non-discrimination protections does not refer to Title VII at all; it relates to "expand[ing] the list of businesses and services that would be subject to the 1964 [Civil Rights] Act's public accommodations provisions," and to prohibiting sex discrimination for the first time in Titles II and VI of the Act. *Id.* at 9; *see* H.R. 5 § 3(a) (expanding the prohibition on discrimination or segregation in public accommodations to include, for example, "any establishment that provides a good, service, or program, including a store, shopping center, online retailer or service provider . . .").

Title VII.[5] This Court should not draw any inference to the contrary from the Equality Act's introduction and its passage in the House.

Indeed, this Court has warned *against* placing significance on introduced but unenacted legislation or amendments, such as the Equality Act and its predecessors, when interpreting current law:

> [S]ubsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress. It is a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns . . . a proposal that does not become law. 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.

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[5] Courts—including this Court—have repeatedly recognized that legislatures legitimately may take such a belt-and-suspenders approach to drafting and enacting legislation. *See, e.g.*, *Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 635 (2012) (finding that seemingly redundant language in the Real Estate Settlement Procedures Act may appear to "all mean the same thing", but this redundancy was a "not uncommon sort of lawyerly iteration"); *United States v. Smith*, 756 F.3d 1179, 1196 (10th Cir. 2014) ("Congress chose a belt-and-suspenders approach . . . ."); *Mercy Hosp., Inc. v. Burwell*, 206 F. Supp. 3d 93, 98 (D.D.C. 2016), *aff'd sub nom. Mercy Hosp., Inc. v. Azar*, 891 F.3d 1062 (D.C. Cir. 2018) ("Congress had good reason to take a belt-and-suspenders approach in drafting [the relevant section of the statute].").

Pension Ben. Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990) (internal citations and quotations omitted). It is often impossible to identify the particular reasons legislators would propose or reject any particular legislation. *See Solid Waste Agency of N. Cook Cty v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 170 (2001) ("A bill can be proposed for any number of reasons, and it can be rejected for just as many others."). Thus, such congressional inaction understandably lacks probative value when evaluating the meaning of statutes.

Circuit Courts addressing the same issue presented here have correctly refrained from drawing inferences from subsequent unenacted legislation. *See, e.g.*, *Zarda*, 883 F.3d at 129-30 (rejecting the argument "that by not enacting legislation expressly prohibiting sexual orientation discrimination in the workplace Congress ha[d] implicitly ratified decisions holding that sexual orientation was not covered by Title VII"). Indeed, as the Seventh Circuit in *Hively* properly noted, it is nearly impossible "to try to divine the significance of unsuccessful legislative efforts to change the law" and therefore "it is simply too difficult to draw a reliable inference from these truncated legislative initiatives to rest our opinion on them". 853 F.3d at 343-44. This is because "[t]hose failures can mean almost anything, ranging from the lack of necessity for a proposed change . . . to the undesirability of a change because a majority of the legislature is happy with the way courts are currently interpreting the law, to the irrelevance of nonenactment . . . ." *Id.* at 343-44; *see also Zarda*, 883 F.3d at 130 (rejecting "theory of ratification by silence [a]s in direct tension" with Supreme Court precedents

because "[w]e 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.").

2. This Court Should Not Consider Subsequently Enacted Legislation To Limit Title VII's Scope.

Reliance on subsequently *enacted* legislation to limit the scope of Title VII's prohibition on sex discrimination to exclude sexual orientation or gender identity discrimination is similarly improper. Indeed, this Court has noted the "oft-repeated warning" that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one". *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117-18 (1980) (internal citations omitted).

For example, some have suggested that the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (the "1991 Act"), effectively narrowed the scope of Title VII by implication by codifying judicial interpretations of sex discrimination that exclude sexual orientation and gender identity discrimination. *See Zarda*, 883 F.3d at 153-54 (Lynch, J., dissenting). But, by its plain language, the 1991 Act did not address Title VII's prohibition on sex discrimination, and thus it has no bearing on the question of whether Title VII prohibits sexual orientation or gender identity discrimination.[6] Nor is there any indication

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[6] The 1991 Act generally focused on amending certain procedural and substantive requirements in employment discrimination suits unrelated to Title VII's prohibition on sex

in the legislative history of the 1991 Act that Congress intended to address sex discrimination or considered judicial decisions about sexual orientation or gender identity discrimination. *See Zarda*, 883 F.3d at 129. And the 1991 Act by its very text was intended to expand the scope of civil rights protections, not curtail them. *See* Civil Rights Act of 1991 § 3 ("The purposes of this Act [include] . . . to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination."). Indeed, there is simply no evidence to suggest that, in passing the 1991 Act, Congress intended to circumvent Title VII's plain language to exclude sexual orientation and gender identity discrimination from the scope of the conduct the law prohibits. *See Zarda*, 883 F.3d at 129 ("[W]e do not consider the 1991 amendment to have ratified the interpretation of Title VII as excluding sexual orientation discrimination.").

Moreover, some have argued that the enactment, after 1964, of legislation that includes explicit references to sexual orientation or gender identity indicates that Title VII's prohibition on sex discrimination does not reach discrimination on the basis of sexual orientation or gender identity. *See, e.g.*, *Hively*, 853 F.3d at 363 (Sykes, J., dissenting). This is also wrong. As a preliminary matter, it should not come as any surprise that neither "sexual orientation" nor "gender identity" appears in the language of Title VII as it was enacted in 1964. These phrases simply were not part of the vernacular in 1964. *See, e.g.*, *Oxford Dictionary* (5th ed. 1964)

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discrimination. *See* Civil Rights Act of 1991, Pub. L. No. 102-166 § 102.

(lacking reference to the terms "sexual orientation" or "gender identity"). Indeed, no legislation enacted prior to or contemporaneously with Title VII appears to have referenced "sexual orientation" or "gender identity". However, the absence of such terms does not suggest that sexual orientation and gender identity discrimination were intentionally beyond the reach of the prohibition on sex discrimination—especially when Congress used capacious language that naturally encompasses such discrimination.

Furthermore, although later statutes may separately delineate "sex", "sexual orientation" and "gender identity", this does not mean that such terms are mutually exclusive. Congress often uses a belt-and-suspenders approach to drafting statutes out of an abundance of caution. *See King v. Burwell*, 135 S. Ct. 2480, 2498 (2015) (Scalia, J., dissenting) ("Lawmakers sometimes repeat themselves—whether out of a desire to add emphasis, a sense of belt-and-suspenders caution, or a lawyerly penchant for doublets (aid and abet, cease and desist, null and void)."). This form of intentional repetition is often a feature of remedial, anti-discrimination legislation, intended explicitly to confirm the inclusion of certain classes to avoid confusion. It does not suggest that Title VII's use of the term "sex" alone somehow excludes sexual orientation and gender identity from its protections. *See*, *e.g.*, *Zarda*, 883 F.3d at 131 ("Title VII's prohibition on race discrimination encompasses discrimination on the basis of ethnicity . . . notwithstanding the fact that other federal statutes now enumerate race and ethnicity separately . . . The same can be said of sex and sexual orientation

because discrimination based on the former encompasses the latter.") (internal citations omitted).

Finally, it is clearly improper to use laws passed by a later Congress to try to extrapolate the meaning of an entirely different law passed by an earlier Congress. This Court recognizes that "[p]ost-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation". *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011); *see Zarda*, 883 F.3d at 130 (warning against assigning the same meaning to "terms used in different statutes passed by different Congresses in different decades").

* * *

For the reasons set forth above, sex discrimination under Title VII includes sexual orientation and gender identity discrimination. Because "it is ultimately the provisions of our laws . . . by which we are governed", *Oncale*, 532 U.S. at 79, this Court need only look to Title VII's plain language to find that sexual orientation and gender identity discrimination are unlawful. This is especially so when Title VII by its very language contemplates a broad remedial purpose—to eradicate invidious workplace discrimination. Thus, we urge this Court to confirm what we firmly believe and Title VII already makes plain—that federal law protects LGBT Americans from discrimination in the workplace on the basis of their sexual orientation or gender identity.

CONCLUSION

For the foregoing reasons, we respectfully request that this Court affirm the decisions of the Second and Sixth Circuits, and reverse the decision of the Eleventh Circuit.

July 3, 2019

Respectfully submitted,

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APPENDIX

I. COMPLETE LIST OF *AMICI CURIAE*

A. United States Senators (39)

Tammy Baldwin
Cory A. Booker
Michael F. Bennet
Richard Blumenthal
Sherrod Brown
Maria Cantwell
Benjamin L. Cardin
Thomas R. Carper
Robert P. Casey Jr.
Christopher A. Coons
Catherine Cortez Masto
Tammy Duckworth
Richard J. Durbin
Dianne Feinstein
Kirsten Gillibrand
Kamala D. Harris
Margaret Wood Hassan
Martin Heinrich
Mazie K. Hirono
Tim Kaine
Amy Klobuchar
Edward J. Markey
Robert Menendez
Jeffrey A. Merkley
Patty Murray
Gary C. Peters
Jack Reed
Jacky Rosen
Bernard Sanders
Brian Schatz
Charles E. Schumer
Jeanne Shaheen
Kyrsten Sinema
Tina Smith
Tom Udall
Chris Van Hollen
Elizabeth Warren
Sheldon Whitehouse
Ron Wyden

B. Members of the United States House of Representatives (114)

Alma S. Adams
Pete Aguilar
Colin Z. Allred
Donald S. Beyer Jr.
Lisa Blunt Rochester
Suzanne Bonamici
Anthony G. Brown
Julia Brownley
Tony Cárdenas
André Carson
Matt Cartwright
Ed Case

Sean Casten
Kathy Castor
Judy Chu
David N. Cicilline
Katherine M. Clark
Yvette D. Clarke
Steve Cohen
Angie Craig
Sharice L. Davids
Danny K. Davis
Susan A. Davis
Peter A. DeFazio
Diana DeGette
Suzan K. DelBene
Mark DeSaulnier
Debbie Dingell
Lloyd Doggett
Eliot L. Engel
Veronica Escobar
Anna G. Eshoo
Adriano Espaillat
Bill Foster
Ruben Gallego
Sylvia R. Garcia
Jimmy Gomez
Al Green
Raúl M. Grijalva
Debra A. Haaland
Alcee L. Hastings
Jahana Hayes
Steny H. Hoyer
Jared Huffman
Sheila Jackson Lee
Pramila Jayapal
Henry C. "Hank" Johnson Jr.
William R. Keating
Joseph P. Kennedy III
Ro Khanna
Daniel T. Kildee
Brenda L. Lawrence
Barbara Lee
Andy Levin
Zoe Lofgren
Alan S. Lowenthal
Ben Ray Luján
Elaine G. Luria
Stephen F. Lynch
Carolyn B. Maloney
Sean Patrick Maloney
Betty McCollum
Donald McEachin
James P. McGovern
Grace Meng
Gwen Moore
Jerrold Nadler
Grace F. Napolitano
Joe Neguse
Donald Norcross
Eleanor Holmes Norton
Frank Pallone Jr.
Jimmy Panetta
Chris Pappas
Donald M. Payne Jr.
Nancy Pelosi
Ed Perlmutter
Scott H. Peters
Chellie Pingree

Mark Pocan
Katie Porter
Ayanna Pressley
Mike Quigley
Jamie Raskin
Kathleen M. Rice
Lucille Roybal-Allard
Bobby L. Rush
Linda T. Sánchez
John P. Sarbanes
Mary Gay Scanlon
Janice D. Schakowsky
Adam B. Schiff
Bradley Scott Schneider
David Scott
José E. Serrano
Albio Sires
Elissa Slotkin
Adam Smith
Darren Soto
Abigail Davis Spanberger
Jackie Speier
Eric Swalwell
Mark Takano
Dina Titus
Rashida Tlaib
Paul Tonko
Norma J. Torres
Jefferson Van Drew
Nydia M. Velázquez
Debbie Wasserman Schultz
Bonnie Watson Coleman
Peter Welch
Susan Wild
John A. Yarmuth